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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

YEARBOOK

Volume XLIX: 2018

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NOTE

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

The footnote numbering follows that used in the original documents on which this *Yearbook* is based. Any footnotes added subsequently are indicated by lower-case letters.

Changes of and additions to wording that appeared in earlier drafts of conventions, model laws and other legal texts are in italics, except in the case of headings to articles, which are in italics as a matter of style.

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Part Three. Annexes

INTRODUCTION

This is the forty-ninth volume in the series of *Yearbooks* of the United Nations Commission on International Trade Law (UNCITRAL).[1]

The present volume consists of three parts. Part one contains the Commission's report on the work of its fifty-first session, which was held in New York, from 25 June–13 July 2018, and the action thereon by the General Assembly. There was no action by the United Nations Conference on Trade and Development (UNCTAD) in 2018. It is expected that there will be action on the Commission's report by UNCTAD in 2019.

In part two, most of the documents considered at the fifty-first session of the Commission are reproduced. These documents include reports of the Commission's Working Groups as well as studies, reports and notes by the Secretary-General and the Secretariat. Also included in this part are selected working papers that were prepared for the Working Groups.

Part three contains summary records, the bibliography of recent writings related to the Commission's work, a list of documents before the fifty-first session and a list of documents relating to the work of the Commission reproduced in the previous volumes of the *Yearbook*.

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[1] To date, the following volumes of the *Yearbook of the United Nations Commission on International Trade Law* (abbreviated herein as *Yearbook* [year]) have been published:

Volume	*Years covered*	*United Nations publication Sales No. or document symbol*
I	1968–1970	E.71.V.1
II	1971	E.72.V.4
III	1972	E.73.V.6
III Suppl.	1972	E.73.V.9
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V	1974	E.75.V.2
VI	1975	E.76.V.5
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VIII	1977	E.78.V.7
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X	1979	E.81.V.2
XI	1980	E.81.V.8
XII	1981	E.82.V.6
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XIV	1983	E.85.V.3
XV	1984	E.86.V.2
XVI	1985	E.87.V.4
XVII	1986	E.88.V.4
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XXIII	1992	E.94.V.7
XXIV	1993	E.94.V.16
XXV	1994	E.95.V.20

Volume	*Years covered*	*United Nations publication Sales No. or document symbol*
XXVI	1995	E.96.V.8
XXVII	1996	E.98.V.7
XXVIII	1997	E.99.V.6
XXIX	1998	E.99.V.12
XXX	1999	E.00.V.9
XXXI	2000	E.02.V.3
XXXII	2001	E.04.V.4
XXXIII	2002	E.05.V.13
XXXIV	2003	E.06.V.14
XXXV	2004	E.08.V.8
XXXVI	2005	E.10.V.4
XXXVII	2006	A/CN.9/SER.A/2006
XXXVIII	2007	A/CN.9/SER.A/2007
XXXIX	2008	A/CN.9/SER.A/2008
XL	2009	A/CN.9/SER.A/2009
XLI	2010	A/CN.9/SER.A/2010
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XLV	2014	A/CN.9/SER.A/2014

Part One

REPORT OF THE COMMISSION ON ITS ANNUAL SESSION AND COMMENTS AND ACTION THEREON

THE FIFTY-FIRST SESSION (2018)

A. Report of the United Nations Commission on International Trade Law, fifty-first session (New York, 25 June–13 July 2018) (A/73/17)

[Original: English]

Contents

I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the fifty-first session of the Commission, held in New York from 25 June to 13 July 2018.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development (UNCTAD).

II. Organization of the session

A. Opening of the session

3. The fifty-first session of the Commission was opened by the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, Miguel de Serpa Soares, on 25 June 2018.

B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the General Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 14 November 2012, 14 December 2012, 9 November 2015, 15 April 2016 and 17 June 2016 are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated: [1] Argentina (2022), Armenia (2019), Australia (2022), Austria (2022), Belarus (2022), Brazil (2022), Bulgaria (2019), Burundi (2022), Cameroon (2019), Canada (2019), Chile (2022), China (2019), Colombia (2022), Côte d'Ivoire (2019), Czechia (2022), Denmark (2019), Ecuador (2019), El Salvador (2019), France (2019), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2022), Indonesia (2019), Iran (Islamic Republic of) (2022), Israel (2022), Italy (2022), Japan (2019), Kenya (2022), Kuwait (2019), Lebanon (2022), Lesotho (2022), Liberia (2019), Libya (2022), Malaysia (2019), Mauritania (2019), Mauritius (2022), Mexico (2019), Namibia (2019), Nigeria (2022), Pakistan (2022), Panama (2019), Philippines (2022), Poland (2022), Republic of Korea (2019), Romania (2022), Russian Federation (2019), Sierra Leone (2019), Singapore (2019), Spain (2022), Sri Lanka (2022), Switzerland (2019), Thailand (2022), Turkey (2022), Uganda (2022), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2022), Venezuela (Bolivarian Republic of) (2022) and Zambia (2019).

5. With the exception of Armenia, Belarus, Cote d'Ivoire, El Salvador, Kenya, Lesotho, Liberia, Mauritania, Pakistan, Sierra Leone and Zambia, all the members of the Commission were represented at the session.

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 29 were elected by the Assembly on 14 November 2012, at its sixty-seventh session, one was elected by the Assembly on 14 December 2012, also at its sixty-seventh session, 23 were elected by the Assembly on 9 November 2015, at its seventieth session, five were elected by the Assembly on 15 April 2016, also at its seventieth session, and two were elected by the Assembly on 17 June 2016, again at its seventieth session. By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election.

6. The session was attended by observers from the following States: Algeria, Bahrain, Belgium, Bolivia (Plurinational State of), Cambodia, Croatia, Dominican Republic, Finland, Gambia, Georgia, Iraq, Morocco, Myanmar, Nepal, Netherlands, Norway, Senegal, Sudan, Uruguay and Viet Nam.

7. The session was also attended by observers from the Holy See and the European Union.

8. The session was also attended by observers from the following international organizations:

(a) United Nations system: World Bank;

(b) Intergovernmental organizations: African Legal Support Facility, Gulf Cooperation Council, International Development Law Organization, International Institute for the Unification of Private Law (Unidroit), Organization of American States (OAS) and Permanent Court of Arbitration (PCA);

(c) Invited non-governmental organizations: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association, Arbitrators' and Mediators' Institute of New Zealand Inc., Association for the Promotion of Arbitration in Africa (APAA), Beijing Arbitration Commission/Beijing International Arbitration Center, China International Economic and Trade Arbitration Commission, Comité Maritime International (CMI), Council of the Notariats of the European Union, European Law Students' Association, EU Federation for the Factoring and Commercial Finance Industry, Factors Chain International, Florence International Mediation Chamber, Group of Latin American International Commercial Law Lawyers (GRULACI), Hong Kong Mediation Centre, INSOL International, International Academy of Mediators, International Arbitration Institute, International Bar Association (IBA), International Chamber of Commerce (ICC), International Insolvency Institute, International Law Institute (ILI), International Mediation Institute, International Union of Judicial Officers, International Union of Notaries, International Women's Insolvency and Restructuring Confederation, Internet Corporation for Assigned Names and Numbers, Jerusalem Arbitration Center, Moot Alumni Association, National Law Center for Inter-American Free Trade, New York International Arbitration Center, Russian Arbitration Association and Vienna International Arbitral Centre (VIAC).

9. The Commission welcomed the participation of international non-governmental organizations with expertise in the main items on the agenda. Their participation was crucial for the quality of texts formulated by the Commission and the Commission requested the Secretariat to continue to invite such organizations to its sessions.

C. Election of officers

10. The Commission elected the following officers:

Chair:	Beate Czerwenka (Germany)
Vice-Chairs:	Daniel Mbabazize (Uganda) Natalie Yu-Lin Morris-Sharma (Singapore) Zoltàn Nemessányi (Hungary)
Rapporteur:	Juan Cuéllar Torres (Colombia)

D. Agenda

11. The agenda of the session, as amended, was adopted by the Commission at its 1069th meeting, on 25 June. It was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.

4. Finalization and adoption of instruments on international commercial settlement agreements resulting from mediation.

5. Consideration of issues in the area of micro, small and medium-sized enterprises:

   (a) Finalization and adoption of a legislative guide on key principles of a business registry;

   (b) Progress report of Working Group I.

6. Celebration of the sixtieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention").

7. Investor-State dispute settlement reform: progress report of Working Group III.

8. Electronic commerce: progress report of Working Group IV.

9. Security interests: progress report of Working Group VI.

10. Work programme of the Commission.

11. Date and place of future meetings.

12. Consideration of issues in the area of insolvency law:

   (a) Finalization and adoption of a model law on cross-border recognition and enforcement of insolvency-related judgments and its guide to enactment;

   (b) Progress report of Working Group V.

13. Coordination and cooperation:

   (a) General;

   (b) Reports of other international organizations;

   (c) International governmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups.

14. Technical assistance to law reform:

   (a) General;

   (b) UNCITRAL regional presence.

15. Status and promotion of UNCITRAL legal texts:

   (a) General;

   (b) Functioning of the transparency repository;

   (c) International moot competitions;

   (d) Bibliography of recent writings related to the work of UNCITRAL.

16. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts: CLOUT and digests.

17. Role of UNCITRAL in promoting the rule of law at the national and international levels.

18. Relevant General Assembly resolutions.

19. Consideration of revised UNCITRAL texts in the area of privately financed infrastructure projects.

20. Other business.

21. Adoption of the report of the Commission.

E. Establishment of the Committee of the Whole

12. The Commission established a Committee of the Whole and referred to it, for consideration, agenda item 5 (a). The Commission elected Maria Chiara Malaguti (Italy) to chair the Committee of the Whole in her personal capacity. The Committee of the Whole met on 26 and 27 June 2018 and held four meetings. At its 1074th meeting, on 27 June, the Commission considered and adopted the report of the Committee of the Whole and agreed to include it in the present report (see para. 111 below). (The report of the Committee of the Whole is reproduced in chapter IV, section B, of the present report.)

F. Adoption of the report

13. The Commission adopted the present report by consensus at its 1078th meeting, on 29 June, at its 1081st meeting, on 3 July, at its 1082nd and 1083rd meetings, on 5 July, and at its 1085th meeting, on 6 July.

III. Finalization and adoption of instruments on international commercial settlement agreements resulting from mediation

A. Introduction

14. The Commission recalled its decision, made at its forty-eighth session, in 2015, to mandate Working Group II to commence work on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the possible preparation of a convention, model provisions or guidance texts.[2] At its forty-ninth session, in 2016, the Commission had confirmed that the Working Group should continue its work on the topic.[3] At its fiftieth session, in 2017, the Commission had taken note of the compromise reached by the Working Group at its sixty-sixth session (A/CN.9/901, para. 52) and had expressed support for the Working Group to finalize its work on the basis of that compromise by preparing a draft convention on international settlement agreements resulting from mediation as well as a draft amendment to the UNCITRAL Model Law on International Commercial Conciliation (2002).[4]

15. The Commission had before it the reports of Working Group II (Dispute Settlement) on the work of its sixty-seventh session, held in Vienna from 2 to 6 October 2017, and of its sixty-eighth session, held in New York from 5 to 9 February 2018 (A/CN.9/929 and A/CN.9/934).

16. It also had before it the texts of the draft convention on international settlement agreements resulting from mediation as contained in document A/CN.9/942 and of the draft amended UNCITRAL Model Law on International Commercial Conciliation as contained in document A/CN.9/943 (together referred to as the "draft instruments").

17. The Commission took note of the summary of the deliberations on the draft instruments that had taken place at the sixty-seventh and sixty-eighth sessions of the Working Group, and of the consensus reached by the Working Group in relation to the instruments. The Commission also took note of the comments by States on the draft instruments as set out in document A/CN.9/945.

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[2] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 135–142.

[3] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162–165.

[4] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 236–239.

B. Finalization and approval of the draft convention on international settlement agreements resulting from mediation

1. Consideration of the draft convention

18. The Commission considered the text of the draft convention, as contained in paragraph 4 of document A/CN.9/942.

Terminology

19. The Commission affirmed the decision of the Working Group to replace the term "conciliation" with "mediation" throughout the draft instruments and approved the explanatory text describing the rationale for that change, as indicated in document A/CN.9/942, paragraph 5, which would be used, with necessary adjustments, when revising existing UNCITRAL texts on conciliation (see also para. 51 below).

Title and preamble

20. The Commission approved the title of the draft convention and the preamble.

Reference to "Party/Parties to the Convention"

21. The Commission agreed that the term "a Party to the Convention" or "Parties to the Convention" should be used in the draft convention.

Draft article 1: Scope of application

22. The Commission approved article 1, without modification.

Draft article 2: Definitions

Paragraph 2

23. The Commission agreed that the definition of the terms "electronic communication" and "data message" should be deleted from paragraph 2 on the basis that those definitions were contained in other United Nations and UNCITRAL instruments, namely the United Nations Convention on the Use of Electronic Communications in International Contracts (2005), the UNCITRAL Model Law on Electronic Commerce (1996) and the UNCITRAL Model Law on Electronic Signatures (2001), which could be used as a reference for the interpretation of those terms in the context of the draft convention.

Paragraph 4

24. The Commission considered paragraph 4, aimed at clarifying the notions of "granting relief" and "seeking relief". A proposal was made to simplify paragraph 4 along the lines of: "'Relief' means any of the actions set out in article 3". It was, however, pointed out that the notion of "actions" might be ambiguous. Another suggestion was made to delete paragraph 4 and include a cross reference to article 3 in the chapeau of article 4 in order to make it abundantly clear that the term "relief" referred to both enforcement of settlement agreements (under art. 3, para. 1) and the right for a party to invoke a settlement agreement as a defence against a claim (under art. 3, para. 2). After discussion, the Commission agreed to delete paragraph 4 as it was generally considered unnecessary.

25. The Commission approved article 2, as modified (see paras. 23 and 24 above).

Draft article 3: General principles

26. The Commission noted that article 3 provided for States' obligations under the draft convention regarding both enforcement of settlement agreements (para. 1) and the right for a party to invoke a settlement agreement as a defence against a claim (para. 2). It was clarified that the fact that the notions of "enforcement" and "enforceability" as used in the instruments should not be understood as indicating that enforcement referred to something different to enforceability. It was stated that

"enforcement" in the meaning of the instruments covered both the process of issuing an enforceable title and the enforcement of that title.

27. The Commission approved article 3, without modification.

Draft article 4: Requirements for reliance on settlement agreements

28. The Commission noted that article 4 reflected a balance between the formalities that were required to ascertain that a settlement agreement resulted from mediation and the need for the draft convention to preserve the flexible nature of the mediation process.

29. The Commission considered whether the words "such as", which appeared at the end of the chapeau of paragraph 1 (b), should be replaced with the words "in the form of". Support was expressed for retaining the words "such as" as it was considered that they better expressed the open-ended nature of the list in article 4, paragraph 1, should the parties be unable to produce the evidence that the settlement agreement resulted from mediation listed in article 4, subparagraphs 1 (b) (i)–(iii) (see also below, para. 60).

30. The Commission approved article 4, without modification.

Draft article 5: Grounds for refusing to grant relief

31. The Commission noted the extensive consultations held by the Working Group at its sixty-eighth session aimed at clarifying the various grounds provided for in paragraph 1, in particular the relationship between subparagraph (b) (i), which mirrored a similar provision of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and was considered to be of a generic nature, and subparagraphs (b) (ii) and (iii), (c) and (d), which were deemed to be illustrative in nature. The Commission also noted that, at that session of the Working Group, various attempts to group the grounds differently had been unsuccessful; such attempts represented serious efforts to avoid overlap, in the light of the importance of the issue; difficulties arose because of the need to accommodate the concerns of different domestic legal systems, which had resulted in the failure of attempts to achieve consensus. The Commission further noted the shared understanding of the Working Group that there might be overlap among the grounds provided for in paragraph 1 and that competent authorities should take that aspect into account when interpreting the various grounds.

32. The Commission approved article 5, without modification.

Draft article 6: Parallel applications or claims

33. The Commission noted that article 6 provided the competent authority with the discretion to adjourn its decision if an application or claim relating to a settlement agreement had been made to a court, arbitral tribunal or other competent authority, which might affect the process. The Commission confirmed the understanding of the Working Group that article 6 should apply both when enforcement of a settlement agreement was sought and when a settlement agreement was invoked as a defence.

34. The Commission approved article 6, without modification.

Draft article 7: Other laws or treaties

35. The Commission considered article 7, which mirrored article VII of the New York Convention and was aimed at permitting the application of more favourable national legislation or treaties to matters covered by the draft convention. The Commission confirmed the understanding that: (a) article 7 would not allow States to apply the draft convention to settlement agreements excluded under article 1, paragraphs 2 and 3, as such settlement agreements would fall outside the scope of the draft convention; and (b) States would nevertheless have the flexibility to enact relevant domestic legislation, which could include in its scope such settlement agreements.

36. The Commission approved article 7, without modification.

Draft final provisions

Draft article 8: Reservations

37. The Commission noted that article 8 provided for two reservations authorized under the draft convention.

38. Regarding the reservation on the application of the draft convention on the basis of the parties' consent, under subparagraph 1 (b), the Commission recalled paragraph 78 of document A/CN.9/934, in which it was clarified that, with regard to how article 8, subparagraph 1 (b), of the draft convention would operate in practice, the understanding was that even without an explicit provision in the draft convention, parties to a settlement agreement would be able to exclude the application of the draft convention.

39. In the context of those discussions, it was further clarified that subparagraph 1 (b) referred to an opt-in possibility, and that article 5, subparagraph 1 (d), would find application where the parties would agree to opt out of the application of the draft convention.

40. After discussion, the Commission approved article 8, without modification.

Draft article 9: Effect on settlement agreements

41. The Commission noted that article 9 addressed the impact of the entry into force of the draft convention and of any reservations or withdrawal thereof on settlement agreements concluded before such entry into force. Similarly, article 16, paragraph 2, addressed the effect of the denunciation of the draft convention on settlement agreements concluded before such denunciation took effect. It was recalled that the purpose of the provisions was to enhance legal certainty for parties to settlement agreements.

42. The Commission approved article 9, without modification.

Draft article 11: Signature, ratification, acceptance, approval, accession

43. In connection with draft article 11, the attention of the Commission was drawn to an offer from the Government of Singapore to organize a ceremony for the signing of the convention, once adopted. The Commission was informed that the Government of Singapore was prepared to assume the additional costs that might be incurred by convening a signing ceremony outside the premises of the United Nations so that the organization of the signing ceremony would not require additional resources under the United Nations budget.

44. The Commission expressed its gratitude for the offer of the Government of Singapore to act as host for such an event, and the proposal was unanimously supported. The Commission therefore agreed that paragraph 1 of article 11 would read as follows: "This Convention is open for signature by all States in Singapore, on 1 August 2019, and thereafter at United Nations Headquarters in New York."

45. Unanimous support was also expressed for the convention to be referred to as the "Singapore Convention on Mediation".

Draft article 13: Non-unified legal systems — Draft article 15: Amendment

46. The Commission clarified the understanding that article 13 would be applicable in the context of amendments to the convention under article 15, so that States could avail themselves of article 13 to decide whether and how to apply amendments to the convention under article 15 to their territorial units.

47. The Commission approved in substance articles 10 to 16, as modified (see para. 44 above).

Material accompanying the draft convention

48. The Commission agreed that, resources permitting, the *travaux préparatoires* of the draft convention should be compiled by the Secretariat, so that they could be easily accessible.

2. Decision of the Commission and recommendation to the General Assembly

49. At its 1070th meeting, on 25 June 2018, the Commission adopted by consensus the following decision and recommendation to the General Assembly:

The United Nations Commission on International Trade Law,

Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Recalling General Assembly resolution 57/18 of 19 November 2002, in which the Assembly noted with appreciation the adoption of the United Nations Commission on International Trade Law Model Law on International Commercial Conciliation (2002),[5] and expressing the conviction that the Model Law, together with the United Nations Commission on International Trade Law Conciliation Rules (1980),[6] the use of which was recommended by the General Assembly in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

Convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and would contribute to the development of harmonious international economic relations,

Recalling that the decision of the Commission to concurrently prepare a draft convention on international settlement agreements resulting from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States will adopt either instrument,[7]

Noting that the preparation of the draft convention on international settlement agreements resulting from mediation was the subject of due deliberation in the Commission and that the draft convention benefited from consultations with Governments and interested intergovernmental and invited non-governmental organizations,

Having considered the draft convention at its fifty-first session, in 2018,

Drawing attention to the fact that the text of the draft convention was circulated for comment before the fifty-first session of the Commission to all Governments invited to attend the meetings of the Commission and the Working Group as members or observers,

Considering that the draft convention has received sufficient consideration and has reached the level of maturity for it to be generally acceptable to States,

1. *Submits* to the General Assembly the draft convention on international settlement agreements resulting from mediation, as it appears in annex I to the

[5] General Assembly resolution 57/18, annex.

[6] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), chap. V, sect. A, para. 106. See also *UNCITRAL Yearbook*, vol. XI: 1980, part three, annex II.

[7] A/CN.9/901, para. 93.

report of the United Nations Commission on International Trade Law on the work of its fifty-first session;[8]

2. *Recommends* that the General Assembly, taking into account the extensive consideration given to the draft convention by the Commission and its Working Group II (Dispute Settlement), consider the draft convention with a view to adopting, at its seventy-third session, on the basis of the draft convention approved by the Commission, a United Nations Convention on International Settlement Agreements Resulting from Mediation, authorizing a signing ceremony to be held as soon as practicable in 2019 in Singapore, upon which the Convention would be open for signature, and recommending that the Convention be known as the "Singapore Convention on Mediation";

3. *Requests* the Secretary-General to publish the Convention, upon adoption, including electronically, in the six official languages of the United Nations and to disseminate it broadly to Governments and other interested bodies.

C. Finalization and adoption of amendments to the UNCITRAL Model Law on International Commercial Conciliation

1. Consideration of the draft amended Model Law

50. The Commission approved the title of the draft amended Model Law, as well as its structure and presentation in three different sections. The Commission agreed to replace the word "Mediation" in the heading of section 2 with the words "International commercial mediation", it being understood that such modification would not have any implication as to the applicability of the Model Law to various fields where mediation was used, including investor-State dispute settlement.

51. The Commission also approved the replacement of the term "conciliation" by "mediation" throughout the draft instruments, as well as in the explanatory text describing the rationale for that change reproduced in footnote 2 to the draft amended Model Law (see also para. 19 above).

52. The Commission noted that, in its deliberations on the draft amended Model Law, the Working Group had generally agreed that the guiding principles would be to ensure a level of consistency with the draft convention and, at the same time, to preserve the existing text of the Model Law to the extent possible.

Draft section 1: General provisions

53. The Commission adopted section 1, without modification.

Draft section 2: International commercial mediation

54. The Commission adopted section 2, with the modification to its title (see para. 50 above).

Draft section 3: International settlement agreements

55. The Commission considered draft articles 16 to 20, which addressed international settlement agreements in a manner consistent with the draft convention.

Draft article 16: Scope of application of the section and definitions

56. The Commission agreed that the modifications approved with respect to the draft convention should be reflected in the relevant provisions of the draft amended Model Law (see above, paras. 23 and 24). Accordingly, the Commission agreed to delete the definition of the terms "electronic communication" and "data message" in draft article 16, paragraph 6, and to delete draft article 16, paragraph 7.

57. The Commission adopted article 16, as modified (see para. 56 above).

[8] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17).

Draft article 17: General principles

58. The Commission noted that article 17 provided for the principles regarding both enforcement of settlement agreements (para. 1) and the right for a party to invoke a settlement agreement as a defence against a claim (para. 2).

59. The Commission adopted article 17, without modification.

Draft article 18: Requirements for reliance on settlement agreements

60. The Commission noted that article 18 reflected a balance between the formalities that would be required to ascertain that the settlement agreement resulted from mediation and the need for the instrument to preserve the flexible nature of the mediation process. As agreed in the context of the consideration of the draft convention, the Commission agreed to retain the words "such as", which appeared at the end of the chapeau of paragraph 1 (b) (see above, para. 29).

61. The Commission adopted article 18, without modification.

Draft article 19: Grounds for refusing to grant relief

62. The Commission noted the extensive consultations of the Working Group at its sixty-eighth session aimed at clarifying the various grounds provided for in paragraph 1 (see also above, para. 31).

63. The Commission adopted article 19, without modification.

Draft article 20: Parallel applications or claims

64. The Commission noted that article 20 provided the competent authority with the discretion to adjourn its decision if an application or claim relating to the settlement agreement had been made to a court, arbitral tribunal or other competent authority, which might affect the process.

65. The Commission adopted article 20, without modification.

Footnotes

66. The Commission considered the footnotes to the draft amended Model Law. The Commission agreed that the third sentence of footnote 5 should become a separate footnote to article 16, paragraph 1. In footnote 6, the Commission agreed to add the word "also" before the word "international" so that the possible addition to paragraph 4 in footnote 6 would read as follows: "A settlement agreement is also 'international' if it results from international mediation as defined in article 3, paragraphs 2, 3 and 4."

Material accompanying the draft amended Model Law

67. The Commission noted the recommendation of the Working Group that, resources permitting, the *travaux préparatoires* of the draft amended Model Law should be compiled by the Secretariat so that they could be easily accessible. It was agreed that the Secretariat should be tasked with the preparation of a text to supplement the "Guide to enactment and use of the UNCITRAL Model Law on International Commercial Conciliation".[9] In that regard, the Commission agreed that the "Guide to enactment and use" should provide guidance on how sections 2 and 3 of the amended Model Law should each be enacted as a stand-alone legislative text.

[9] *UNCITRAL Yearbook*, vol. XXXIII: 2002, part three, annex II.

2. Adoption of the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation

68. At its 1070th meeting, on 25 June 2018, the Commission adopted by consensus the following decision:

The United Nations Commission on International Trade Law,

Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Recalling General Assembly resolution 57/18 of 19 November 2002, in which the Assembly noted with appreciation the adoption of the United Nations Commission on International Trade Law Model Law on International Commercial Conciliation (2002), and expressing the conviction that the Model Law, together with the United Nations Commission on International Trade Law Conciliation Rules (1980),[10] the use of which was recommended by the General Assembly in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

Believing that the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation will significantly assist States in enhancing their legislation governing the use of modern mediation techniques and in formulating such legislation where none currently exists,

Recalling that the decision of the Commission to concurrently prepare a draft convention on international settlement agreements resulting from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States will adopt either instrument,[11]

Noting that the preparation of the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation was the subject of due deliberation in the Commission and that the draft Model Law benefited from consultations with Governments and interested intergovernmental and invited non-governmental organizations,

1. *Adopts* the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation as it appears in annex II to the report of the United Nations Commission on International Trade Law on the work of its fifty-first session;[12]

2. *Recommends* that all States give favourable consideration to the enactment of the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation when they enact or revise their laws, in view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial mediation practice;

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[10] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), chap. V, sect. A, para. 106. See also *UNCITRAL Yearbook*, vol. XI: 1980, part three, annex II.

[11] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 238 and 239. See also A/CN.9/901, para. 93.

[12] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17).

3. *Requests* the Secretary-General to publish the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, including electronically, in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies.

IV. Consideration of issues in the area of micro, small and medium-sized enterprises

A. Introduction

69. The Commission recalled that, at its forty-sixth session, in 2013, it had agreed that work on reducing the legal obstacles faced by micro, small and medium-sized enterprises throughout their life cycle, in particular in developing economies, should be added to its work programme and that such work should be allocated to Working Group I. The Commission also recalled that it had agreed at that session that such work should start with a focus on legal questions surrounding the simplification of incorporation.[13] The Commission further recalled that Working Group I, since its twenty-third session, in 2014, had considered the legal issues surrounding the simplification of incorporation and good practices in business registration, both of which aimed at reducing the legal obstacles encountered by micro, small and medium-sized enterprises throughout their life cycle.

70. The Commission had before it: (a) the reports of Working Group I (Micro, Small and Medium-sized Enterprises) on its twenty-ninth and thirtieth sessions (A/CN.9/928 and A/CN.9/933, respectively); (b) a note by the Secretariat on the draft legislative guide on key principles of a business registry (A/CN.9/940); and (c) a note by the Secretariat on adopting an enabling legal environment for the operation of micro, small and medium-sized enterprises (A/CN.9/941), which was intended to provide the context for the work of UNCITRAL on micro, small and medium-sized enterprises.

B. Finalization of a draft legislative guide on key principles of a business registry: report of the Committee of the Whole

71. The Committee of the Whole, established by the Commission at its fifty-first session (see para. 12 above), considered the text of the draft legislative guide on key principles of a business registry and approved the changes as set out below. Paragraphs and recommendations not referred to below were adopted by the Committee as drafted.

1. Introduction

Paragraph 2

72. The Committee agreed to replace the word “certain” with “many” and to add the words “depending on their legal forms” after the word “businesses”.

Terminology: paragraph 12

73. To resolve concerns about the use of terminology, the Committee agreed to delete the definition of “business registration” and the reference to “business registration system” in the definition of “business registry” and to adopt the following definition of “business registry”: “‘Business registry’ means the State’s mechanism for receiving, storing and making accessible to the public certain information about businesses, as required by domestic law.”

74. The Committee also agreed to add a footnote to that definition to the following effect: “The business registry may also function as a one-stop shop to support mandatory registration with other relevant authorities (e.g., taxation and social

[13] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

security authorities) — this is discussed further in paragraph 57." With respect to the use of the phrase "business registration system" throughout the text, the Committee agreed that it could be replaced with the term "business registry" as appropriate; it was noted that the direct replacement would not be possible in all instances.

75. The Committee agreed to delete the definition of "formal economy" on the basis that that issue was addressed in A/CN.9/941.

76. The Committee agreed to delete the words "or a non-business entity" from the definition of "unique identifier" and from other parts of the text, as appropriate, such as from paragraphs 101 and 104 (see paras. 92 and 93 below).

2. Objectives of a business registry: paragraph 25

77. The Committee agreed to delete from the paragraph the sentence commencing with the words "A desirable approach" and also agreed that the paragraph should end after the words "and social security authorities" in the penultimate sentence.

Purposes of the business registry: paragraph 26

78. The Committee agreed to delete the following words from the paragraph: "However, since business registration may be viewed as a conduit through which businesses of all sizes and legal forms interact with the State and operate in the formal economy (see paras. 123 to 126 below and rec. 20),".

79. The Committee agreed to add, before the penultimate sentence of paragraph 26, text explaining that, in some States, one of the consequences of business registration was that the registered information had *erga omnes* legal effect.

Simple and predictable legislative framework permitting registration: recommendation 3

80. The Committee agreed that the chapeau and subparagraph (a) of the recommendation should read: "Laws governing the business registry should: (a) Adopt a simple structure and avoid the unnecessary use of exceptions or granting of discretionary power;".

Key features of a business registry: paragraph 32

81. The Committee agreed to delete from the paragraph the following words: "whether or not the information in the business registry is legally binding on the registry, the registrant, the registered business or on third parties, nor to".

3. Establishment and functions of the business registry

Responsible authority: paragraph 40

82. The Committee agreed to replace the word "liability" in the first sentence with the word "responsibility".

Appointment and accountability of the registrar: paragraph 43

83. The Committee agreed to revise the second sentence as follows: "In this regard, the applicable law of the enacting State should establish principles for the accountability of the registrar to ensure appropriate conduct in administering the business registry (the potential liability of the registry is addressed in paras. 213–218 and rec. 47 below)."

Core functions of business registries: paragraphs 53 and 56

84. The Committee agreed to delete from paragraph 53 the words "and in any event, the assignment of a unique identifier will assist in ensuring the unique identity of the business within and across jurisdictions (see also paras. 98 to 105 below)."

85. The Committee also agreed that the reference to email in paragraph 56 (as well as paras. 74, 120 and 196) should be expanded to include electronic address or other electronic means of communication.

4. Operation of the business registry

Electronic, paper-based or mixed registry: recommendation 12

86. The Committee agreed to replace the title of the recommendation with "Medium to operate a business registry".

Electronic documents and electronic authentication methods: paragraph 85 and recommendation 13

87. The Committee agreed to modify the third sentence of paragraph 85 to refer to "electronic signature or other means of identification and authentication".

88. The Secretariat was requested to ensure that the reference to "electronic signatures and other equivalent identification methods" in recommendation 13, subparagraph (a), was consistent with the language used in other UNCITRAL texts.

A one-stop shop for business registration and registration with other authorities: paragraphs 86 and 88

89. The Committee agreed to delete the reference to "justice and employment authorities" in paragraph 86.

90. The Committee also agreed to delete the second sentence of paragraph 88 and to adjust the third sentence as appropriate, in particular by deleting the word "additional".

Use of unique identifiers: paragraphs 98, 101 and 102

91. The Committee agreed to delete the last sentence of paragraph 98.

92. The Committee also agreed to replace the word "entities" in the first sentence of paragraph 101 with the word "businesses" and similarly the word "entity" with the word "business" in the penultimate sentence. The Committee further agreed to revise the third sentence as follows: "The unique identifier is usually allocated by an authority with which the business is required to register and does not change during the existence of that business, or after its deregistration."

93. The Committee further agreed to delete the last two sentences of paragraph 102.

Business permitted or required to register: paragraphs 124 and 125

94. The Committee agreed to delete the reference to "government bodies" in the fourth sentence of paragraph 124.

95. In respect of paragraph 125, the Committee agreed that: (a) the first sentence should end after the word "markets"; (b) the words "and, subject to the legal form chosen for the business which may require it to be registered," should be deleted; and (c) the new second sentence should be revised as follows: "In any event, registration is always required for the separation of personal assets from assets devoted to the business or for limiting the liability of the owner of the business."

Minimum information required for registration: paragraph 127

96. The Committee agreed to delete the words "and economic framework" from the first sentence of the paragraph.

Rejection of an application for registration: paragraph 149

97. The Committee agreed to replace "may" with "must" and to add the word "only" before the word "if" in the first sentence of the paragraph, as well as to delete the last sentence of that paragraph.

5. Accessibility and information-sharing

Access to registration services of the business registry: paragraph 167 and recommendation 33

98. The Committee agreed that: (a) the title of section B and that of recommendation 33 should be changed to: "Access to services of the business registry"; (b) the first sentence of paragraph 167 should refer to "all potential users, including potential registrants"; and (c) the opening phrase of recommendation 33 should be amended to read: "The law should permit access to the business registry without discrimination".

Equal rights of women to access the registration services of the business registry: paragraphs 173 and 174 and recommendation 34

99. The Committee agreed that in the last sentence of paragraph 173, the word "some" should be replaced with "many".

100. The Committee also agreed that in the last sentence of paragraph 174, a reference should be added to the Universal Declaration of Human Rights so that the sentence reads: "Such steps are also in compliance with the non-discrimination commitments of States under international human rights instruments, such as the Universal Declaration of Human Rights, as well as with the obligations of States parties to the United Nations Convention on the Elimination of All Forms of Discrimination against Women and other United Nations treaties for the elimination of discrimination based on gender."

101. The Committee further agreed to add a new paragraph after paragraph 174 along the lines of: "To establish gender-neutral business registration frameworks, States also need to institute policies to collect anonymized, sex-disaggregated data for business registration on a voluntary basis through the business registry. Such efforts would facilitate a Government's ability to determine the extent of informal barriers. Evidence for policy development continues to suffer because of the lack of sex-disaggregated data for statistical purposes."

102. Finally, the Committee agreed to add a new subparagraph to recommendation 34, reading: "(c) Provide for the adoption of policies to collect anonymized, sex-disaggregated data for business registration through the business registry."

Direct electronic access to submit registration, to request amendments and to search the registry: paragraphs 185 and 188 and recommendation 37

103. The Committee agreed to: (a) revise the title of section F and recommendation 37 to "Direct electronic access to registry services"; (b) add the words "including mobile devices," after the words "any electronic device" in the first sentence of paragraph 185; and (c) delete the last two sentences of that paragraph.

104. The Committee also agreed to revise paragraph 188 as follows: (a) to end the third sentence after the words "multiple points of access"; and (b) to revise the last sentence to read: "The overall objective of access to business registry services is the same for both electronic and paper-based or mixed registries: to make the registration and information retrieval process as simple, transparent, efficient, inexpensive and publicly accessible as possible."

6. Fees: paragraph 197

105. The Committee agreed to delete the words "while to a lesser extent, fines may also generate funds" from the paragraph.

Fees charged for information: recommendation 42

106. The Committee agreed to add the word "Basic" at the beginning of recommendation 42, subparagraph (a).

7. Liability and sanctions

107. The Committee agreed to move paragraph 210 to follow paragraph 207.

8. Underlying legal reforms

Clarity of the law: paragraphs 238 and 239 and recommendation 56

108. The Committee agreed to: (a) delete paragraph 238; (b) insert ", where possible," after the word "unification" in paragraph 239; (c) add ", in a clear manner," after the word "should" in recommendation 56; and (d) end that recommendation after the words "business registration".

Flexible legal forms for business: paragraph 240 and recommendation 57

109. The Committee heard a proposal to delete recommendation 57, subparagraph (b), or, if deletion was not approved, to revise it along the following lines: "The law in all States, no matter which registration system may apply, should adopt the measures necessary to promote the creation and growth of businesses and ensure that the registration procedures for micro, small and medium-sized enterprises are fast, efficient, reliable and low cost."

110. In the course of the discussion of that proposal, the Committee heard a number of additional proposals seeking to achieve a compromise between different views on the substance of the recommendation. Although some of those proposals received some support, the Committee ultimately agreed that recommendation 57, subparagraph (b), should be deleted. The Committee agreed that a cross reference to paragraphs 115–117 should be added at the end of paragraph 240.

C. Adoption of the report of the Committee of the Whole and of the *UNCITRAL Legislative Guide on Key Principles of a Business Registry*

111. At its 1074th meeting, on 27 June 2018, the Commission adopted the report of the Committee of the Whole and agreed that it should form part of the present report. It also adopted the following decision:

The United Nations Commission on International Trade Law,

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

Recognizing the importance to all States of a fair, stable and predictable legal framework for the promotion of development-oriented policies that support productive activities, decent job creation, entrepreneurship, the equal rights of women to economic resources, creativity and innovation, and encourage the formalization and growth of micro, small and medium-sized enterprises,

Noting that simple, efficient and cost-effective business registration can assist in business formation of all sizes and types of business, in particular micro, small and medium-sized enterprises,

Noting also that when business registries perform their functions in accordance with simplified and streamlined procedures they greatly contribute to the economic development of a State as they allow expedited access to business information from interested users, including from foreign jurisdictions, thus facilitating the search for potential business partners, clients or sources of finance and reducing risks in transacting and contracting,

Noting further the widespread wave of reforms of business registration systems carried out by States in all regions and at all levels of development and, accordingly, the wealth of lessons learned that have informed the preparation of the legislative guide on key principles of a business registry and the growing opportunities for the use and application of such guide,

Recalling the mandate given to Working Group I (Micro, Small and Medium-sized Enterprises) to prepare legal standards aimed at reducing the legal

obstacles encountered by micro, small and medium-sized enterprises throughout their life cycle, in particular those in developing economies,

Convinced that legislative recommendations negotiated internationally through a process involving a broad range of constituents will be useful to both States that do not have an efficient and effective business registration system and States that are undertaking a process of review and reform of their business registration systems,

Expressing its appreciation to Working Group I for its work in developing the draft legislative guide on key principles of a business registry and to intergovernmental and invited non-governmental organizations active in the field of business registration reform for their support and participation,

1. *Adopts* the *UNCITRAL Legislative Guide on Key Principles of a Business Registry*, contained in document A/CN.9/940, as revised by the Commission at its fifty-first session,[14] and authorizes the Secretariat to edit and finalize the text of the *Legislative Guide* in the light of those revisions;

2. *Requests* the Secretary-General to publish the *Legislative Guide*, including electronically, in the six official languages of the United Nations, and to disseminate it to Governments and other interested bodies, so that it becomes widely known and available;

3. *Recommends* that the *Legislative Guide* be given due consideration, as appropriate, by legislators, policymakers, registry system designers and other interested bodies and individuals.

D. Progress report of Working Group I

112. The Commission noted that Working Group I, at its thirty-first session, would resume its deliberations on a draft legislative guide on an UNCITRAL limited liability organization, with a view to completing the first reading of the draft text.

V. Consideration of issues in the area of insolvency law

A. Finalization and adoption of the Model Law on the Recognition and Enforcement of Insolvency-Related Judgments and its guide to enactment

1. Introduction

113. The Commission recalled that, at its forty-seventh session, in 2014, it had approved a mandate for Working Group V (Insolvency Law) to develop a model law or model legislative provisions providing for the recognition and enforcement of insolvency-related judgments.[15] It also recalled that the Working Group had discussed that topic at its forty-sixth to fifty-third sessions (from 2014 to 2018),[16] and noted that, at its fifty-second session, the Working Group had requested the Secretariat to circulate the draft model law to States for comment (A/CN.9/931, para. 41).

114. The Commission had before it: (a) the reports of Working Group V (Insolvency Law) on the work of its fifty-second and fifty-third sessions (A/CN.9/931 and A/CN.9/937, respectively); (b) the draft Model Law on Recognition and Enforcement of Insolvency-Related Judgments (as contained in the annex to document A/CN.9/937); (c) the draft guide to enactment of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (A/CN.9/WG.V/WP.157); (d) a note by the Secretariat on amendments to the draft guide to enactment agreed by the

[14] Ibid., *Seventy-third Session, Supplement No. 17* (A/73/17), chapter IV, section B.
[15] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.
[16] For the reports of the Working Group on those sessions, see A/CN.9/829, A/CN.9/835, A/CN.9/864, A/CN.9/870, A/CN.9/898, A/CN.9/903, A/CN.9/931 and A/CN.9/937.

Working Group at its fifty-third session (A/CN.9/955); and (e) a compilation of comments on the draft Model Law (A/CN.9/956, A/CN.9/956/Add.1, A/CN.9/956/Add.2 and A/CN.9/956/Add.3).

115. The Commission commenced with an article-by-article consideration of the draft Model Law and then took up the accompanying draft guide to enactment.

2. Article-by-article consideration

Preamble and articles 1 to 12, 14 and X

116. The Commission approved the preamble and articles 1 to 12, 14 and X as drafted.

Article 13. Grounds to refuse recognition and enforcement of an insolvency-related judgment

117. The Commission approved the following amendments to article 13:

(a) In subparagraph (a) (ii), adding the words “in this State” after the word “notified” and replacing the words “fundamental principles” with “the rules”;

(b) In subparagraph (g) (ii), replacing the words “the defendant” with the words “that party”.

118. A proposal was made to delete the words at the end of subparagraph (g) (ii), commencing with the word “unless”. It was indicated that the text to be deleted might be superfluous as it was difficult to envisage a situation where the exclusion could be applied in practice. It was said that, if it was not possible to come up with a practical example, that phrase should be deleted. That proposal did not receive sufficient support. Proposals to delete subparagraph (h) in its entirety or to retain the chapeau but delete subparagraphs (h) (i) and (ii) were also made. Reference was made to document A/CN.9/956/Add.3 in that respect and it was stated that subparagraph (h) legitimized the exercise of insolvency jurisdiction in situations that were not widely accepted, such as situations where the exercise of court jurisdiction was based on the mere presence of the debtor’s assets in the jurisdiction. In response it was stated that subparagraph (h) would provide a useful tool in the recovery of assets. The proposals to delete all or part of subparagraph (h) did not receive sufficient support.

119. The Commission heard another proposal to add a further subparagraph to article 13 along the following lines:

> (x) The judgment affects the rights of creditors in this State, who could have opened an insolvency proceeding in relation to the same debtor whose insolvency proceeding issued the insolvency-related judgment, and these creditors would be better off if the laws of this State apply, unless they have agreed to this treatment.

120. It was indicated that that additional subparagraph would complement article 13, subparagraph (f), as it would cover situations where adequate protection was not specifically requested but was nonetheless needed by creditors in the receiving State to ensure that they were not worse off than they would have been had they been subject to local insolvency proceedings. In support of that proposal, reference was made to document A/CN.9/956/Add.3.

121. Various concerns were expressed, including: (a) the manner in which the new subparagraph would interact with other articles of the draft text, including article 13, subparagraph (f); (b) whether the provision was intended to apply only to States that had enacted the UNCITRAL Model Law on Cross-Border Insolvency (1997);[17] and (c) the breadth of the exception and, in particular, the possibility that the words “affects the rights of creditors” could lead to litigation to determine whether creditors were adversely affected by the judgment, and the delay that might be occasioned by that litigation to what was intended to be a straightforward and expeditious

[17] General Assembly resolution 52/158, annex.

mechanism for the recognition of judgments. After discussion, the proposal did not receive sufficient support.

122. The Commission approved article 13 with the amendments noted in paragraph 117 above.

Article 15. Severability

123. A proposal to replace the word "shall" with "may" in draft article 15 did not receive sufficient support and the Commission approved article 15 as drafted.

3. Guide to enactment of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments

Purpose and origin of the Model Law

Paragraph 8

124. A proposal to delete the last sentence of paragraph 8 did not received sufficient support.

Article 2. Definitions

Subparagraph 59 (d)

125. With reference to subparagraph 59 (d) of the draft guide, reference was made to the ongoing work of the Hague Conference on Private International Law on a global judgments convention. It was explained that, while a neutral approach was taken in subparagraph 59 (d) with respect to the applicability of the Model Law to judgments on causes of action arising prior to the commencement of insolvency proceedings, other international instruments might take a different approach. It was added that a reference to that approach could provide useful guidance to legislators and assist in ensuring consistency across international instruments. Suggestions were made to insert a reference in subparagraph 59 (d) to existing and future international agreements. In response, it was indicated that, on the one hand, legislators were usually not concerned with instruments not yet in force or still under negotiation and, on the other hand, States had to take into account their international obligations when making legislative decisions.

126. After discussion, the Commission agreed that the beginning of the second sentence of the paragraph should be revised to read "Enacting States will need" and that the following sentence should be inserted at the end of subparagraph 59 (d):

> "Enacting States may also wish to have regard to the treatment of such judgments under other international instruments."

Article 7. Public policy exception

Paragraph 70

127. It was indicated that, during the preparation of the model law, several reasons had been suggested to support the absence of a uniform definition of public policy in the model law and that paragraph 70 seemed to be too narrow. It was suggested that the paragraph should be drafted in a more neutral manner and that a reference to the Model Law should be inserted. In response, it was indicated that the notion of public policy was general and not exclusive to the Model Law.

128. After discussion, the Commission agreed on the following text for paragraph 70:

> "The notion of public policy is grounded in national law and may differ from State to State. No uniform definition of that notion is attempted in article 7."

Article 13. Grounds to refuse recognition and enforcement of an insolvency-related judgment

Paragraph 105

129. Various proposals were made with respect to the last sentence of paragraph 105. In particular, it was suggested that there was a need to better explain the basis of the inconsistency arising under article 13, subparagraph (c), and the use of the phrase "mutually exclusive". After discussion, the Commission agreed to revise the final sentence of the paragraph as follows:

> "Under subparagraph (c), inconsistencies between judgments occur when findings of fact or conclusions of law, which are based on the same issues, are different."

4. Renumbering of the articles of the Model Law and finalization of the guide to enactment

130. The Secretariat was requested to renumber the articles of the Model Law and to edit and finalize the text of the guide to enactment in the light of the changes agreed to the text of article 13 (see para. 117 above). It was noted that the list of references to the discussion at UNCITRAL and in the Working Group in the guide to enactment would be updated.

5. Adoption of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments and its guide to enactment

131. At its 1080th meeting, on 2 July 2018, after consideration of the text of the draft Model Law on Recognition and Enforcement of Insolvency-Related Judgments and the guide to enactment, the Commission adopted the following decision:

> *The United Nations Commission on International Trade Law*,
>
> *Recalling* General Assembly resolution 2205 (XXI) of 17 December 1966, in which the Assembly established the United Nations Commission on International Trade Law with the purpose of promoting the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,
>
> *Recognizing* that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment and of fostering entrepreneurial activity and preserving employment,
>
> *Convinced* that the law of recognition and enforcement of judgments is becoming more and more important in a world in which it is increasingly easy for enterprises and individuals to have assets in more than one State and to move assets across borders,
>
> *Considering* that international instruments on the recognition and enforcement of judgments in civil and commercial matters exclude insolvency-related judgments from their scope,
>
> *Concerned* that inadequate coordination and cooperation in cases of cross-border insolvency, including uncertainties associated with recognition and enforcement of insolvency-related judgments, can operate as an obstacle to the fair, efficient and effective administration of cross-border insolvencies, reducing the possibility of rescuing financially troubled but viable businesses, making it more likely that debtors' assets are concealed or dissipated and hindering reorganizations or liquidations that would be the most advantageous for all interested persons, including the debtors, the debtors' employees and the creditors,
>
> *Convinced* that fair and internationally harmonized legislation on cross-border insolvency that respects national procedural and judicial systems and is acceptable to States with different legal, social and economic systems would contribute to the development of international trade and investment,

Appreciating the support for and the participation of intergovernmental and invited non-governmental organizations active in the field of insolvency law reform in the development of a draft model law on recognition and enforcement of insolvency-related judgments and its guide to enactment,

Expressing its appreciation to Working Group V (Insolvency Law) for its work in developing the draft Model Law on Recognition and Enforcement of Insolvency-Related Judgments and its guide to enactment,

1. *Adopts* the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments, as it appears in annex III to the report of the United Nations Commission on International Trade Law on its fifty-first session,[18] and its guide to enactment, consisting of the text contained in A/CN.9/WG.V/WP.157, with the amendments listed in document A/CN.9/955 and the amendments adopted by the Commission at its fifty-first session;[19]

2. *Requests* the Secretary-General to publish the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments and its guide to enactment, including electronically, in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments when revising or adopting legislation relevant to insolvency, and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that all States continue to consider implementation of the UNCITRAL Model Law on Cross-Border Insolvency (1997).[20]

B. Progress report of Working Group V

132. The Commission recalled that Working Group V, at its forty-fourth session, held in Vienna from 16 to 20 December 2013, had commenced its deliberations on a legislative text addressing the cross-border insolvency of enterprise groups. That text, which the Working Group had decided should be a model law, was likely to be available, together with a guide to enactment, for finalization and adoption by the Commission at its fifty-second session, in 2019. In addition, the Commission noted that a draft commentary and recommendations on the obligations of directors of enterprise group companies in the period approaching insolvency (which would supplement part four of the UNCITRAL Legislative Guide on Insolvency Law, dealing with obligations of directors in the period approaching insolvency, (2013)[21]) had been prepared and it was likely that the text could be finalized and adopted at the same time as the draft model law and guide to enactment on enterprise group insolvency.

133. The Commission also took note that the Working Group, at its fifty-first session, held in New York from 10 to 19 May 2017, had commenced its deliberations on the insolvency of micro, small and medium-sized enterprises, based upon the provisions of the UNCITRAL Legislative Guide on Insolvency Law (2004)[22] and that that work was ongoing.

134. The Commission expressed its satisfaction with the progress of the work of the Working Group, in particular its management of parallel topics and the likelihood of completion of several texts so that they could be considered by the Commission at its fifty-second session, in 2019.

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[18] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17).
[19] Ibid., chapter V, subsection A.3.
[20] General Assembly resolution 52/158, annex.
[21] Available at www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part4-ebook-E.pdf.
[22] Available at www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html.

VI. Consideration of revised UNCITRAL texts in the area of privately financed infrastructure projects

135. At its forty-eighth and forty-ninth sessions, in 2015 and 2016, the Commission had reiterated its belief in the key importance of public-private partnerships to infrastructure and development.[23] The Commission had decided that the Secretariat should consider updating where necessary all or parts of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000),[24] and involve experts in the process.[25] At its fiftieth session, in 2017, the Commission had confirmed that the Secretariat (with the assistance of experts) should continue to update and consolidate the Legislative Guide, the accompanying Legislative Recommendations and the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003), and should report further to the Commission at its fifty-first session, in 2018.[26] The Secretariat had since organized and convened the Third International Colloquium on Public-Private Partnerships in Vienna on 23 and 24 October 2017.[27]

136. The Commission had before it a note by the Secretariat setting out the proposals of the Secretariat on both the scope and nature of the proposed amendments to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, as well as the process for implementing them (A/CN.9/939). Revised drafts of the introduction and of chapters I, II and III of the Legislative Guide reflecting the changes proposed by the Secretariat were contained in A/CN.9/939/Add.1, A/CN.9/939/Add.2 and A/CN.9/939/Add.3, for review and consideration by the Commission.

137. The Commission took note of the general policy proposals for amending the Legislative Guide, as well as the specific amendments proposed by the Secretariat in the revised drafts of the introduction and of chapters I, II and III. The Commission endorsed the general policy proposals for amending the Legislative Guide. The Commission also approved in principle the nature of the amendments proposed by the Secretariat, subject to specific comments and further adjustments that might be proposed in the course of the consultations with experts that the Commission encouraged the Secretariat to pursue with a view to submitting to the Commission the complete set of all draft revised chapters of the Guide, to be renamed the UNCITRAL Legislative Guide on Public-Private Partnerships, for consideration and adoption at its fifty-second session, in 2019.

VII. Investor-State dispute settlement reform: progress report of Working Group III

138. The Commission recalled that, at its fiftieth session, in 2017, it had approved a mandate for Working Group III to work on the possible reform of investor-State dispute settlement. It further recalled that the Working Group was, in discharging that mandate and in line with the UNCITRAL process, to ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all

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

[24] United Nations publication, Sales No. E.01.V.4.

[25] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 362.

[26] Ibid., *Seventy-second Session, Supplement No. 17 (*A/72/17), para. 448.

[27] The documents presented at the colloquium and a summary report of the discussions are available in English at the colloquium website (www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2017.html).

stakeholders, would be Government-led, with high-level input from all Governments, consensus-based and fully transparent.[28]

139. The Commission had before it the reports of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth and thirty-fifth sessions (A/CN.9/930/Rev.1, A/CN.9/930/Add.1/Rev.1 and A/CN.9/935).

140. The Commission noted the discussions of the Working Group, which had focused on the first stage of its mandate (to identify and consider concerns regarding investor-State dispute settlement).

141. Recalling that the process should be Government-led, the Commission welcomed the participation of 80 States and 35 intergovernmental organizations and invited non-governmental organizations in the thirty-fourth session and of 84 States and 50 organizations in the thirty-fifth session of the Working Group.

142. In that context, the Commission expressed its appreciation for the contributions to the UNCITRAL trust fund from the European Union and the Swiss Agency for Development and Cooperation, aimed at allowing the participation of representatives of developing States in the deliberations of the Working Group (see also para. 191 below), and was informed about ongoing efforts by the Secretariat to secure additional voluntary contributions. States were urged to support those efforts.

143. The Commission welcomed the outreach activities of the Secretariat aimed at raising awareness about the work of the Working Group and ensuring that the process would remain inclusive and fully transparent. The Commission noted the engagement of the Working Group, and of the Secretariat, with diverse stakeholders, including intergovernmental organs and organizations such as UNCTAD, the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD), the International Centre for the Settlement of Investment Disputes and PCA.

144. The Commission expressed its appreciation for the provision of information by various stakeholders to assist the Working Group in its deliberations, as well as for proposals by an academic forum and a group of practitioners to make information from their research and experience available to the Working Group.

145. After discussion, the Commission expressed its satisfaction with the progress made by the Working Group and the support provided by the Secretariat. The Commission noted that the Working Group would continue its deliberations pursuant to the mandate given to it, allowing sufficient time for all States to express their views, but without unnecessary delay.

146. The Commission also welcomed the invitation of the Republic of Korea to a regional intersessional meeting on investor-State dispute settlement reform to be held in Incheon on 10 and 11 September 2018. The Commission took note that, while it was clear that no decisions would be taken at the intersessional meeting, the event would provide an open forum for high-level Government representatives and relevant stakeholders in the Asia-Pacific region to discuss issues being deliberated by Working Group III. (For further discussions of methods of work relevant to Working Group III, see paras. 269 and 270 below.)

VIII. Electronic commerce: progress report of Working Group IV

147. The Commission recalled that, at its forty-ninth session, in 2016, it had mandated Working Group IV (Electronic Commerce) to take up work on the topics of identity management and trust services, and cloud computing, upon completion of the work on the Model Law on Electronic Transferable Records. In that context, the Secretariat, within its existing resources, and the Working Group had been asked to continue to update and conduct preparatory work on the two topics, including their feasibility, in parallel and in a flexible manner and to report back to the Commission

[28] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), para. 264.

so that it could make an informed decision at a future session, including on the priority to be given to each topic.[29]

148. The Commission also recalled that, at its fiftieth session, in 2017, having considered the reports of the Working Group on the work of its fifty-fourth and fifty-fifth sessions, it had recognized that, until the following session of the Commission, in 2018, both the Secretariat and the Working Group would be able to handle the projects on cloud computing, identity management and trust services in parallel. The Commission had therefore reaffirmed the mandate given to the Working Group at its forty-ninth session, in 2016, and agreed to revisit that mandate at its fifty-first session, in particular if the need arose to prioritize between the topics or to give a more specific mandate to the Working Group as regards its work in the area of identity management and trust services.[30]

149. The Commission had before it the report of the Working Group on its fifty-sixth session, held in New York from 16 to 20 April 2018 (A/CN.9/936).

150. The Commission considered the recommendation of the Working Group that the Commission should review the draft notes on the main issues of cloud computing contracts at its fifty-second session, in 2019, and authorize its publication or issuance in the form of an online reference tool, in both cases as a work product of the Secretariat (A/CN.9/936, para. 44). After discussion, the Commission decided to review the draft notes on the main issues of cloud computing contracts at its fifty-second session, in 2019.

151. The Commission also considered the suggestion by the Secretariat and discussed by the Working Group that the notes on the main issues of cloud computing contracts could be prepared as an online reference tool (A/CN.9/936, paras. 16 and 17). The Commission took note of the recommendation of the Working Group that the Commission should request the Secretariat to prepare a note setting out considerations relating to the preparation of the suggested online reference tool (A/CN.9/936, para. 17).

152. Broad support was expressed for developing new forms of electronic publication that could more effectively reach users and ultimately increase the relevance of UNCITRAL texts, especially non-legislative texts. The possible use of an online tool to present the outcome of the work on a practice guide on security interests as well as of the work on a guidance document on international commercial contracts (with a focus on sales), conducted jointly with the Hague Conference on Private International Law and Unidroit, was mentioned.

153. It was indicated that the notion of an online tool could be interpreted in different ways; the envisaged features of the online tool should therefore be clarified. Various concerns were expressed, including about how the online tool would address multilingualism, how users and the tool would interact, and the availability of financial and human resources. It was suggested that the Commission could benefit from piloting the use of an online tool.

154. It was noted that, since the structure and content of each non-legislative text varied, they might need to be presented online in different ways. The suggestion was made that Working Group VI (Security Interests) could consider how the practice guide on security interests might be presented, and that other working groups may also make useful contributions. States and other entities were invited to share their experience, expertise and, when possible, resources in designing and deploying online tools relating to legal texts.

155. After discussion, the Commission requested the Secretariat to prepare, within existing resources, a pilot online tool containing the draft notes on the main issues of cloud computing contracts, for consideration at its fifty-second session, in 2019. The Commission also requested the Secretariat to prepare a note illustrating the considerations relating to the preparation of the pilot online tool, including budgetary and other implications, and departure from the existing UNCITRAL publication policy.

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[29] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 235.
[30] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), para. 127.

156. The Commission considered the recommendation of the Working Group that it should request the Working Group to conduct work on legal issues relating to identity management and trust services with a view to preparing a text aimed at facilitating cross-border recognition of identity management and trust services, on the basis of the principles and discussing the issues identified by the Working Group at its fifty-sixth session (A/CN.9/936, para. 95).

157. Broad support was expressed for requesting the Working Group to conduct work on legal issues relating to identity management and trust services in the light of the fundamental importance of that topic for the global digital economy.

158. It was indicated that, while the issues identified by the Working Group at its fifty-sixth session could provide a useful starting point for its deliberations, the mandate of the Working Group should not be restricted to those issues since the flexibility provided by a broader mandate was desirable. It was also indicated that the Working Group should, to the extent possible, expedite its work on substantive matters.

159. After discussion, the Commission requested Working Group IV to conduct work on legal issues relating to identity management and trust services with a view to preparing a text aimed at facilitating cross-border recognition of identity management and trust services, on the basis of the principles and issues identified by the Working Group at its fifty-sixth session (A/CN.9/936, paras. 61–94).

160. With respect to ongoing work in the field of paperless trade facilitation, including electronic cross-border single window facilities,[31] the Commission was informed that the Secretariat was carrying out that work in cooperation with the Economic Commission for Europe (ECE), the Economic and Social Commission for Asia and the Pacific and other international governmental and non-governmental organizations.

IX. Security interests: progress report of Working Group VI

161. The Commission recalled that, at its fiftieth session, in 2017, it had decided that the Working Group should prepare a practice guide to the UNCITRAL Model Law on Secured Transactions. At that session, it was agreed that issues addressed in document A/CN.9/926 and the relevant sections of document A/CN.9/913 should form the basis of that work.[32] It was widely felt that, to be able to use a law implementing the UNCITRAL Model Law on Secured Transactions to their benefit, parties to transactions, judges, arbitrators, regulators, insolvency administrators and academics would need guidance with respect to contractual, transactional and regulatory issues, as well as issues relating to the financing of micro-businesses. The Commission further recalled that it had given broad discretion to the Working Group in determining the scope, structure and content of the practice guide.[33]

162. The Commission considered the reports of the Working Group on the work of its thirty-second session, held in Vienna from 11 to 15 December 2017 (A/CN.9/932), and its thirty-third session, held in New York from 30 April to 4 May 2018 (A/CN.9/938). The Commission noted the Working Group's preliminary discussions on the intended audience, scope, structure, style and overall content of the draft practice guide, which formed the basis of the first draft. The Commission also noted that the Working Group, at its thirty-third session, had completed its first reading of the draft practice guide, and expressed support for the Working Group to continue its work.

163. After discussion, the Commission expressed its satisfaction with the progress made by the Working Group and noted the Secretariat's efforts to coordinate with the Basel Committee on Banking Supervision with respect to the regulatory aspects. Considering the progress made, the Commission requested the Working Group to complete the work expeditiously, with a view to presenting a final draft to the

[31] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 240.
[32] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), para. 227.
[33] Ibid., paras. 222, 223 and 227.

Commission for consideration at its fifty-second session, in 2019. (See paras. 152 and 154 above on the issues also relevant to the work of Working Group VI.)

X. Celebration of the sixtieth anniversary of the New York Convention

A. Celebratory event

164. The Commission held a celebratory event to mark the sixtieth anniversary of the New York Convention. In addition to the representatives of member States of the Commission and observers, some 300 persons were invited to participate in the event.

165. In the opening statements, it was pointed out that the almost universal acceptance of the New York Convention brought legal certainty to business operations worldwide, thereby contributing to decreasing the level of risk and transactional costs associated with international trade. It was said that the implementation of the New York Convention was an important indicator of a sound business and investment environment. Further, it was pointed out that acceptance of the Convention was a demonstration of States' strong commitment to the rule of law and represented a step towards better access to justice for economic operators. Adoption and proper implementation of the Convention were regarded as furthering progress towards achieving the Sustainable Development Goals. The Convention, by establishing a fundamental legal framework for the use of arbitration and its effectiveness, had strengthened respect for binding commitments, inspired confidence in the rule of law and ensured fair treatment in the resolution of disputes arising over contractual rights and obligations.

166. The celebratory event provided an opportunity to consider how the mandate of UNCITRAL contributed in general to the successful development of the international arbitration framework, with the New York Convention as a foundational instrument.

167. The first panel discussion was focused on cooperation and coordination activities. Representatives of international organizations and governmental cooperation agencies provided insights into the role of their organizations in the promotion of the New York Convention. It was underlined that international organizations had developed specific expertise, and cooperation among organizations was key to strengthening the international framework that had been built over the years.

168. The second panel discussion addressed the relation between domestic legislative frameworks on the recognition and enforcement of foreign arbitral awards and the New York Convention; the relevance of the law reform process and the role of article VII of the New York Convention in the development of the international arbitration framework was highlighted. On that point, it was observed that the New York Convention set a maximum level of control that contracting States might exert over arbitral awards, but they remained free to apply more liberal rules than those provided in the Convention. It was said that article VII had enabled contracting States to adapt to the development of international arbitration for the past 60 years.

169. The celebratory event also provided an opportunity to highlight the importance of adequate legislative implementation and judicial application of the New York Convention. In that context, the *UNCITRAL Secretariat Guide on the New York Convention* and the web platform (www.newyorkconvention1958.org) created to publish both the Guide and the resources on which it was based electronically were presented as the most comprehensive freely accessible resource on the Convention. Other initiatives were presented, such as the ICC Guide to national procedures for recognition and enforcement of awards under the New York Convention and the International Council for Commercial Arbitration Guide to the interpretation of the New York Convention.

170. The celebratory event ended with a panel on instruments recently finalized and adopted by UNCITRAL to strengthen the framework for alternative dispute resolution. Regarding mediation, it was highlighted that while the finalized draft convention on international settlement agreements resulting from mediation and the

UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (see chapter III above) were mainly intended for the private sector, enforcement of international mediated settlements was a sensitive policy issue for many States, as evidenced by the many responses submitted by States to the initial questionnaire sent by the Secretariat before the commencement of work. Hope was expressed that the instruments on mediation would be widely adopted, and that the draft convention would be as successful as the New York Convention and would become a cornerstone in the field of alternative dispute settlement. To end, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration was presented as a first step in addressing concerns in investor-State dispute settlement.

171. The celebratory event also included an evening reception where the international arbitration community gathered to celebrate the sixtieth anniversary of the Convention. The reception was jointly organized by the Commission and the International Court of Arbitration of ICC, hosted by the United States District Court for the Southern District of New York. A number of organizations representing the international arbitration community supported the event, including IBA, the New York State Bar Association, AAA/ICDR, the Chartered Institute of Arbitrators (CIArb), the Centre for Dispute Resolution and JAMS.

172. The Commission commended the Secretariat for the organization of the celebratory event, and the opportunity to reflect on the implementation of the UNCITRAL mandate in relation to the New York Convention. It requested the Secretariat to publish the conference proceedings electronically and to disseminate the publication broadly to any interested bodies.

B. Decision of the Commission

173. At its 1076th meeting, on 28 June 2018, the Commission adopted by consensus the following decision:

The United Nations Commission on International Trade Law,

Recalling the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[34] on 10 June 1958 by the United Nations Conference on International Commercial Arbitration,

Recalling also General Assembly resolution 2205 (XXI) of 17 December 1966, in which the Assembly established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

Convinced that the Convention, by establishing a fundamental legal framework for the use of arbitration and its effectiveness, has strengthened respect for binding commitments, inspired confidence in the rule of law and ensured fair treatment in the resolution of disputes arising over contractual rights and obligations,

Recalling General Assembly resolution 62/65 of 6 December 2007, in which the Assembly requested the Secretary-General to increase efforts to promote wider

[34] United Nations, *Treaty Series*, vol. 330, No. 4739.

adherence to the Convention and its uniform interpretation and effective implementation,

Taking note of the UNCITRAL Secretariat Guide on the New York Convention, which is aimed at assisting in the dissemination of information on the Convention and further promoting its effective implementation,

Expressing its hope that States that are not yet parties to the Convention will soon become parties thereto, which would ensure that the legal certainty afforded by the Convention is universally enjoyed, decreasing the level of risk and transactional costs associated with doing business and thus promoting international trade,

1. *Welcomes* the initiatives being undertaken by various organs and agencies within and outside the United Nations system to organize conferences, judicial workshops and other similar events to provide a forum for an exchange of views on experiences worldwide with the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards;[35]

2. *Encourages* the use of these events for the promotion of wider adherence to the Convention and greater understanding of its provisions and their uniform interpretation and effective implementation;

3. *Invites* all States that have not yet done so to consider becoming parties to the Convention.

XI. Coordination and cooperation

A. General

174. The Commission had before it a note by the Secretariat (A/CN.9/948) providing information on the activities of international organizations active in the field of international trade law in which the Secretariat had participated since the last note to the Commission (A/CN.9/908). The Commission expressed appreciation for the Secretariat engaging with a high number of organizations and entities, both within and outside the United Nations system. Among others, the Secretariat had participated in the activities of the following: UNCTAD, ECE, United Nations Inter-Agency Cluster on Trade and Productive Capacity, Inter-Agency Task Force on Financing for Development, World Bank, Hague Conference on Private International Law, OECD, Unidroit, WTO, Asia-Pacific Economic Cooperation (APEC), European Commission, Basel Committee on Banking Supervision and ILI.

175. In particular, the Commission noted with satisfaction the coordination activities involving the Hague Conference on Private International Law, particularly with respect to its work on judgments, and Unidroit.

176. The Commission heard an oral report on the preparation of a guidance document in the area of international commercial contract law (with a focus on sales) in coordination with the Hague Conference on Private International Law and with Unidroit.[36] It was indicated that an initial draft was being prepared with the help of experts and that it would be informally circulated to stakeholders. It was added that, according to the envisaged timeline, the document should be finalized in 2020, on the occasion of the fortieth anniversary of the United Nations Convention on Contracts for the International Sale of Goods (1980).

177. Broad appreciation was expressed for the joint project. It was said that such a project was particularly useful for illustrating the coordination among uniform law instruments. Cooperation allowed for efficient allocation of resources. It was indicated that the project contributed to ensuring the visibility of UNCITRAL, which,

[35] Ibid.

[36] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 281.

in turn, was important for it to carry out its coordination mandate effectively. However, it was added that work on the project should be balanced with the needs of UNCITRAL legislative activities. The Commission encouraged the Secretariat to continue its collaboration with the Hague Conference on Private International Law and Unidroit on that project.

178. The Commission noted that the coordination work of the Secretariat concerned topics currently being considered by the working groups, as well as topics related to texts already adopted by the Commission, and that the Secretariat had participated in expert groups, working groups and plenary meetings with the purpose of sharing information and expertise and avoiding duplication of work in the resultant work products.

179. The Commission observed that coordination work often involved travel to meetings of the different organizations concerned and the use of funds allocated for official travel. The Commission reiterated the importance of such work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and supported the use of travel funds for that purpose.

B. Reports of other international organizations

180. The Commission took note of statements made on behalf of international and regional organizations invited to the session.

1. Permanent Court of Arbitration

181. The representative of PCA made a statement providing a summary of the work of PCA during the period 2017–2018, including an update on the provision of registry support in a number of different arbitration and conciliation proceedings, its role as an appointing authority and, in particular, its experience with the operation of the UNCITRAL Arbitration Rules and some novel ways in which they had recently been used. PCA had increased its technical contribution to discussions in Working Group III on investor-State dispute settlement reform, including information on costs and appointment and challenges of arbitrators.

2. Organization of American States

182. The representative of OAS recalled the general mandate received from the OAS General Assembly to promote a greater dissemination of private international law among its member States, in collaboration with other organizations and associations that worked in that area; UNCITRAL, the Hague Conference on Private International Law, Unidroit and the American Association of Private International Law had been identified in particular. The OAS General Assembly had also instructed the secretariat to: (a) continue promoting the UNCITRAL Model Law on Secured Transactions among member States (the Model Law had been adopted at the Inter-American Specialized Conference on Private International Law held in 2002, and the accompanying Model Regulations had been adopted at the Inter-American Specialized Conference on Private International Law held in 2009); (b) extend the training for judges and other public officials on the effective implementation of international treaties on enforcing decisions and arbitral awards; and (c) disseminate the OAS Model Law on the Simplified Corporation. Lastly, at its most recent session, in June 2018, the OAS General Assembly had requested the Inter-American Juridical Committee to update its 2016 report on principles for electronic warehouse receipts for agricultural products in the light of developments that had occurred since those principles were adopted.

183. The representative of OAS also informed the Commission about the activities of the Inter-American Juridical Committee and the instruments it had produced in areas of interest for UNCITRAL, highlighting the importance of the ongoing work on drafting a guide to the law applicable to international contracts, and a set of draft principles on electronic warehouse receipts for agricultural products. In those and

other areas, the OAS secretariat looked forward to a continuation of its fruitful cooperation with UNCITRAL.

C. International governmental and non-governmental organizations invited to the sessions of UNCITRAL and its working groups

184. The Commission recalled that, at its forty-fourth session to fiftieth sessions, from 2011 to 2017, it had heard oral reports by the Secretariat about intergovernmental organizations and non-governmental organizations (NGOs) invited to sessions of UNCITRAL.[37] At its forty-eighth session, in 2015, it had requested the Secretariat, when presenting its oral report on the topic of organizations invited to sessions of UNCITRAL, to provide comments on the manner in which invited organizations fulfilled the criteria applied by the Secretariat in making its decision to invite NGOs.[38] At its forty-ninth session, in 2016, the Commission had welcomed the detailed and informative report presented by the Secretariat pursuant to that request.[39] At its fiftieth session, in 2017, the Commission had requested the Secretariat to provide information about organizations invited to sessions of UNCITRAL in writing for future sessions.[40]

185. The Commission had before it a note submitted pursuant to the request made by the Commission at its fiftieth session (A/CN.9/951). The note presented information about the newly accepted organizations and those whose applications had been declined between the start of the fiftieth session of UNCITRAL and 28 May 2018. The Commission noted the establishment of a separate list of additional NGOs invited only to sessions of Working Group III (Investor-State Dispute Settlement Reform) for its work on issues of investor-State dispute settlement reform, the reasons for establishing that list and the NGOs included in that list.

186. The Commission took note of the request submitted by Public Citizen, an NGO interested in participating as an observer in sessions of Working Group III, but which the Secretariat had not found to be international in membership and focus or to possess demonstrated international expertise in the area of work currently dealt with by Working Group III, for a reconsideration of that decision (A/CN.9/951, para. 5 (d)). The Commission confirmed the decision of the Secretariat in that case.

XII. Technical assistance to law reform

A. General

187. The Commission had before it a note by the Secretariat (A/CN.9/958/Rev.1) on technical cooperation and assistance activities undertaken in the period since the last report to the Commission in 2017 (A/CN.9/905). The Commission stressed that technical cooperation and assistance activities continued to be an important part of the Secretariat's activities in order to ensure that the legislative texts developed and adopted by the Commission were enacted or adopted by States and applied and interpreted in a uniform manner to promote the basic goal of harmonization of international trade law. The technical assistance and cooperation activities of the Secretariat included (a) providing States with information necessary to allow them to enact the various texts developed or adopted by UNCITRAL, including technical information, information and advice on practical experience in the enactment of UNCITRAL texts, (b) providing assistance to the drafting of laws and regulations

[37] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 288–298; ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 174–178; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 257–261; ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 205–207; ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 279–281; ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 286–290; and ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 360–364.

[38] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 280.

[39] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 290.

[40] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), para. 364.

enacting UNCITRAL texts, including information and advice on interpretation and implementation of texts, and (c) providing capacity-building for law reform and the interpretation and application of UNCITRAL texts. The Commission acknowledged that development of legislative texts was only the first step in the process of trade law harmonization and that technical cooperation and assistance activities were vital to the further use, adoption and interpretation of those legislative texts. The Commission expressed its appreciation for the work undertaken by the Secretariat in that regard. At the same time, the Commission recalled that the main mandate of the Secretariat was to support the Commission's legislative work and encouraged the Secretariat to ensure that human resources allocated to technical assistance would not adversely affect the servicing of the Commission and its working groups.

188. The Commission noted that the continuing ability to respond to requests from States and regional organizations for these activities was dependent upon the availability of funds to meet the associated costs. With respect to the Trust Fund for UNCITRAL Symposia, the Commission acknowledged the contribution by the Republic of Korea to support participation in the APEC Ease of Doing Business project (as noted in A/CN.9/958/Rev.1, paras. 10 and 52). The Commission further noted that, despite efforts by the Secretariat to solicit new donations, funds available in the Trust Fund for UNCITRAL Symposia were very limited. Accordingly, requests for technical cooperation and assistance activities continued to be very carefully considered, and the number of such activities, which of late had mostly been carried out on a cost-share or no-cost basis, was limited. The Commission requested the Secretariat to continue exploring alternative sources of extrabudgetary funding, in particular by more extensively engaging permanent missions, as well as other possible partners in the public and private sectors, subject to relevant United Nations rules and regulations on fundraising and relations with the private sector. The Commission also encouraged the Secretariat to seek cooperation and partnership with international organizations, including through regional offices, and bilateral assistance providers in the provision of technical assistance, and appealed to all States, international organizations and other interested entities to facilitate such cooperation and take any other initiative to maximize the use of relevant UNCITRAL standards in law reform. In that connection, the Commission expressed the wish that the Secretariat would be able to maintain a neutral and independent approach to technical assistance, consistent with the policies of the Commission, bearing in mind that potential donors, including national development agencies, might have their own priority or policy considerations.

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

190. With respect to the Trust Fund for Granting Travel Assistance to Developing States Members of UNCITRAL, the Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the Trust Fund. The Commission noted that the available Trust Fund resources had been used to facilitate participation at the fifty-first session of the Commission for one delegate from Honduras. Owing to the limited resources, only partial assistance could be provided.

191. The Commission further noted that the European Union and Swiss Agency for Development and Cooperation had made resources available to provide financial support for the participation of developing countries in Working Group III (Investor-State Dispute Settlement Reform), which had been used to facilitate participation at the thirty-fifth session of Working Group III (New York, 23–27 April 2018) for delegates from El Salvador and Sri Lanka, as the agreement between the United Nations and the European Union also covered the funding of travel for States that are not currently members of UNCITRAL.

192. The Commission commended the Secretariat for organizing a round table on technical assistance at the Commission's 1084th meeting, on Friday, 6 July. The round table brought together governmental and intergovernmental organizations active in international development assistance to explore synergies and discuss ways to further cooperate with the Secretariat in implementing sound reforms of international trade law. The presentations made at the round table and the discussion that took place thereafter offered valuable insights into needs for commercial law reform, the tools and methods for enhancing delivery of law reform projects and the means for evaluating their effectiveness. The Commission expressed its appreciation to the experts who had participated in the round table.

193. With regard to the dissemination of information on the work and texts of UNCITRAL, the Commission noted the important role played by the UNCITRAL website (www.uncitral.org) and the UNCITRAL Law Library. The Commission welcomed the inclusion on the UNCITRAL website of a feature highlighting the role of UNCITRAL in supporting the Sustainable Development Goals.[41] The Commission recalled its request that the Secretariat continue to explore the development of new social media features on the UNCITRAL website as appropriate,[42] noting that the development of such features in accordance with the applicable guidelines was also welcomed by the General Assembly.[43] In that regard, the Commission noted with approval the continued development of the "What's new at UNCITRAL?" Tumblr microblog[44] and the establishment of an UNCITRAL presence on LinkedIn.[45] Finally, recalling the General Assembly resolutions commending the website's six-language interface,[46] the Commission requested the Secretariat to continue to provide, via the website, UNCITRAL texts, publications, and related information, in a timely manner and in the six official languages of the United Nations.

B. UNCITRAL regional presence

194. The Commission had before it a note by the Secretariat on the activities undertaken by its Regional Centre for Asia and the Pacific (A/CN.9/947) in the period since the last report to the Commission in 2017 (A/CN.9/910).

195. The Commission acknowledged the noticeable progress, as a result of the regional activities of the Secretariat, through its Regional Centre, in the levels of awareness, adoption and implementation of harmonized and modern international trade law standards elaborated by UNCITRAL, and emphasized the significance of the Regional Centre in mobilizing contributions to the work of UNCITRAL from the Asia-Pacific region.

196. The Commission noted that the Regional Centre was staffed by one professional, one programme assistant, one team assistant and two legal experts, and that its core project budget allowed for the occasional employment of experts and consultants. During the reporting period, the Regional Centre had received 15 interns. The Commission also noted that the Regional Centre relied on the annual financial contribution to the Trust Fund for UNCITRAL Symposia to meet the costs of operations and programmes. The Commission expressed its gratitude to the Incheon Metropolitan City for extending its financial contribution over a five-year period (2017–2021) for the operation of the Regional Centre, revising the annual contribution to $450,000. The Commission further expressed its gratitude to the Ministry of Justice of the Republic of Korea and to the government of the Hong Kong

[41] Available from www.uncitral.org/uncitral/about/SDGs/Sustainable_Development_Goals.html.
[42] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 247.
[43] General Assembly resolutions 69/115, para. 21; 70/115, para. 21; 71/135, para. 23; and 72/113, para. 29.
[44] Available from http://uncitral.tumblr.com.
[45] Available from www.linkedin.com/company/uncitral.
[46] General Assembly resolutions 61/32, para. 17; 62/64, para. 16; 63/120, para. 20; 69/115, para. 21; 70/115, para. 21; 71/135, para. 23; and 72/113, para. 29.

Special Administrative Region of China for the extension of their contribution of two legal experts on non-reimbursable loans.

197. The Commission commended the Regional Centre for having continued to deliver its flagship activities during the reporting period, namely the second edition of the UNCITRAL Asia Pacific Judicial Summit (Hong Kong, China, 16–18 October 2017), the Asia Pacific Alternative Dispute Resolution Conference (Seoul, 7–9 November 2017) and the UNCITRAL Asia Pacific Day held by various universities during the last quarter of 2017 with the objective of streamlining activities to promote UNCITRAL texts and establishing regular opportunities for substantive regional contributions to support the present and possible future legislative work of UNCITRAL.

198. The Commission noted with appreciation the various public, private and civil society initiatives that the Regional Centre had organized or supported, or in which, through either Incheon-based staff or Vienna-based secretariat staff, it had participated during the reporting period. The Commission further noted with appreciation that the Regional Centre, in consultation and with the support of Vienna-based secretariat staff had also been engaged in the technical assistance and capacity-building services, provided to States in the Asia-Pacific region and to international and regional organizations and development banks.

199. The Commission encouraged the Secretariat to continue seeking cooperation, including through formal agreements, with regional stakeholders, including development banks, to ensure coordination and funding for its technical assistance and capacity-building activities and services aimed at promoting the adoption of UNCITRAL texts in the region.

200. The delegate of Cameroon informed the Commission that, since the announcement of its intention to host an UNCITRAL regional centre for Africa, at the Commission's fiftieth session, in 2017,[47] the Government of Cameroon had continued to examine the financial implications and the feasibility of establishing a UNCITRAL regional centre in the country. The Commission reiterated its gratitude to the Government of Cameroon for actively pursuing that matter, and encouraged the Secretariat to continue its consultations and consider carefully the level of human resources that the Secretariat would need for the efficient management of any new regional centre and for ensuring adequate supervision by, and coordination with, Vienna-based secretariat staff.

XIII. Status and promotion of UNCITRAL legal texts

A. General discussion

201. The Commission considered the status of the conventions and model laws emanating from its work and the status of the New York Convention, on the basis of a note by the Secretariat (A/CN.9/950). It was noted that certain States had adopted more than one UNCITRAL text in the framework of a comprehensive exercise on commercial law modernization. The Commission noted with appreciation the information on treaty actions and legislative enactments received since its fiftieth session and invited States to share with the Secretariat information on the enactment of UNCITRAL texts.

202. The Commission also noted the following actions and legislative enactments made known to the Secretariat subsequent to the submission of the Secretariat's note:

(a) Mauritius Convention on Transparency: ratification by Cameroon (four States parties);

[47] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), para. 292.

(b) UNCITRAL Model Law on Cross-Border Insolvency (1997): new legislation based on the Model Law had been adopted in Israel;

(c) UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006: legislation based on the Model Law had been adopted in British Columbia, Canada.

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

B. Functioning of the transparency repository

204. The Commission recalled that the repository of published information under the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Transparency Rules"), adopted at its forty-sixth session in 2013, had been established under article 8 of the Transparency Rules ("transparency repository"). The Commission also recalled reports on the transparency repository that had been provided at its previous sessions.[48]

205. The Commission recalled that, following ratification by Mauritius, Canada and Switzerland (listed in the chronological order of ratification), the Mauritius Convention on Transparency entered into force on 18 October 2017. It also noted that since that date, Cameroon had ratified the Convention (see para. 202 (a) above). The Commission noted that none of the ratifying States had made reservations and, as a result, the Transparency Rules were part of the investor-State dispute settlement regime created by investment treaties concluded by those four States. Thus, the Transparency Rules apply on a unilateral basis, under all treaties concluded by those States, if the claimant agrees to their application.

206. The Commission reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the funding of the project, preferably in the form of multi-year contributions, so as to facilitate its continued operation. It expressed its gratitude to the European Commission for its continuing financial commitment and to the Fund for International Development (OFID) of the Organization of the Petroleum Exporting Countries for its recent offer of additional funds.

207. The Commission recalled that a certain number of projects and activities taking place throughout the year in which the UNCITRAL transparency standards were promoted, strengthen the trend in investor-State dispute settlement towards increased transparency. For instance, the Commission heard about several academic programmes, including moots, where around 4,000 students were able to become familiar with the UNCITRAL transparency standards. In addition, the Commission was informed about the continuation of the 18-month project under the overall project "Open regional fund: legal reform", conducted by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), which was a key element of the promotion of the UNCITRAL transparency standards in South-Eastern Europe.

[48] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 107–110; ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 152–161; ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 166–173; and ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 308–321.

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

C. International commercial law moot competitions

1. Willem C. Vis International Commercial Arbitration Moot

209. The Commission noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Twenty-fifth Moot, the oral arguments phase of which had taken place in Vienna from 24 to 29 March 2018, and that the best team in oral arguments had been the National Research University Higher School of Economics of Moscow. As in previous years, the Moot had been co-sponsored by the Commission. Legal issues addressed by the teams in the Twenty-fifth Moot were based on the United Nations Sales Convention and the UNCITRAL Arbitration Rules.

210. A total of 362 teams from 82 countries participated in the 2018 Vis Moot, comprising more than 2,000 students, 1,000 arbitrators and 700 coaches. It was stressed that Vis Moot contributed to promoting cultural diversity and improving gender representation in international arbitration, both important aspects in increasing the credibility and acceptance of international arbitration. The oral arguments phase of the Twenty-sixth Willem C. Vis International Commercial Arbitration Moot were to be held in Vienna from 12 to 18 April 2019.

211. It was also noted that the Vis East Moot Foundation had organized the Fifteenth Willem C. Vis (East) International Commercial Arbitration Moot, which had been co-sponsored by the Commission. The final phase took place in Hong Kong, China, from 11 to 18 March 2018. A total of 125 teams from 31 jurisdictions participated in the Fifteenth (East) Moot and the best team in oral arguments had been ILS Law College (India). The Sixteenth (East) Moot was to be held in Hong Kong, China, from 31 March to 7 April 2019.

2. Additional moots

Madrid Commercial Arbitration Moot 2018

212. The Commission noted that Carlos III University of Madrid had organized the Tenth International Commercial Arbitration Competition in Madrid from 16 to 20 April 2018. The Commission co-sponsored the Moot. Legal issues addressed by the teams related to an international sale of goods, where the United Nations Sales Convention, the New York Convention, the UNCITRAL Arbitration Rules and the Transparency Rules were applicable. A total of 27 teams from 13 jurisdictions participated in the Madrid Moot 2018, which was conducted in Spanish. The best team in oral arguments had been the Pontifical Catholic University of Peru. The Eleventh Madrid Moot was to be held from 1 to 5 April 2019.

Frankfurt Investment Moot Court

213. The Commission noted that the Eleventh Frankfurt Investment Moot Case involved the application of the Transparency Rules, with a key issue concerning the question of confidential documents. More than 80 teams from over 30 countries participated in the competition, which took place from 12 to 16 March 2018, and the National University of Singapore had been declared the best team in oral arguments. The Twelfth Moot will take place from 4 to 8 March 2019.

Mediation and negotiation competition

214. It was noted that the fourth mediation and negotiation competition organized jointly by IBA and VIAC with the support of the Commission was to take place in Vienna on 17–20 July 2018. Legal issues to be considered were those that were addressed at the Twenty-fifth Willem C. Vis International Commercial Arbitration

Moot (see para. 209 above). A total of 33 teams from 15 jurisdictions had registered to participate.

Ian Fletcher International Insolvency Law Moot

215. The second Ian Fletcher International Insolvency Law Moot was held in Vancouver, Canada, on 5–8 February 2018, with the winning team being from the University of British Columbia (located in Vancouver). The Moot provides an opportunity to learn about international insolvency law and the use of the UNCITRAL Model Law on Cross-Border Insolvency. It is supported by the Commission and offers the best individual mooter the opportunity to visit UNCITRAL in New York or Vienna during a session of Working Group V (Insolvency Law) to observe first-hand the experience of Secretariat members.

D. Bibliography of recent writings related to the work of UNCITRAL

216. The UNCITRAL Law Library specializes in international commercial law. Its collection features important titles and online resources in that field in the six official languages of the United Nations. In 2017, library staff responded to approximately 520 reference requests, originating in over 50 countries, and hosted researchers from over 25 countries.

217. Considering the broader impact of UNCITRAL texts, the Commission took note of the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/949) and the influence of UNCITRAL legislative guides, practice guides and contractual texts as described in academic and professional literature. The Commission noted the importance of facilitating a comprehensive approach to the creation of the bibliography and the need to remain informed of activities of non-governmental organizations active in the field of international trade law. In this regard, the Commission recalled and repeated its request that non-governmental organizations invited to the Commission's annual session donate copies of their journals, reports and other publications to the UNCITRAL Law Library for review.[49] The Commission expressed appreciation to all non-governmental organizations that donated materials. The Commission noted, in particular, the addition of current and forthcoming issues of the following journals to the UNCITRAL Law Library collection: *The International Journal of Arbitration, Mediation and Dispute Management* (Chartered Institute of Arbitrators) and the *Dispute Resolution Journal (*American Arbitration Association), as well as new donations from the Centre de recherches informatique et droit, the European Consumer Centre Belgium, the International Union of Notaries and the Regional Centre for International Commercial Arbitration — Lagos. In addition, a great number of book donations were received from Beck, Bruylant, Cambridge University Press, Eleven, Kluwer, LexisNexis and Schulthess.

XIV. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts

218. The Commission considered a note by the Secretariat on promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts (A/CN.9/946), which provided information on the current status of the Case Law on UNCITRAL Texts (CLOUT) system, including the digests of case law relating to the United Nations Sales Convention and the UNCITRAL Model Law on International Commercial Arbitration.

219. The Commission expressed its appreciation that CLOUT and the digests continued to be used by the Secretariat for promoting uniform interpretation of the law relating to UNCITRAL texts. The Commission also noted with satisfaction the increasing number of UNCITRAL legal texts that were currently represented in

[49] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 264.

CLOUT. As at the publication date of A/CN.9/946, 190 issues of compiled case-law abstracts had been prepared, dealing with 1,752 cases. The cases related to the following legislative texts:

- The New York Convention
- Convention on the Limitation Period in the International Sale of Goods (New York, 1974) and Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol of 11 April 1980 (Vienna)
- United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)
- United Nations Sales Convention
- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)
- United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)
- UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006
- UNCITRAL Model Law on International Credit Transfers (1992)
- UNCITRAL Model Law on Electronic Commerce (1996)
- UNCITRAL Model Law on Cross-Border Insolvency (1997)
- UNCITRAL Model Law on Electronic Signatures (2001)

220. The Commission took note of the considerable gap that still existed between the volume of abstracts referring to Western European and other States and those referring to other geographic regions. Similarly, the Commission noted that the United Nations Sales Convention and the UNCITRAL Model Law on International Commercial Arbitration were still the texts most represented in the CLOUT system, although in the period under review there was an increase in published cases concerning the New York Convention.

221. After taking note of the current composition of the network of national correspondents, the Commission encouraged States that had not yet appointed national correspondents to do so in order to contribute to the increased collection of relevant case law. The Commission also noted that in the period under review national correspondents had provided approximately 33 per cent of the abstracts published in CLOUT, while the rest of the abstracts had been prepared by voluntary contributors or by the Secretariat.

222. The Commission expressed its appreciation for the volume of users of the CLOUT database in the period under review, as well as the increasing number of full texts of decisions, including decisions stored in the database's archives, published in the database. The Commission also commended the Secretariat for its use of social media in order to promote visibility of the CLOUT system and encourage contributions.

223. As at previous sessions, the Commission took note with satisfaction of the performance of the website www.newyorkconvention1958.org, and the successful coordination between that website and CLOUT.

224. After drawing attention to the resource-intensive nature of the CLOUT system and the need for further means to sustain it, the Commission commended the Secretariat for its work despite its limited resources.

XV. Role of UNCITRAL in promoting the rule of law at the national and international levels

A. Introduction

225. The Commission recalled that the item had been on the agenda of the Commission since its forty-first session, in 2008,[50] in response to the General Assembly's invitation to the Commission to comment, in its report to the General Assembly, on the Commission's current role in promoting the rule of law.[51] The Commission further recalled that, at its forty-first to fiftieth sessions, from 2008 to 2017, the Commission, in its annual reports to the General Assembly, transmitted comments on its role in promoting the rule of law at the national and international levels, including in the post-conflict reconstruction context.[52]

226. The Commission also recalled that it had considered it essential to keep a regular dialogue with the Rule of Law Coordination and Resource Group through the Rule of Law Unit and to keep abreast of progress made in the integration of the work of UNCITRAL into the United Nations joint rule of law activities. The Commission recalled that, to that end, it requested the Secretariat to organize briefings by the Rule of Law Unit biannually, when sessions of the Commission were held in New York.[53] The Commission recalled that the briefings consequently took place at the Commission's forty-fifth, forty-seventh and forty-ninth sessions, in 2012, 2014 and 2016,[54] and it welcomed holding the rule of law briefing at its fifty-first session. (A summary of the briefing is contained in section B below.)

227. At its fifty-first session, in 2018, the Commission also took note of General Assembly resolution 72/119 on the rule of law at the national and international levels, in paragraph 25 of which the Assembly invited the Commission to continue to comment, in its reports to the General Assembly, on its current role in promoting the rule of law. The Commission recalled that it had been the practice in the Commission to focus comments on its current role in promoting the rule of law on a subtopic identified by the General Assembly for its deliberations under the rule of law agenda item at its subsequent session.

228. The Commission noted that the General Assembly, in its resolution 72/119, did not identify any specific subtopic for discussion at its next session, in 2018, inviting Member States and the Secretary-General to suggest possible subtopics for future Sixth Committee debates, for inclusion in the forthcoming annual report, with a view to assisting the Sixth Committee in choosing future subtopics (resolution 72/119, para. 29). The Commission further noted that, for that reason, no written note by the Secretariat was presented to the Commission at its fifty-first session.

229. In its comments to the General Assembly this year, the Commission decided to highlight the role for the promotion of the rule of law of the texts adopted or approved

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

[51] General Assembly resolutions 62/70, para. 3; 63/128, para. 7; 64/116, para. 9; 65/32, para. 10; 66/102, para. 12; 67/97, para. 14; 68/116, para. 14; 69/123, para. 17; 70/118, para. 20; and 71/148, para. 22.

[52] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 386; ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 413–419; ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 313–336; ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 299–321; ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 195–227; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 267–291; ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 215–240; ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 318–324; ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 317–342; and ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 435–441.

[53] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 335.

[54] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 199–210; ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 229–233; and ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 313–317.

at the session, of its ongoing work in the areas of investor-State dispute settlement reform, electronic commerce and public-private partnerships, and of the New York Convention, whose sixtieth anniversary was celebrated during the session. (For comments of the Commission transmitted to the General Assembly under this agenda item, as requested in para. 25 of General Assembly resolution 72/119, see sect. C below.)

B. Summary of the rule of law briefing

230. The Chief of the Rule of Law Unit held a briefing on the current and future rule of law agenda of the United Nations and the expected role of UNCITRAL therein.

231. The Commission expressed appreciation to the Chief of the Rule of Law Unit for holding a briefing in UNCITRAL and looked forward to the next rule of law briefing at its fifty-third session, in 2020. The Commission noted with interest the increased attention being paid to the Sustainable Development Goals, in particular Goal 16. The Commission was of the view that this broader perspective offered an interesting avenue for a better focusing of its consideration of the relevance of its work for the broader agenda of the United Nations to promote the rule of law at the national and international levels. The Commission agreed to continue that discussion in connection with its consideration of proposals for changes in its working methods under agenda item 20 (see paras. 264–267 below).

C. Comments of the Commission on its current role in promoting the rule of law

232. The Commission brought the attention of the General Assembly to the preambular paragraphs of the decisions adopted by the Commission during the current session that explained the role of the texts adopted, approved or celebrated at the session to the promotion of the rule of law (see paras. 49, 68, 111, 131 and 173 above).

233. It also highlighted the importance of the proper identity management in the digital economy, which was the subject of the current work of Working Group IV (see chapter VIII above), for the implementation of the United Nations anti-corruption, anti-money-laundering, anti-fraud and good governance agenda. The Commission also referred to issues of transparency, access to justice and accountability dealt with in its ongoing work on investor-State dispute settlement reform and on the revision of the UNCITRAL texts in the area of infrastructure development (see chapters VI and VII above).

XVI. Relevant General Assembly resolutions

234. The Commission recalled that, at its fiftieth session, in 2017, it had requested the Secretariat to replace an oral report to the Commission on relevant General Assembly resolutions with a written report to be issued before the relevant session.[55] Pursuant to that request, the Commission had before it at its fifty-first session a note by the Secretariat (A/CN.9/953) summarizing the content of the operative paragraphs of General Assembly resolution 72/113 on the report of UNCITRAL on the work of its fiftieth session and resolution 72/114 on the UNCITRAL Model Law on Electronic Transferable Records, both resolutions having been adopted by the General Assembly on 7 December 2017 on the recommendation of the Sixth Committee (A/72/458).

235. The Commission took note of those General Assembly resolutions.

[55] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), para. 480.

XVII. Work programme

236. The Commission recalled its agreement to reserve time for discussion of its overall work programme as a separate topic at each session, in order to facilitate the effective planning of its activities.[56]

237. The Commission took note of the documents prepared to assist its discussions on the topic (A/CN.9/952 and A/CN.9/952/Corr.1 and the documents referred to therein, including the proposals contained in documents A/CN.9/944/Rev.1, A/CN.9/954, A/CN.9/959, A/CN.9/960 and A/CN.9/961, as well as the proposals referred to in working group documents and reports, namely A/CN.9/WG.V/WP.154 and A/CN.9/937, paras. 121–122, as well as A/CN.9/938, paras. 92–93 and annex).

A. Current legislative programme

238. The Commission took note of the progress of its working groups as reported earlier in the session (see chapters III to IX above) and confirmed the programme of current legislative activities set out in table 1 of document A/CN.9/952 and A/CN.9/952/Corr.1 as follows:

(a) As regards micro, small and medium-sized enterprises, the Commission confirmed that Working Group I should continue its work to prepare a legislative guide on a UNCITRAL limited liability organization (see para. 112 above);

(b) With respect to investor-State dispute settlement reform, the Commission agreed that Working Group III should continue with its work programme as mandated (see para. 145 above);

(c) As regards e-commerce, the Commission confirmed that Working Group IV should continue with its ongoing projects on legal issues related to identity management and trust services (see para. 159 above). With respect to contractual aspects of cloud computing, the Commission noted that the draft Secretariat notes on the main issues of cloud computing contracts would be available to the Commission at its fifty-second session, in 2019 (see para. 150 above);

(d) With respect to insolvency, the Commission noted that it was anticipated that two draft legislative texts would be sufficiently developed for submission by Working Group V to the Commission for finalization and adoption in 2019, namely the draft model law on enterprise group insolvency and its guide to enactment and a supplement to part four of the *UNCITRAL Legislative Guide on Insolvency Law* addressing the obligations of directors of enterprise group companies in the period approaching insolvency (see para. 132 above). The Commission confirmed that the work on insolvency of micro, small and medium-sized enterprises should continue (see para. 133 above);

(e) As regards secured transactions, the Commission confirmed that Working Group VI should continue its work to prepare a practice guide on the contractual, transactional and regulatory issues arising in the context of secured transactions (see also para. 163 above), with a request that it be presented to the Commission in 2019 for finalization and adoption.

B. Future legislative programme

239. The Commission recalled the importance of a strategic approach to the allocation of resources to, inter alia, legislative development, and its role in setting the work programme of UNCITRAL, especially as regards the mandates of working groups.[57]

240. The Commission heard several proposals for possible future legislative development.

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[56] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 310.

[57] Ibid., paras. 294 and 295.

241. Firstly, the Government of Italy presented a proposal on possible future work on contractual networks (A/CN.9/954). It was recalled that an earlier proposal had been presented to the Commission at its fiftieth session, in 2017, and noted that document A/CN.9/954 clarified aspects of that proposal in response to comments received at the fiftieth session. It was noted that those networks provided an opportunity to organize cooperation between businesses without a requirement for a legal entity to be formed. They could facilitate sharing of resources; provide a means of accessing business opportunities not otherwise available to individual participating entities; facilitate access to finance for the network itself, rather than the individual participating entities; and permit sharing of property and of labour. It was pointed out that certain international organizations were undertaking projects using clusters, where the governance of the projects was organized in a manner similar to contractual networks but without the legal certainty provided by contractual networks. In conclusion, the delegation observed that work on such networks would complement the work on the UNCITRAL limited liability organization currently being considered by Working Group I.

242. The Government of Switzerland presented a proposal on possible future work on cross-border issues related to the judicial sale of ships (A/CN.9/944/Rev.1). The Commission recalled that a proposal had been made at its fiftieth session by CMI, that it had indicated its support for a colloquium to be initiated by CMI to discuss and advance the proposal, and that it had agreed to revisit the topic at a future session. The Commission noted that that colloquium had been held in February 2018 and that the proposal included the outcomes and conclusions of that colloquium.

243. In support of the proposal, it was noted that that issue had the potential to affect many areas of international trade and commerce, not simply the shipping industry, with several examples of that impact being provided. In support of work being undertaken by UNCITRAL, various parallels were drawn between the work currently being undertaken in Working Group V on recognition of insolvency-related judgments and a possible instrument on judicial sale of ships.

244. The Governments of Italy, Norway and Spain presented a proposal for possible future work in the field of dispute resolution (A/CN.9/959), in particular on expedited arbitration. The Government of Belgium supported that proposal in its submission (A/CN.9/961), suggesting in addition work on the conduct of arbitrators in the field of commercial arbitration, with a focus on questions of impartiality and independence of arbitrators. It was pointed out that the aim of the proposals was to improve the efficiency and quality of arbitral proceedings.

245. Regarding expedited arbitration, it was suggested that the work could consist of providing information on how the UNCITRAL Arbitration Rules could be modified or incorporated into contracts via arbitration clauses that provided for expedited procedures or in guidance to arbitral institutions adopting such procedures in order to ensure the right balance between speedy resolution of the process and respect for due process. Reference was also made to the possibility of considering jointly the topics of expedited arbitration and adjudication, as expedited arbitration would provide generally applicable tools for reducing the cost and time of arbitration, while adjudication would facilitate use of a particular tool that had demonstrated its utility in efficiently resolving disputes in a specific sector.

246. The Commission also heard the proposal that the Secretariat could undertake work on (a) updating the UNCITRAL Conciliation Rules (1980) to both reflect current practice and ensure consistency with the contents of the draft instruments finalized by the Commission at is current session, and (b) preparing notes on organizing mediation proceedings.

247. The Government of Czechia presented a proposal that the Secretariat should closely monitor developments relating to legal aspects of smart contracts and artificial intelligence (A/CN.9/960) and report back to the Commission on areas that might warrant uniform legal treatment, with a view to undertaking work in those fields when appropriate.

248. It was indicated that several suggestions had been made in the working groups and in the Commission with respect to various legal aspects of the digital economy.

It was recalled that additional considerations on those legal aspects had been presented at the Congress held in 2017 on the occasion of the Commission's fiftieth session, to celebrate the fiftieth anniversary of UNCITRAL. It was suggested that UNCITRAL would benefit from a broader understanding of the legal issues related to the digital economy and, that to do so, it should monitor relevant developments on the basis of information compiled by the Secretariat. It was said that in addition to artificial intelligence and smart contracts, topics of possible relevance included the use of distributed ledger technology, supply chain management, payments and cross-border data flows. It was stressed that such work should not only legally enable the commercial use of new technologies and methods but also assist developing economies in bridging the digital gap.

249. In addition to the proposals noted above, reference was made to two proposals that had been considered by working groups and were contained in working group documents as noted in paragraph 237 above. The first of those proposals concerned warehouse receipts, which had first been considered at a colloquium on secured transactions (Vienna, 15–17 March 2017).[58] After further discussion at its thirty-third session (New York, 30 April–4 May 2018), Working Group VI requested a mandate on that issue to develop a modern and predictable legal regime (A/CN.9/938, paras. 92–93). In support of the proposal, the importance of warehouse receipts to agriculture and food security was noted, as well as their use in supply and value chains.

250. The second proposal concerned civil law aspects of asset tracing and recovery, which had been considered by Working Group V (A/CN.9/937, paras. 121–122). With respect to that proposal, it was suggested that it would be relevant not only to insolvency but also to treatment of commercial fraud and other topics. It was noted that many States lacked adequate legal tools for tracing and recovery. What was suggested was the development of a toolbox of legislative provisions from which States could choose, as indicated in document A/CN.9/WG.V/WP.154. It was emphasized that the work proposed was not intended to address criminal law or cross-border issues and that coordination and cooperation with other relevant organizations would be a key element, in order to avoid potential overlap and duplication. The first step, it was proposed, was to undertake work to explore the issues in more detail and identify the scope of possible work.

251. In that context, the European Union delegation presented as an alternative a proposal to dedicate future work to applicable law related to insolvency. It was stressed that the issue of applicable law was an important matter that warranted consideration.

252. After discussion, the Commission agreed that priority, in the allocation of working group time, should be given to the topics of judicial sale of ships and issues relating to expedited arbitration; that judicial sale of ships should be allocated to the first available working group, possibly Working Group VI when it had completed its current work on the practice guide, and that Working Group II should be mandated to take up issues relating to expedited arbitration.

253. Regarding the other topics discussed, the Commission came to the conclusion that the preparatory work on those matters was less mature, and given the limited resources of the Secretariat, should be given less priority. More preparatory work by the Secretariat would be needed before the Commission could decide on further steps on those matters. Accordingly, the Commission decided the following:

(a) The Secretariat should conduct exploratory and preparatory work on warehouse receipts in order to refer that work to a working group;

(b) The Secretariat should compile information on legal issues related to the digital economy, including by organizing, within existing resources and in cooperation with other organizations, symposiums, colloquiums and other expert meetings, and to report that information for its consideration at a future session. It was stressed that discussions should focus on identifying legal obstacles and their possible solutions and avoid privacy and data protection issues. In that respect, it was

[58] For further information, see www.uncitral.org/uncitral/en/commission/colloquia_security.html.

noted that Working Groups IV and VI had already compiled a list of legal matters related to the use of new technologies and methods, which could provide a basis for further expert discussion;

(c) With respect to the proposal on contractual networks, Working Group I was authorized to hold a colloquium in the context of a future working group session for the purpose of further analysing the relevance of those networks to the work on developing an enabling legal environment for micro, small and medium-sized enterprises and the desirability of taking up work of those networks. That discussion should also explore legal tools that achieve goals similar to contractual networks that were being used in both civil and common law jurisdictions;

(d) With regard to the proposal on asset tracing in the area of insolvency, the Secretariat should prepare a background study on the relevant issues, taking into account work undertaken by other organizations, in order to avoid duplication and overlap.

254. In the area of dispute settlement, the Commission noted that the Secretariat would prepare notes on organizing mediation proceedings and update the UNCITRAL Conciliation Rules in the light of the mediation framework adopted at its current session.

C. Technical cooperation and assistance activities

255. The Commission recalled the importance of support activities and the need to encourage such activities at the global and regional levels through the Secretariat, through the expertise available in the working groups and the Commission, through member States and through partnering arrangements with relevant international organizations. It also recalled the importance of promoting increased awareness of UNCITRAL texts among those organizations and within the United Nations system.[59]

256. The Commission took note of the general priorities identified in the note, as well as the specific priorities for the period 2018–2019.

257. In concluding the consideration of the agenda item, it was emphasized that the above-mentioned activities should be undertaken taking into account the extent of the resources available to the Secretariat.

XVIII. Other business

A. Methods of work

258. The Commission heard a proposal presented by the Governments of France, Germany, Israel, Switzerland and the United States concerning the methods of work of the Commission.

259. In previous UNCITRAL meetings, the possibility had been raised of reducing the duration of Commission sessions to two weeks. The States making that proposal supported that idea and sought to initiate further discussion on the matter. It was suggested that sessions lasting three weeks posed a problem for many member States due to staff workload and that a two-week session would be easier to manage.

260. Those making the proposal also indicated that they saw various possibilities for making the Commission sessions more effective. The following changes were suggested for consideration:

(a) Several agenda items could be suitably addressed, at least in part, through information-only documents, for example, the following agenda items: “Coordination and cooperation”, “Technical assistance to law reform”, “Status and promotion of UNCITRAL legal texts” and “Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts: CLOUT and digests”.

[59] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 263–265.

Member States would be informed via those documents, and decisions generally would not need to be made. At most, a short explanation by the Secretariat would be required. States and organizations represented in the meeting could comment on those information documents. It was noted that information-only documents were already used in other United Nations organizations to help meetings run efficiently;

(b) The working groups should increasingly be asked to send legislative texts to the Commission only if they had already undergone extensive consultation; specific details which were of no special significance should be discussed and decided on in the working groups. The Commission should not assume the role of a working group but must continue to make final decisions on the results submitted by the working groups;

(c) Since 2008, the topic "Role of UNCITRAL in promoting the rule of law at the national and international levels" had been handled by the Commission. While the proposal did not aim to suggest that the Commission should no longer deal with that issue and while the presentations made on that topic had succeeded in bringing numerous interesting aspects to the Commission's attention, there had been only a limited amount of subsequent discussion. It was requested that the manner in which that issue was handled within the Commission be reviewed;

(d) Time during the annual sessions that would be freed up as a result of the proposal should still be utilized effectively. For example, those meeting days could be made available to the working groups, if necessary.

261. In summary, the following was proposed:

(a) Use of information-only documents with a short explanation;

(b) More efficient preparation by the working groups to enable more efficient discussions in the Commission;

(c) Review of how to handle the topic "Role of UNCITRAL in promoting the rule of law at the national and international levels" more efficiently;

(d) Flexible use of meeting days that would be freed up as a result of the proposal.

262. The Commission welcomed the proposal and, noting that the Secretariat had already implemented a number of the suggestions, commended its responsiveness to the request of member States for streamlining and focusing the Commission's agenda and the preparation for the Commission's session.

263. The Secretariat was requested to plan and prepare the fifty-second session of the Commission, in 2019, on the basis of the proposal.

264. In subsequent discussion, the Commission considered the proposal to generate discussion within the Commission on agenda item "Role of UNCITRAL in promoting the rule of law at the national and international levels" (see chapter XV above) and to improve the way the Commission handles that agenda item.

265. The Commission considered the possibility of broadening the discussion of its role in promoting the rule of law at the national and international levels to a discussion of the way the work of UNCITRAL relates to the 2030 Agenda for Sustainable Development and 17 Sustainable Development Goals, both with regard to the instruments developed by UNCITRAL and with regard to assistance to States in their achievement of the Goals.

266. It was suggested that in order for the Commission to achieve a more meaningful consideration of that agenda item, the Secretariat could prepare a paper outlining the way that the UNCITRAL instruments and texts relate to the Sustainable Development Goals and identifying concrete issues to be discussed by the Commission. It was further suggested that that paper could also take stock of the evolution of the agenda item relating to the rule of law over several Commission meetings and how the Commission could ensure that its work reflected the broader development agenda of the United Nations as a whole.

267. It was further decided that a discussion would take place at the fifty-second session of the Commission, in 2019, on the basis of the report to be prepared by the Secretariat.

268. Also related to the Commission's working methods, a request was made that email contacts for the delegations attending the Commission and the Working Groups be made available with a view to facilitating intersessional contacts and discussions among delegates. The Secretariat clarified that the list of participants for each session of the Commission and each working group did not contain contact details of the delegates but that it would look into a way to make those contacts available on the new version of the UNCITRAL website, in the areas reserved to States. In that connection, it was noted that the Secretariat needed to examine carefully applicable rules and policies on the treatment of similar data within the United Nations system.

269. A further suggestion was made with regard to the interaction between Working Group III, the Secretariat and the two groups constituted on its margins, namely the Academic Forum and the Group of Practitioners (see para. 144 above). It was suggested that the Working Group should clarify the way that the Academic Forum and the Group of Practitioners interacted with the Secretariat and with the Working Group respectively and how their contributions were made available to the members of the Working Group and were reflected in the background documents prepared by the Secretariat. To that effect, the Secretariat was asked to prepare a short paper establishing methods of work with the two groups already established and any further group of representatives (if any). The Commission requested Working Group III to discuss the issue based on the paper prepared by the Secretariat and to formulate its preferred approach in the report to the Commission.

270. A further question was raised regarding the criteria for posting papers, articles and documents by contributors to Working Group III, by the Academic Forum, the Group of Practitioners or other stakeholders on the UNCITRAL website. The Secretariat indicated that that issue would be considered in the course of the overhaul of its website, and a paper identifying the relevant criteria would be presented to the Commission in its forthcoming session.

B. Internship programme

271. The Commission recalled the considerations taken by the UNCITRAL secretariat in selecting candidates for internship[60] and noted with satisfaction the continuing positive effects of changes introduced in 2013 and 2014 in the United Nations internship programme (selection procedures and eligibility requirements) on the pool of eligible and qualified candidates for internship from underrepresented countries, regions and language groups.

272. The Commission was informed that since the Secretariat's oral report to the Commission at its fiftieth session, in July 2017, 21 new interns had undertaken an internship with the UNCITRAL secretariat in Vienna. Most of the interns were from developing countries.

273. The Commission was informed that the large majority of applicants were from countries of the regional group of Western Europe and other States and that the Secretariat faced difficulties in attracting candidates from African and Latin American States, as well as candidates with fluent Arabic language skills.

274. States and observer organizations were requested to bring the possibility of applying for internships at the UNCITRAL secretariat to the attention of interested persons who met those specific requirements. It was highlighted that, since the internships were unpaid, States and observer organizations might also consider

[60] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 328–330; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 344; and ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 277 and 278.

granting scholarships for the purpose of attracting those most qualified for an internship at UNCITRAL.

C. Evaluation of the role of the Secretariat in facilitating the work of the Commission

275. The Commission recalled that at its fortieth session, in 2007,[61] it had been informed of the programme budget for the biennium 2008–2009, which listed among the expected accomplishments of the UNCITRAL secretariat "facilitating the work of UNCITRAL". The performance measure for that expected accomplishment was the level of satisfaction of UNCITRAL with the services provided by its secretariat, as evidenced by a rating on a scale ranging from 1 to 5 (5 being the highest rating).[62] At that session, the Commission had agreed to provide feedback to the Secretariat.

276. From the fortieth session to the forty-fifth session of the Commission, in 2012, feedback was provided by States attending the annual sessions of UNCITRAL in response to the questionnaire circulated by the Secretariat by the end of the session. That practice had changed since the Commission's forty-fifth session, in 2012, partly because of the need to solicit more responses. Instead of an in-session questionnaire, the Secretariat started circulating to all States, closer to the start of each annual session of the Commission, a note verbale with the request to indicate, by filling in the evaluation form enclosed to the note verbale, their level of satisfaction with the services provided to UNCITRAL by the UNCITRAL secretariat during the preceding session. A note verbale requesting to evaluate the performance of the UNCITRAL secretariat during the fiftieth session of UNCITRAL was circulated to all States Members of the United Nations on 14 May 2018, and the period covered was indicated as being from the start of the fiftieth session of UNCITRAL (3 July 2017).

277. The Commission was informed that the request had elicited 25 responses and that the level of satisfaction with the services provided to UNCITRAL by the UNCITRAL secretariat, as indicated in those responses, remained high (21 States respondents gave 5 out of 5 and 4 States respondents gave 4 out of 5). The Commission heard that States in their statements to the Sixth Committee of the General Assembly on the report of the Commission often included their views on the work of the UNCITRAL secretariat in servicing the Commission. Such statements did not easily lend themselves to the quantitative assessment.

278. The Commission took note of the concern that the level of responses to the request for evaluation remained low and that it was essential to receive from more States feedback about the UNCITRAL secretariat's performance in order to have a more objective evaluation of the role of the Secretariat. That was required for budgetary and other purposes.

279. The Commission expressed its deep appreciation to the Secretariat for its excellent work in servicing UNCITRAL.

XIX. Date and place of future meetings

280. The Commission recalled that at its thirty-sixth session, in 2003, it had agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could be allocated from the unused entitlement of another working group provided that such arrangement would not result in the increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time would result in the increase of the 12-week allotment, it should be reviewed by the Commission, with proper justification being given by that working

[61] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 243.
[62] A/62/6 (Sect. 8) and Corr.1, table 8.19 (d).

group regarding the reasons for which a change in the meeting pattern was needed.[63] The Commission noted that all working groups would meet for two one-week sessions before its fifty-second session, in 2019, except for Working Group II (Dispute Settlement), which would meet only for one one-week session that would take place in New York in the first half of 2019 (see para. 284 (b) below).

281. The Commission further recalled that at its fiftieth session, in 2017, the Commission had taken note of General Assembly resolutions on the pattern of conferences promulgating policies as regards significant holidays on which United Nations Headquarters and the Vienna International Centre remained open but United Nations bodies were invited to avoid holding meetings. The Commission had agreed to take into account those policies as far as possible when considering the dates of its future meetings.[64] It had noted at that time that dates tentatively scheduled for the second half of 2018 included Gurpurab (23 November 2018). The Commission had requested the Secretariat to explore whether an alternative week in the second half of 2018 could be found for a session of Working Group IV (Electronic Commerce) in Vienna that would not include a significant holiday, and had decided to consider the matter further at its next session.[65]

282. At its fifty-first session, the Commission was informed that no alternative dates for the second half of 2018 were found and the dates for the fifty-seventh session of Working Group IV (Electronic Commerce) therefore included Gurpurab (23 November 2018). The Commission noted that other dates of future meetings as set out below did not include significant holidays.

A. Fifty-second session of the Commission

283. The Commission approved the holding of its fifty-second session in Vienna from 8 to 26 July 2019. The Commission agreed that it would aim to complete its work agenda in the first two weeks of the session, with the third week being devoted, for example, to expert discussions or a colloquium on aspects of topics for which the Commission had requested preparatory work or that were of broader interest for an UNCITRAL-wide discussion, such as the legal issues arising from particular regional or global trade law initiatives.

B. Sessions of working groups

1. Sessions of working groups between the fifty-first and fifty-second sessions of the Commission

284. The Commission approved the following schedule of meetings for its working groups:

(a) Working Group I (Micro, Small and Medium-sized Enterprises) would hold its thirty-first session in Vienna from 8 to 12 October 2018, and its thirty-second session in New York, from 25 to 29 March 2019;

(b) Working Group II (Dispute Settlement) would hold its sixty-ninth session in New York from 4 to 8 February 2019; no session would be held in Vienna in the second half of 2018;

(c) Working Group III (Investor-State Dispute Settlement Reform) would hold its thirty-sixth session in Vienna from 29 October to 2 November 2018, and its thirty-seventh session in New York from 1 to 5 April 2019;

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[63] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 275.

[64] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), para. 485.

[65] Ibid., para. 490.

(d) Working Group IV (Electronic Commerce) would hold its fifty-seventh session in Vienna from 19 to 23 November 2018,[66] and its fifty-eighth session in New York from 8 to 12 April 2019;

(e) Working Group V (Insolvency Law) would hold its fifty-fourth session in Vienna from 10 to 14 December 2018, and its fifty-fifth session in New York from 28 to 31 May 2019 (noting that that would be a 4-day session);

(f) Working Group VI (Security Interests) would hold its thirty-fourth session in Vienna from 17 to 21 December 2018, and its thirty-fifth session in New York from 13 to 17 May 2019.

2. Sessions of working groups in 2019 after the fifty-second session of the Commission

285. The Commission noted that the following tentative arrangements had been made for working group meetings in 2019 after its fifty-second session, subject to the approval by the Commission at that session:

(a) Working Group I (Micro, Small and Medium-sized Enterprises) would hold its thirty-third session in Vienna, from 30 September to 4 October 2019;

(b) Working Group II (Dispute Settlement) would hold its seventieth session in Vienna, from 23 to 27 September 2019;

(c) Working Group III (Investor-State Dispute Settlement Reform) would hold its thirty-eighth session in Vienna from 14 to 18 October 2019;

(d) Working Group IV (Electronic Commerce) would hold its fifty-ninth session in Vienna from 25 to 29 November 2019;

(e) Working Group V (Insolvency Law) would hold its fifty-sixth session in Vienna from 2 to 6 December 2019; and

(f) Working Group VI (Security Interests) would hold its thirty-sixth session in Vienna from 18 to 22 November 2019.

[66] 23 November 2018 is Gurpurab.

Annex I

United Nations Convention on International Settlement Agreements Resulting from Mediation

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Have agreed as follows:

Article 1. Scope of application

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2. Definitions

1. For the purposes of article 1, paragraph 1:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

2. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

3. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

Article 3. General principles

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 5. Grounds for refusing to grant relief

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Article 6. Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Article 7. Other laws or treaties

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

Article 8. Reservations

1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

2. No reservations are permitted except those expressly authorized in this article.

3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited with the depositary.

5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

Article 9. Effect on settlement agreements

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

Article 10. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 11. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in Singapore, on 1 August 2019, and thereafter at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatories.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 12. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "Party to the Convention", "Parties to the Convention", a "State" or "States" in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization.

Article 13. Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 14. Entry into force

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

Article 15. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting

upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 16. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE at ---- this [X] day of [X] ------, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

Annex II

UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)

Section 1 — General provisions

Article 1. Scope of application of the Law and definitions

1. This Law applies to international commercial[1] mediation[2] and to international settlement agreements.

2. For the purposes of this Law, "mediator" means a sole mediator or two or more mediators, as the case may be.

3. For the purposes of this Law, "mediation" means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ("the mediator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.

Article 2. Interpretation

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Section 2 — International commercial mediation

Article 3. Scope of application of the section and definitions

1. This section applies to international[3] commercial mediation.

2. A mediation is "international" if:

(a) The parties to an agreement to mediate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

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[1] The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road.

[2] In its previously adopted texts and relevant documents, UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. In preparing this Model Law, the Commission decided to use the term "mediation" instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications.

[3] States wishing to enact this section to apply to domestic as well as international mediation may wish to consider the following changes to the text:

- Delete the word "international" in paragraph 1 of articles 1 and 3; and
- Delete paragraphs 2, 3 and 4 of article 3, and modify references to paragraphs accordingly.

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected.

3. For the purposes of paragraph 2:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to mediate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

4. This section also applies to commercial mediation when the parties agree that the mediation is international or agree to the applicability of this section.

5. The parties are free to agree to exclude the applicability of this section.

6. Subject to the provisions of paragraph 7 of this article, this section applies irrespective of the basis upon which the mediation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

7. This section does not apply to:

(a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and

(b) […].

Article 4. Variation by agreement

Except for the provisions of article 7, paragraph 3, the parties may agree to exclude or vary any of the provisions of this section.

Article 5. Commencement of mediation proceedings[4]

1. Mediation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in mediation proceedings.

2. If a party that invited another party to mediate does not receive an acceptance of the invitation within 30 days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to mediate.

Article 6. Number and appointment of mediators

1. There shall be one mediator, unless the parties agree that there shall be two or more mediators.

2. The parties shall endeavour to reach agreement on a mediator or mediators, unless a different procedure for their appointment has been agreed upon.

3. Parties may seek the assistance of an institution or person in connection with the appointment of mediators. In particular:

(a) A party may request such an institution or person to recommend suitable persons to act as mediator; or

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[4] The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:

Article X. Suspension of limitation period

1. When the mediation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the mediation is suspended.

2. Where the mediation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement.

(b) The parties may agree that the appointment of one or more mediators be made directly by such an institution or person.

4. In recommending or appointing individuals to act as mediator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial mediator and, where appropriate, shall take into account the advisability of appointing a mediator of a nationality other than the nationalities of the parties.

5. When a person is approached in connection with his or her possible appointment as mediator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A mediator, from the time of his or her appointment and throughout the mediation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

Article 7. Conduct of mediation

1. The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

2. Failing agreement on the manner in which the mediation is to be conducted, the mediator may conduct the mediation proceedings in such a manner as the mediator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

3. In any case, in conducting the proceedings, the mediator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

4. The mediator may, at any stage of the mediation proceedings, make proposals for a settlement of the dispute.

Article 8. Communication between mediator and parties

The mediator may meet or communicate with the parties together or with each of them separately.

Article 9. Disclosure of information

When the mediator receives information concerning the dispute from a party, the mediator may disclose the substance of that information to any other party to the mediation. However, when a party gives any information to the mediator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the mediation.

Article 10. Confidentiality

Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

Article 11. Admissibility of evidence in other proceedings

1. A party to the mediation proceedings, the mediator and any third person, including those involved in the administration of the mediation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings;

(b) Views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the mediation proceedings;

(d) Proposals made by the mediator;

(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator;

(f) A document prepared solely for purposes of the mediation proceedings.

2. Paragraph 1 of this article applies irrespective of the form of the information or evidence referred to therein.

3. The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

4. The provisions of paragraphs 1, 2 and 3 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the mediation proceedings.

5. Subject to the limitations of paragraph 1 of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a mediation.

Article 12. Termination of mediation proceedings

The mediation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;

(b) By a declaration of the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified, on the date of the declaration;

(c) By a declaration of the parties addressed to the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration; or

(d) By a declaration of a party to the other party or parties and the mediator, if appointed, to the effect that the mediation proceedings are terminated, on the date of the declaration.

Article 13. Mediator acting as arbitrator

Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator in respect of a dispute that was or is the subject of the mediation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

Article 14. Resort to arbitral or judicial proceedings

Where the parties have agreed to mediate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to mediate or as a termination of the mediation proceedings.

Article 15. Binding and enforceable nature of settlement agreements

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable.

Section 3 — International settlement agreements[5]

Article 16. Scope of application of the section and definitions

1. This section applies to international agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreements").[6]

2. This section does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This section does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

4. A settlement agreement is "international" if, at the time of the conclusion of the settlement agreement:[7]

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

5. For the purposes of paragraph 4:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

6. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

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[5] A State may consider enacting this section to apply to agreements settling a dispute, irrespective of whether they resulted from mediation. Adjustments would then have to be made to relevant articles.

[6] A State may consider enacting this section to apply only where the parties to the settlement agreement agreed to its application.

[7] A State may consider broadening the definition of "international" settlement agreement by adding the following subparagraph to paragraph 4: "A settlement agreement is also 'international' if it results from international mediation as defined in article 3, paragraphs 2, 3 and 4."

Article 17. General principles

1. A settlement agreement shall be enforced in accordance with the rules of procedure of this State, and under the conditions laid down in this section.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State, and under the conditions laid down in this section, in order to prove that the matter has already been resolved.

Article 18. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this section shall supply to the competent authority of this State:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of this State, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of this section have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 19. Grounds for refusing to grant relief

1. The competent authority of this State may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of this State may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of this State; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of this State.

Article 20. Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 18, the competent authority of this State where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Annex III

UNCITRAL Model Law on Recognition and Enforcement of Insolvency-related Judgments

Preamble

1. The purpose of this Law is:

(a) To create greater certainty in regard to rights and remedies for recognition and enforcement of insolvency-related judgments;

(b) To avoid the duplication of insolvency proceedings;

(c) To ensure timely and cost-effective recognition and enforcement of insolvency-related judgments;

(d) To promote comity and cooperation between jurisdictions regarding insolvency-related judgments;

(e) To protect and maximize the value of insolvency estates; and

(f) Where legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has been enacted, to complement that legislation.

2. This Law is not intended:

(a) To restrict provisions of the law of this State that would permit the recognition and enforcement of an insolvency-related judgment;

(b) To replace legislation enacting the UNCITRAL Model Law on Cross-Border Insolvency or limit the application of that legislation;

(c) To apply to the recognition and enforcement in the enacting State of an insolvency-related judgment issued in the enacting State; or

(d) To apply to the judgment commencing the insolvency proceeding.

Article 1. Scope of application

1. This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a State that is different to the State in which recognition and enforcement are sought.

2. This Law does not apply to [...].

Article 2. Definitions

For the purposes of this Law:

(a) “Insolvency proceeding” means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(b) “Insolvency representative” means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the insolvency proceeding;

(c) “Judgment” means any decision, whatever it may be called, issued by a court or administrative authority, provided an administrative decision has the same effect as a court decision. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses. An interim measure of protection is not to be considered a judgment for the purposes of this Law;

(d) "Insolvency-related judgment":

(i) Means a judgment that:

a. Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and

b. Was issued on or after the commencement of that insolvency proceeding; and

(ii) Does not include a judgment commencing an insolvency proceeding.

Article 3. International obligations of this State

1. To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

2. This Law shall not apply to a judgment where there is a treaty in force concerning the recognition or enforcement of civil and commercial judgments, and that treaty applies to the judgment.

Article 4. Competent court or authority

The functions referred to in this Law relating to recognition and enforcement of an insolvency-related judgment shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*] and by any other court before which the issue of recognition is raised as a defence or as an incidental question.

Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to act in another State with respect to an insolvency-related judgment issued in this State, as permitted by the applicable foreign law.

Article 6. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance under other laws of this State.

Article 7. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State.

Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

Article 9. Effect and enforceability of an insolvency-related judgment

An insolvency-related judgment shall be recognized only if it has effect in the originating State and shall be enforced only if it is enforceable in the originating State.

Article 10. Effect of review in the originating State on recognition and enforcement

1. Recognition or enforcement of an insolvency-related judgment may be postponed or refused if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired. In such cases, the court may also make recognition or enforcement conditional on the provision of such security as it shall determine.

2. A refusal under paragraph 1 does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 11. Procedure for seeking recognition and enforcement of an insolvency-related judgment

1. An insolvency representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment may seek recognition and enforcement of that judgment in this State. The issue of recognition may also be raised as a defence or as an incidental question.

2. When recognition and enforcement of an insolvency-related judgment is sought under paragraph 1, the following shall be submitted to the court:

(a) A certified copy of the insolvency-related judgment; and

(b) Any documents necessary to establish that the insolvency-related judgment has effect and, where applicable, is enforceable in the originating State, including information on any pending review of the judgment; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence on those matters acceptable to the court.

3. The court may require translation of documents submitted pursuant to paragraph 2 into an official language of this State.

4. The court is entitled to presume that documents submitted pursuant to paragraph 2 are authentic, whether or not they have been legalized.

5. Any party against whom recognition and enforcement is sought has the right to be heard.

Article 12. Provisional relief

1. From the time recognition and enforcement of an insolvency-related judgment is sought until a decision is made, where relief is urgently needed to preserve the possibility of recognizing and enforcing an insolvency-related judgment, the court may, at the request of an insolvency representative or other person entitled to seek recognition and enforcement under article 11, paragraph 1, grant relief of a provisional nature, including:

(a) Staying the disposition of any assets of any party or parties against whom the insolvency-related judgment has been issued; or

(b) Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related judgment.

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice, including whether notice would be required under this article*.]

3. Unless extended by the court, relief granted under this article terminates when a decision on recognition and enforcement of the insolvency-related judgment is made.

Article 13. Decision to recognize and enforce an insolvency-related judgment

Subject to articles 7 and 14, an insolvency-related judgment shall be recognized and enforced provided:

(a) The requirements of article 9 with respect to effect and enforceability are met;

(b) The person seeking recognition and enforcement of the insolvency-related judgment is an insolvency representative within the meaning of article 2, subparagraph (b), or another person entitled to seek recognition and enforcement of the judgment under article 11, paragraph 1;

(c) The application meets the requirements of article 11, paragraph 2; and

(d) Recognition and enforcement is sought from a court referred to in article 4, or the question of recognition arises by way of defence or as an incidental question before such a court.

Article 14. Grounds to refuse recognition and enforcement of an insolvency-related judgment

In addition to the ground set forth in article 7, recognition and enforcement of an insolvency-related judgment may be refused if:

(a) The party against whom the proceeding giving rise to the judgment was instituted:

(i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or

(ii) Was notified in this State of the institution of that proceeding in a manner that is incompatible with the rules of this State concerning service of documents;

(b) The judgment was obtained by fraud;

(c) The judgment is inconsistent with a judgment issued in this State in a dispute involving the same parties;

(d) The judgment is inconsistent with an earlier judgment issued in another State in a dispute involving the same parties on the same subject matter, provided the earlier judgment fulfils the conditions necessary for its recognition and enforcement in this State;

(e) Recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings, including by conflicting with a stay or other order that could be recognized or enforced in this State;

(f) The judgment:

(i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and

(ii) The interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

(g) The originating court did not satisfy one of the following conditions:

(i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;

(ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that that party argued on the

merits before the court without objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that such an objection to jurisdiction would not have succeeded under that law;

(iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or

(iv) The court exercised jurisdiction on a basis that was not incompatible with the law of this State;

[*States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency might wish to enact subparagraph (h).*]

(h) The judgment originates from a State whose insolvency proceeding is not or would not be recognizable under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*], unless:

(i) The insolvency representative of a proceeding that is or could have been recognized under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*] participated in the proceeding in the originating State to the extent of engaging in the substantive merits of the cause of action to which that proceeding related; and

(ii) The judgment relates solely to assets that were located in the originating State at the time the proceeding in the originating State commenced.

Article 15. Equivalent effect

1. An insolvency-related judgment recognized or enforceable under this Law shall be given the same effect it [has in the originating State] or [would have had if it had been issued by a court of this State].[1]

2. If the insolvency-related judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

Article 16. Severability

Recognition and enforcement of a severable part of an insolvency-related judgment shall be granted where recognition and enforcement of that part is sought, or where only that part of the judgment is capable of being recognized and enforced under this Law.

[*States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency will be aware of judgments that may have cast doubt on whether judgments can be recognized and enforced under article 21 of that Model Law. States may therefore wish to consider enacting the following provision*:]

Article X. Recognition of an insolvency-related judgment under [*insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*]

Notwithstanding any prior interpretation to the contrary, the relief available under [*insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment.

[1] The enacting State may wish to note that it should choose between the two alternatives provided in square brackets. An explanation of this provision is provided in the Guide to Enactment in the notes to article 15.

Annex IV

List of documents before the Commission at its fifty-first session

Symbol	*Title or description*
A/CN.9/927/Rev.1	Provisional agenda, annotations thereto and scheduling of meetings of the fifty-first session
A/CN.9/928	Report of Working Group I (Micro, Small and Medium-sized Enterprises) on the work of its twenty-ninth session
A/CN.9/929	Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session
A/CN.9/930/Rev.1	Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session — Part I
A/CN.9/930/Add.1/Rev.1	Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session — Part II
A/CN.9/931	Report of Working Group V (Insolvency Law) on the work of its fifty-second session
A/CN.9/932	Report of Working Group VI (Security Interests) on the work of its thirty-second session
A/CN.9/933	Report of Working Group I (Micro, Small and Medium-sized Enterprises) on the work of its thirtieth session
A/CN.9/934	Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session
A/CN.9/935	Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session
A/CN.9/936	Report of Working Group IV (Electronic Commerce) on the work of its fifty-sixth session
A/CN.9/937	Report of Working Group V (Insolvency Law) on the work of its fifty-third session
A/CN.9/938	Report of Working Group VI (Security Interests) on the work of its thirty-third session
A/CN.9/939 and A/CN.9/939/Add.1, A/CN.9/939/Add.2 and A/CN.9/939/Add.3	Public-private partnerships (PPPs): proposed updates to the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects*
A/CN.9/940	Draft legislative guide on key principles of a business registry
A/CN.9/941	Adopting an enabling legal environment for the operation of micro, small and medium-sized enterprises (MSMEs)
A/CN.9/942	Settlement of commercial disputes: international commercial mediation — draft convention on international settlement agreements resulting from mediation
A/CN.9/943	Settlement of commercial disputes: international commercial mediation — draft model law on international commercial mediation and international settlement agreements resulting from mediation

Symbol	*Title or description*
A/CN.9/944/Rev.1	Possible future work on cross-border issues related to the judicial sale of ships: proposal from the Government of Switzerland
A/CN.9/945	Settlement of commercial disputes: draft convention on international settlement agreements resulting from mediation — draft model law on international commercial mediation and international settlement agreements resulting from mediation. Compilation of comments
A/CN.9/946	Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts
A/CN.9/947	Activities of the UNCITRAL Regional Centre for Asia and the Pacific
A/CN.9/948	Coordination activities
A/CN.9/949	Bibliography of recent writings related to the work of UNCITRAL
A/CN.9/950	Status of conventions and model laws
A/CN.9/951	Coordination and cooperation: international governmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups
A/CN.9/952 and A/CN.9/952/Corr.1	Work programme of the Commission
A/CN.9/953	Relevant General Assembly resolutions
A/CN.9/954	Contractual networks and economic development: a proposal by Italy for possible future work by UNCITRAL on alternative forms of organization to corporate-like models — advanced proposal
A/CN.9/955	Recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law
A/CN.9/956 and A/CN.9/956/Add.1, A/CN.9/956/Add.2 and A/CN.9/956/Add.3	Compilation of comments on the draft model law on the recognition and enforcement of insolvency-related judgments as contained in an annex to the report of Working Group V (Insolvency Law) on the work of its fifty-second session (A/CN.9/931)
A/CN.9/957	Public-private partnerships (PPPs): proposed updates to the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* —comments by the World Bank
A/CN.9/958/Rev.1	Technical cooperation and assistance
A/CN.9/959	Possible future work: proposal by the Governments of Italy, Norway and Spain — future work for Working Group II
A/CN.9/960	Work programme of the Commission: legal aspects of smart contracts and artificial intelligence — submission by Czechia
A/CN.9/961	Possible future work: proposal by the Government of Belgium — future work for Working Group II

B. United Nations Conference on Trade and Development (UNCTAD)

There was no action by the United Nations Conference on Trade and Development (UNCTAD) on the United Nations Commission on International Trade Law's report on the work of its fifty-first session, which was held in New York, from 25 June–13 July 2018. It is expected that there will be action on the Commission's report by UNCTAD in 2019.

C. General Assembly: Report of the Sixth Committee on the report of the United Nations Commission on International Trade Law on the work of its fifty-first session (A/73/496)

[Original: English]

Rapporteur: Ms. Nadia Alexandra **Kalb** (Austria)

I. Introduction

1. At its 3rd plenary meeting, on 21 September 2018, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its seventy-third session the item entitled "Report of the United Nations Commission on International Trade Law on the work of its fifty-first session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 15th, 32nd and 34th meetings, on 16 October and 2 and 6 November 2018. The views of the representatives who spoke during the Committee's consideration of the item are reflected in the relevant summary records.[1]

3. For its consideration of the item, the Committee had before it the report of the United Nations Commission on International Trade Law on the work of its fifty-first session (A/73/17).

4. At the 15th meeting, on 16 October, the Chair of the United Nations Commission on International Trade Law at its fifty-first session introduced the report of the Commission on the work of its fifty-first session.

II. Consideration of proposals

A. Draft resolution A/C.6/73/L.11

5. At the 32nd meeting, on 2 November, the representative of Austria, on behalf of Argentina, Armenia, Austria, Belarus, Belgium, Bulgaria, Canada, Central African Republic, Croatia, Cyprus, Czechia, El Salvador, Finland, France, Germany, Greece, Honduras, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Malaysia, Mauritius, Namibia, Poland, Portugal, Republic of Moldova, Romania, Singapore, Slovakia, Sweden, Thailand and Ukraine, introduced a draft resolution entitled "Report of the United Nations Commission on International Trade Law on the work of its fifty-first session" (A/C.6/73/L.11). At the same meeting, the representative of Austria announced that Mexico, the Russian Federation, Seychelles and Switzerland had joined in sponsoring the draft resolution.

6. At the 34th meeting, on 6 November, the representative of Austria announced that Serbia and Spain had also joined in sponsoring the draft resolution.

7. At the same meeting, the Committee adopted draft resolution A/C.6/73/L.11 without a vote (see para. 14, draft resolution I).

B. Draft resolution A/C.6/73/L.12

8. At the 32nd meeting, on 2 November, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled "United Nations Convention on International Settlement Agreements Resulting from Mediation" (A/C.6/73/L.12).

9. At its 34th meeting, on 6 November, the Committee adopted draft resolution A/C.6/73/L.12 without a vote (see para. 14, draft resolution II). The representative of

[1] A/C.6/73/SR.15, A/C.6/73/SR.32 and A/C.6/73/SR.34.

Singapore made a statement in explanation of position, after the adoption of the draft resolution.

C. Draft resolution A/C.6/73/L.13

10. At the 32nd meeting, on 2 November, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled "Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation of the United Nations Commission on International Trade Law" (A/C.6/73/L.13).

11. At its 34th meeting, on 6 November, the Committee adopted draft resolution A/C.6/73/L.13 without a vote (see para. 14, draft resolution III).

D. Draft resolution A/C.6/73/L.14

12. At the 32nd meeting, on 2 November, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled "Model Law on Recognition and Enforcement of Insolvency-Related Judgments of the United Nations Commission on International Trade Law" (A/C.6/73/L.14).

13. At its 34th meeting, on 6 November, the Committee adopted draft resolution A/C.6/73/L.14 without a vote (see para. 14, draft resolution IV).

III. Recommendations of the Sixth Committee

14. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolutions:

Draft resolution I
Report of the United Nations Commission on International Trade Law on the work of its fifty-first session

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Reaffirming its belief that the progressive modernization and harmonization of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity, common interest and respect for the rule of law, to the elimination of discrimination in international trade and, thereby, to peace, stability and the well-being of all peoples,

Having considered the report of the Commission,[2]

Reiterating its concern that activities undertaken by other bodies in the field of international trade law without adequate coordination with the Commission might lead to undesirable duplication of efforts and would not be in keeping with the aim of promoting efficiency, consistency and coherence in the unification and harmonization of international trade law,

[2] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17).

Reaffirming the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in this field, in particular to avoid duplication of efforts, including among organizations formulating rules of international trade, and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law, and to continue, through its secretariat, to maintain close cooperation with other international organs and organizations, including regional organizations, active in the field of international trade law,

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law;[1]

2. *Commends* the Commission for the finalization of the draft convention on international settlement agreements resulting from mediation;[3]

3. *Also commends* the Commission for the finalization and adoption of the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation,[4] the Legislative Guide on Key Principles of a Business Registry[5] and the Model Law on Recognition and Enforcement of Insolvency-Related Judgments and its Guide to Enactment;[6]

4. *Notes with appreciation* the event held to mark the sixtieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention of 1958),[7] at which it was acknowledged that the Convention, with its almost universal acceptance, brings legal certainty to business operations worldwide, thereby contributing to decreasing the level of risk and transactional costs associated with international trade, furthering the Sustainable Development Goals[8] and, by establishing a fundamental legal framework for the use of arbitration and its effectiveness, strengthens respect for binding commitments, inspires confidence in the rule of law and ensures fair treatment in the resolution of disputes arising over contractual rights and obligations;[9]

5. *Notes with satisfaction* the contributions from the Fund for International Development of the Organization of the Petroleum Exporting Countries and from the European Commission, which allow the operation of the repository of published information under the Rules on Transparency in Treaty-based Investor-State Arbitration[10] and that the Commission reiterated its strong and unanimous opinion that the secretariat of the Commission should continue to operate the transparency repository, which constitutes a central feature both of the Rules on Transparency and of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency);[11]

6. *Requests* the Secretary-General to continue to operate, through the secretariat of the Commission, the repository of published information in accordance with article 8 of the Rules on Transparency, as a pilot project until the end of 2020, to be funded entirely by voluntary contributions, and to keep the General Assembly informed of developments regarding the funding and budgetary situation of the transparency repository based on its pilot operation;

7. *Takes note with interest* of the decisions taken by the Commission as regards its future work and the progress made by the Commission in its work in the areas of micro, small and medium-sized enterprises, dispute settlement, investor-State dispute settlement reform, electronic commerce, insolvency law and security interests

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[3] Ibid., chap. III, sect. B, and annex I.
[4] Ibid., chap. III, sect. C, and annex II.
[5] Ibid., chap. IV, sects. B and C.
[6] Ibid., chap. V, sect. A, and annex III.
[7] United Nations, *Treaty Series*, vol. 330, No. 4739.
[8] See resolution 70/1.
[9] See *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), chap. X.
[10] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I.
[11] Resolution 69/116, annex.

and privately financed infrastructure projects,[12] as well as the decisions to take up work on expedited arbitration and, as its next priority, the judicial sale of ships, to conduct exploratory and preparatory work on warehouse receipts, to compile information on legal issues related to the digital economy aimed at enabling the commercial use of new technologies and methods and assisting developing economies in bridging the digital gap, and to undertake exploratory work on contractual networks and the civil law aspects of asset tracing and recovery,[13] and encourages the Commission to continue to move forward efficiently to achieve tangible work outcomes in those areas;

8. *Welcomes* the decision by the Commission to give Working Group IV a more specific mandate to conduct work on legal issues in the area of identity management and trust services with a view to facilitating cross-border recognition of identity management and trust services on the basis of the principles and issues identified by the Working Group at its fifty-sixth session,[14] and takes note of the decision of the Commission to request the Secretariat to prepare, within existing resources, a pilot online tool containing the draft notes on the main issues of cloud computing contracts, for consideration at its next session, in 2019;[15]

9. *Endorses* the efforts and initiatives of the Commission, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law and at promoting the rule of law at the national and international levels in this field, and in this regard appeals to relevant international and regional organizations to coordinate their activities with those of the Commission, to avoid duplication of efforts and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law;

10. *Reaffirms* the importance, in particular for developing countries, of the work of the Commission concerned with technical cooperation and assistance in the field of international trade law reform and development, and in this connection:

(a) Welcomes the initiatives of the Commission towards expanding, through its secretariat, its technical cooperation and assistance programme, in that respect encourages the Secretary-General to seek partnerships with State and non-State actors to increase awareness about the work of the Commission and facilitate the effective implementation of legal standards resulting from its work, and notes in that regard the round table on technical assistance held during the fifty-first session of the Commission, which brought together governmental and intergovernmental organizations active in international development assistance to explore synergies and discuss ways to further cooperate with the secretariat of the Commission in implementing sound reforms of international trade law;

(b) Expresses its appreciation to the Commission for carrying out technical cooperation and assistance activities and for providing assistance with legislative drafting in the field of international trade law, and draws the attention of the Secretary-General to the limited resources that are made available in this field;

(c) Expresses its appreciation to the Governments whose contributions enabled the technical cooperation and assistance activities to take place, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the United Nations Commission on International Trade Law trust fund for symposia and, where appropriate, for the financing of special projects and otherwise to assist the secretariat of the Commission in carrying out technical cooperation and assistance activities, in particular in developing countries;

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[12] See *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), chaps. IV–IX.

[13] Ibid., chap. XVII, sects. A and B.

[14] Ibid., chap. VIII, para. 159.

[15] Ibid., para. 155.

(d) Reiterates its appeal to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and regional development banks, as well as to Governments in their bilateral aid programmes, to support the technical cooperation and assistance programme of the Commission and to cooperate with the Commission and coordinate their activities with those of the Commission in the light of the relevance and importance of the work and programmes of the Commission for the promotion of the rule of law at the national and international levels and for the implementation of the international development agenda, including the achievement of the 2030 Agenda for Sustainable Development;[7]

(e) Recalls its resolutions stressing the need to strengthen support to Member States, upon their request, in the domestic implementation of their respective international obligations through enhanced technical assistance and capacity-building, and welcomes the efforts of the Secretary-General to ensure greater coordination and coherence among United Nations entities and with donors and recipients;

11. *Recalls* the importance of adherence to the rules of procedure and methods of work of the Commission, including transparent and inclusive deliberations, taking into account the summary of conclusions as reproduced in annex III to the report on the work of its forty-third session,[16] requests the Secretariat to issue, prior to meetings of the Commission and of its working groups, a reminder of those rules of procedure and methods of work with a view to ensuring the high quality of the work of the Commission and encouraging the assessment of its instruments, recalls in this regard its previous resolutions related to this matter, and notes that the Commission, during its fifty-first session, welcomed a joint comprehensive proposal submitted by Member States on its methods of work, including to use information-only documents on matters not requiring in-depth discussions, to apply a flexible approach to the allocation of meeting days with the goal of finalizing instruments and subsequently making decisions on future work in consecutive sessions of the Commission, to conduct a more efficient discussion of the topic of the role of the Commission in the promotion of the rule of law and to explore the possibility of reducing the duration of Commission sessions to two weeks, when possible and subject to the need for finalization of ongoing projects by the Commission, all aimed at enhancing the efficiency of the Commission's work as well as reducing the burden on delegations, and to streamline and focus the Commission's agenda and preparation for the session, and notes in that respect that the Secretariat was requested to plan and prepare for the fifty-second session of the Commission, in 2019, on the basis of that proposal;[17]

12. *Welcomes* the activities of the United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific, in the Republic of Korea, towards providing capacity-building and technical assistance services to States in the Asia-Pacific region, including to international and regional organizations, expresses its appreciation to the Republic of Korea and China, whose contributions enabled continuing operation of the Regional Centre, notes that the continuation of the regional presence relies entirely on extrabudgetary resources, including but not limited to voluntary contributions from States, welcomes expressions of interest from other States in hosting regional centres of the Commission, and requests the Secretary-General to keep the General Assembly informed of developments regarding the establishment of regional centres, in particular their funding and budgetary situation;

13. *Notes* that, further to the offer of the Government of Cameroon in 2017, approved by the Commission, to establish, subject to the relevant rules and regulations of the United Nations and the internal approval process of the Office of Legal Affairs of the Secretariat, a regional centre for Africa in Cameroon,[18] the Government of Cameroon is continuing to examine the financial implications and the

[16] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17).
[17] Ibid., *Seventy-third Session, Supplement No. 17* (A/73/17), chap. XVIII, sect. A.
[18] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), para. 293.

feasibility of establishing that regional centre, and encourages the secretariat of the Commission to continue its consultations and consider carefully the level of human resources that it would need for the efficient management of any new regional centre and for ensuring adequate supervision by, and coordination with, Vienna-based secretariat staff,[19] and requests the Commission, in its annual report, to keep the General Assembly informed of developments regarding the project, in particular its funding and budgetary situation;

14. *Appeals* to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General, in order to enable renewal of the provision of that assistance and to increase expert representation from developing countries at sessions of the Commission and its working groups, necessary to build local expertise and capacities in those countries to put in place a regulatory and enabling environment for business, trade and investment;

15. *Decides*, in order to ensure full participation of all Member States in the sessions of the Commission and its working groups, to continue, in the competent Main Committee during the seventy-third session of the General Assembly, its consideration of granting travel assistance to the least developed countries that are members of the Commission, at their request and in consultation with the Secretary-General, and notes the contributions from the European Union and the Swiss Agency for Development and Cooperation to the trust fund, which would facilitate the participation of representatives of developing States in the deliberations of Working Group III;

16. *Endorses* the conviction of the Commission that the implementation and effective use of modern private law standards in international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger and that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General;

17. *Notes* the role of the Commission in promoting the rule of law, respective activity in the Commission at its fifty-first session[20] and the comments transmitted by the Commission, pursuant to paragraph 25 of General Assembly resolution 72/119 of 7 December 2017, highlighting the role in the promotion of the rule of law of the texts adopted or approved by the Commission and of its ongoing work, in particular through wide dissemination of international commercial law, including across the United Nations system;[21]

18. *Notes with satisfaction* that, in paragraph 8 of the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, adopted by consensus as resolution 67/1 of 24 September 2012, Member States recognized the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship and, in this regard, commended the work of the Commission in modernizing and harmonizing international trade law and that, in paragraph 7 of the declaration, Member States expressed their conviction that the rule of law and development were strongly interrelated and mutually reinforcing;

19. *Also notes with satisfaction* that, in paragraph 89 of the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, adopted by the General Assembly by consensus as resolution 69/313 of 27 July 2015,

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[19] Ibid., *Seventy-third Session, Supplement No. 17* (A/73/17), para. 200.
[20] Ibid., paras. 230–231.
[21] Ibid., chap. XV.

States endorsed the efforts and initiatives of the Commission, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law and at promoting the rule of law at the national and international levels in this field;

20. *Reiterates its request* to the Secretary-General, in conformity with resolutions of the General Assembly on documentation-related matters,[22] which, in particular, emphasize that any invitation to limit, where appropriate, the length of documents should not adversely affect either the quality of the presentation or the substance of the documents, to bear in mind the particular characteristics of the mandate and functions of the Commission in the progressive development and codification of international trade law when implementing page limits with respect to the documentation of the Commission;[23]

21. *Requests* the Secretary-General to continue the publication of Commission standards and the provision of summary records of the meetings of the Commission, including committees of the whole established by the Commission for the duration of its annual session, relating to the formulation of normative texts, and takes note of the decision of the Commission to continue the trial use of digital recordings, in parallel with summary records where applicable, with a view to assessing the experience of using digital recordings and, on the basis of that assessment, taking a decision at a future session regarding the possible replacement of summary records by digital recordings;[24]

22. *Recalls* paragraph 48 of its resolution 66/246 of 24 December 2011 regarding the rotation scheme of meetings between Vienna and New York;

23. *Stresses* the importance of promoting the use of texts emanating from the work of the Commission for the global unification and harmonization of international trade law, and to this end urges States that have not yet done so to consider signing, ratifying or acceding to conventions, enacting model laws and encouraging the use of other relevant texts;

24. *Notes with appreciation* the work of the Secretariat on the system for the collection and dissemination of case law on Commission texts in the six official languages of the United Nations (the CLOUT system), notes the resource-intensive nature of the system, acknowledges the need for further resources to sustain and expand it, and in this regard welcomes efforts by the Secretariat towards building partnerships with interested institutions, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to assist the secretariat of the Commission in raising awareness as to the availability and usefulness of the CLOUT system in professional, academic and judiciary circles and in securing the funding required for the coordination and expansion of the system and the establishment, within the secretariat of the Commission, of a pillar focused on the promotion of ways and means of interpreting Commission texts in a uniform manner;

25. *Welcomes* the continuing work of the Secretariat on digests of case law related to Commission texts, including their wide dissemination, as well as the continuing increase in the number of abstracts available through the CLOUT system, in view of the role of the digests and the CLOUT system as important tools for the promotion of the uniform interpretation of international trade law, in particular by building local capacity of judges, arbitrators and other legal practitioners to interpret those standards in the light of their international character and the need to promote uniformity in their application and the observance of good faith in international trade, and notes the satisfaction of the Commission with the performance of the New York

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[22] Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

[23] See resolutions 59/39, para. 9, and 65/21, para. 18; see also *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 124–128.

[24] See *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 276.

Convention website[25] and the successful coordination between that website and the CLOUT system;

26. *Recalls* its resolutions affirming the importance of high-quality, user-friendly and cost-effective United Nations websites and the need for their multilingual development, maintenance and enrichment,[26] commends the fact that the website of the Commission is published simultaneously in the six official languages of the United Nations, and welcomes the continuous efforts of the Commission to maintain and improve its website, including by developing its latest updated version, and to enhance the visibility of its work by utilizing social media features in accordance with the applicable guidelines.[27]

Draft resolution II
United Nations Convention on International Settlement Agreements Resulting from Mediation

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its resolution 57/18 of 19 November 2002, in which it noted the adoption by the Commission of the Model Law on International Commercial Conciliation[28] and expressed the conviction that the Model Law, together with the Conciliation Rules of the Commission[29] recommended in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations,

Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,[30]

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[25] www.newyorkconvention1958.org.

[26] Resolutions 52/214, sect. C, para. 3; 55/222, sect. III, para. 12; 56/64 B, sect. X; 57/130 B, sect. X; 58/101 B, sect. V, paras. 61–76; 59/126 B, sect. V, paras. 76–95; 60/109 B, sect. IV, paras. 66–80; and 61/121 B, sect. IV, paras. 65–77.

[27] See resolution 63/120, para. 20.

[28] Resolution 57/18, annex.

[29] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 106; see also *Yearbook of the United Nations Commission on International Trade Law*, vol. XI: 1980, part three, annex II.

[30] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 238–239; see also A/CN.9/901, para. 52.

Noting with satisfaction that the preparation of the draft convention was the subject of due deliberation and that the draft convention benefited from consultations with Governments as well as intergovernmental and non-governmental organizations,

Taking note of the decision of the Commission at its fifty-first session to submit the draft convention to the General Assembly for its consideration,[31]

Taking note with satisfaction of the draft convention approved by the Commission,[32]

Expressing its appreciation to the Government of Singapore for its offer to host a signing ceremony for the Convention in Singapore,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft convention on international settlement agreements resulting from mediation;

2. *Adopts* the United Nations Convention on International Settlement Agreements Resulting from Mediation, contained in the annex to the present resolution;

3. *Authorizes* a ceremony for the opening for signature of the Convention to be held in Singapore on 7 August 2019, and recommends that the Convention be known as the "Singapore Convention on Mediation";

4. *Calls upon* those Governments and regional economic integration organizations that wish to strengthen the legal framework on international dispute settlement to consider becoming a party to the Convention.

Annex
United Nations Convention on International Settlement Agreements Resulting from Mediation

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Have agreed as follows:

Article 1. Scope of application

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

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[31] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 49.

[32] Ibid., annex I.

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2. Definitions

1. For the purposes of article 1, paragraph 1:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

2. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

3. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

Article 3. General principles

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 5. Grounds for refusing to grant relief

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Article 6. Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Article 7. Other laws or treaties

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

Article 8. Reservations

1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

2. No reservations are permitted except those expressly authorized in this article.

3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited with the depositary.

5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

Article 9. Effect on settlement agreements

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

Article 10. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 11. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in Singapore, on 7 August 2019, and thereafter at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatories.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 12. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a “Party to the Convention”, “Parties to the Convention”, a “State” or “States” in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization.

Article 13. Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 14. Entry into force

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

Article 15. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 16. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

Draft resolution III
Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation of the United Nations Commission on International Trade Law

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its resolution 57/18 of 19 November 2002, in which it noted the adoption by the Commission of the Model Law on International Commercial Conciliation[33] and expressed the conviction that the Model Law, together with the Conciliation Rules of the Commission[34] recommended in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Believing that the amendments to the Model Law on International Commercial Conciliation will significantly assist States in enhancing their legislation governing the use of modern mediation techniques and in formulating such legislation where none currently exists,

Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,[35]

Noting with satisfaction that the preparation of the amendments to the Model Law was the subject of due deliberation and that they benefited from consultations with Governments as well as with intergovernmental and non-governmental organizations,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for finalizing and adopting the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (amending the Model Law on International Commercial Conciliation);[36]

2. *Requests* the Secretary-General to transmit the text of the Model Law to Governments and other interested bodies;

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[33] Resolution 57/18, annex.

[34] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 106; see also *Yearbook of the United Nations Commission on International Trade Law*, vol. XI: 1980, part three, annex II.

[35] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 238–239; see also A/CN.9/901, para. 52.

[36] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), annex II.

3. *Recommends* that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to mediation, bearing in mind the desirability of uniformity of the law of mediation procedures and the specific needs of international commercial mediation practice, and invites States that have used the Model Law to advise the Commission accordingly.

Draft resolution IV
Model Law on Recognition and Enforcement of Insolvency-Related Judgments of the United Nations Commission on International Trade Law

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

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

Convinced that the law of recognition and enforcement of judgments is becoming more and more important in a world in which it is increasingly easy for enterprises and individuals to have assets in more than one State and to move assets across borders,

Considering that international instruments on the recognition and enforcement of judgments in civil and commercial matters exclude insolvency-related judgments from their scope,

Concerned that inadequate coordination and cooperation in cases of cross-border insolvency, which lead to uncertainties associated with recognition and enforcement of insolvency-related judgments, can operate as an obstacle to the fair, efficient and effective administration of cross-border insolvencies, reducing the possibility of rescuing financially troubled but viable businesses, making it more likely that debtors' assets would be concealed or dissipated and hindering reorganizations or liquidations that would be the most advantageous for all interested persons, including the debtors, the debtors' employees and the creditors,

Convinced that fair and internationally standardized legislation on cross-border insolvency that respects national procedural and judicial systems, as expressed by the provisions of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments,[37] that is acceptable to States with different legal, social and economic systems would contribute to the development of international trade and investment,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for finalizing and adopting the Model Law on Recognition and Enforcement of Insolvency-Related Judgments[1] and its guide to enactment;

2. *Requests* the Secretary-General to transmit the text of the Model Law, together with its guide to enactment, to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to insolvency, bearing in mind the need for internationally harmonized legislation governing and facilitating instances of cross-border insolvency, and invites States that have used the Model Law to advise the Commission accordingly;

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[37] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), annex III.

4. *Also recommends* that all States continue to consider implementation of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law.[38]

[38] Resolution 52/158, annex.

D. General Assembly resolutions 73/197, 73/198, 73/199, 73/200 and 73/207

73/197. Report of the United Nations Commission on International Trade Law on the work of its fifty-first session

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Reaffirming its belief that the progressive modernization and harmonization of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity, common interest and respect for the rule of law, to the elimination of discrimination in international trade and, thereby, to peace, stability and the well-being of all peoples,

Having considered the report of the Commission,[39]

Reiterating its concern that activities undertaken by other bodies in the field of international trade law without adequate coordination with the Commission might lead to undesirable duplication of efforts and would not be in keeping with the aim of promoting efficiency, consistency and coherence in the unification and harmonization of international trade law,

Reaffirming the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in this field, in particular to avoid duplication of efforts, including among organizations formulating rules of international trade, and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law, and to continue, through its secretariat, to maintain close cooperation with other international organs and organizations, including regional organizations, active in the field of international trade law,

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law;[39]

2. *Commends* the Commission for the finalization of the draft convention on international settlement agreements resulting from mediation;[40]

3. *Also commends* the Commission for the finalization and adoption of the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation,[41] the Legislative Guide on Key Principles of a Business Registry[42] and the Model Law on Recognition and Enforcement of Insolvency-Related Judgments and its Guide to Enactment;[43]

4. *Notes with appreciation* the event held to mark the sixtieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention of 1958),[44] at which it was acknowledged that the Convention, with its almost universal acceptance, brings legal certainty to business operations worldwide, thereby contributing to decreasing the level of risk and transactional costs

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[39] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17).
[40] Ibid., chap. III, sect. B, and annex I.
[41] Ibid., chap. III, sect. C, and annex II.
[42] Ibid., chap. IV, sects. B and C.
[43] Ibid., chap. V, sect. A, and annex III.
[44] United Nations, *Treaty Series*, vol. 330, No. 4739.

associated with international trade, furthering the Sustainable Development Goals[45] and, by establishing a fundamental legal framework for the use of arbitration and its effectiveness, strengthens respect for binding commitments, inspires confidence in the rule of law and ensures fair treatment in the resolution of disputes arising over contractual rights and obligations;[46]

5. *Notes with satisfaction* the contributions from the Fund for International Development of the Organization of the Petroleum Exporting Countries and from the European Commission, which allow the operation of the repository of published information under the Rules on Transparency in Treaty-based Investor-State Arbitration[47] and that the Commission reiterated its strong and unanimous opinion that the secretariat of the Commission should continue to operate the transparency repository, which constitutes a central feature both of the Rules on Transparency and of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency);[48]

6. *Requests* the Secretary-General to continue to operate, through the secretariat of the Commission, the repository of published information in accordance with article 8 of the Rules on Transparency, as a pilot project until the end of 2020, to be funded entirely by voluntary contributions, and to keep the General Assembly informed of developments regarding the funding and budgetary situation of the transparency repository based on its pilot operation;

7. *Takes note with interest* of the decisions taken by the Commission as regards its future work and the progress made by the Commission in its work in the areas of micro, small and medium-sized enterprises, dispute settlement, investor-State dispute settlement reform, electronic commerce, insolvency law and security interests and privately financed infrastructure projects,[49] as well as the decisions to take up work on expedited arbitration and, as its next priority, the judicial sale of ships, to conduct exploratory and preparatory work on warehouse receipts, to compile information on legal issues related to the digital economy aimed at enabling the commercial use of new technologies and methods and assisting developing economies in bridging the digital gap, and to undertake exploratory work on contractual networks and the civil law aspects of asset tracing and recovery, [50] and encourages the Commission to continue to move forward efficiently to achieve tangible work outcomes in those areas;

8. *Welcomes* the decision by the Commission to give Working Group IV a more specific mandate to conduct work on legal issues in the area of identity management and trust services with a view to facilitating cross-border recognition of identity management and trust services on the basis of the principles and issues identified by the Working Group at its fifty-sixth session,[51] and takes note of the decision of the Commission to request the Secretariat to prepare, within existing resources, a pilot online tool containing the draft notes on the main issues of cloud computing contracts, for consideration at its next session, in 2019;[52]

9. *Endorses* the efforts and initiatives of the Commission, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law and at promoting the rule of law at the national and international levels in this field, and in this regard appeals to relevant international and regional organizations to coordinate their activities with those of the Commission, to avoid duplication of efforts and to promote

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[45] See resolution 70/1.
[46] See *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), chap. X.
[47] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I.
[48] Resolution 69/116, annex.
[49] See *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), chaps. IV–IX.
[50] Ibid., chap. XVII, sects. A and B.
[51] Ibid., chap. VIII, para. 159.
[52] Ibid., para. 155.

efficiency, consistency and coherence in the modernization and harmonization of international trade law;

10. *Reaffirms* the importance, in particular for developing countries, of the work of the Commission concerned with technical cooperation and assistance in the field of international trade law reform and development, and in this connection:

(a) Welcomes the initiatives of the Commission towards expanding, through its secretariat, its technical cooperation and assistance programme, in that respect encourages the Secretary-General to seek partnerships with State and non-State actors to increase awareness about the work of the Commission and facilitate the effective implementation of legal standards resulting from its work, and notes in that regard the round table on technical assistance held during the fifty-first session of the Commission, which brought together governmental and intergovernmental organizations active in international development assistance to explore synergies and discuss ways to further cooperate with the secretariat of the Commission in implementing sound reforms of international trade law;

(b) Expresses its appreciation to the Commission for carrying out technical cooperation and assistance activities and for providing assistance with legislative drafting in the field of international trade law, and draws the attention of the Secretary-General to the limited resources that are made available in this field;

(c) Expresses its appreciation to the Governments whose contributions enabled the technical cooperation and assistance activities to take place, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the United Nations Commission on International Trade Law trust fund for symposia and, where appropriate, for the financing of special projects and otherwise to assist the secretariat of the Commission in carrying out technical cooperation and assistance activities, in particular in developing countries;

(d) Reiterates its appeal to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and regional development banks, as well as to Governments in their bilateral aid programmes, to support the technical cooperation and assistance programme of the Commission and to cooperate with the Commission and coordinate their activities with those of the Commission in the light of the relevance and importance of the work and programmes of the Commission for the promotion of the rule of law at the national and international levels and for the implementation of the international development agenda, including the achievement of the 2030 Agenda for Sustainable Development;[45]

(e) Recalls its resolutions stressing the need to strengthen support to Member States, upon their request, in the domestic implementation of their respective international obligations through enhanced technical assistance and capacity-building, and welcomes the efforts of the Secretary-General to ensure greater coordination and coherence among United Nations entities and with donors and recipients;

11. *Recalls* the importance of adherence to the rules of procedure and methods of work of the Commission, including transparent and inclusive deliberations, taking into account the summary of conclusions as reproduced in annex III to the report on the work of its forty-third session,[53] requests the Secretariat to issue, prior to meetings of the Commission and of its working groups, a reminder of those rules of procedure and methods of work with a view to ensuring the high quality of the work of the Commission and encouraging the assessment of its instruments, recalls in this regard its previous resolutions related to this matter, and notes that the Commission, during its fifty-first session, welcomed a joint comprehensive proposal submitted by Member States on its methods of work, including to use information-only documents on matters not requiring in-depth discussions, to apply a flexible approach to the allocation of meeting days with the goal of finalizing instruments and subsequently making decisions on future work in consecutive sessions of the Commission, to

[53] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17).

conduct a more efficient discussion of the topic of the role of the Commission in the promotion of the rule of law and to explore the possibility of reducing the duration of Commission sessions to two weeks, when possible and subject to the need for finalization of ongoing projects by the Commission, all aimed at enhancing the efficiency of the Commission's work as well as reducing the burden on delegations, and to streamline and focus the Commission's agenda and preparation for the session, and notes in that respect that the Secretariat was requested to plan and prepare for the fifty-second session of the Commission, in 2019, on the basis of that proposal;[54]

12. *Welcomes* the activities of the United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific, in the Republic of Korea, towards providing capacity-building and technical assistance services to States in the Asia-Pacific region, including to international and regional organizations, expresses its appreciation to the Republic of Korea and China, whose contributions enabled continuing operation of the Regional Centre, notes that the continuation of the regional presence relies entirely on extrabudgetary resources, including but not limited to voluntary contributions from States, welcomes expressions of interest from other States in hosting regional centres of the Commission, and requests the Secretary-General to keep the General Assembly informed of developments regarding the establishment of regional centres, in particular their funding and budgetary situation;

13. *Notes* that, further to the offer of the Government of Cameroon in 2017, approved by the Commission, to establish, subject to the relevant rules and regulations of the United Nations and the internal approval process of the Office of Legal Affairs of the Secretariat, a regional centre for Africa in Cameroon,[55] the Government of Cameroon is continuing to examine the financial implications and the feasibility of establishing that regional centre, and encourages the secretariat of the Commission to continue its consultations and consider carefully the level of human resources that it would need for the efficient management of any new regional centre and for ensuring adequate supervision by, and coordination with, Vienna-based secretariat staff,[56] and requests the Commission, in its annual report, to keep the General Assembly informed of developments regarding the project, in particular its funding and budgetary situation;

14. *Appeals* to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General, in order to enable renewal of the provision of that assistance and to increase expert representation from developing countries at sessions of the Commission and its working groups, necessary to build local expertise and capacities in those countries to put in place a regulatory and enabling environment for business, trade and investment;

15. *Decides*, in order to ensure full participation of all Member States in the sessions of the Commission and its working groups, to continue, in the competent Main Committee during the seventy-third session of the General Assembly, its consideration of granting travel assistance to the least developed countries that are members of the Commission, at their request and in consultation with the Secretary-General, and notes the contributions from the European Union and the Swiss Agency for Development and Cooperation to the trust fund, which would facilitate the participation of representatives of developing States in the deliberations of Working Group III;

16. *Endorses* the conviction of the Commission that the implementation and effective use of modern private law standards in international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger and that the promotion of the rule of law in commercial relations

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[54] Ibid., *Seventy-third Session, Supplement No. 17* (A/73/17), chap. XVIII, sect. A.
[55] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), para. 293.
[56] Ibid., *Seventy-third Session, Supplement No. 17* (A/73/17), para. 200.

should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General;

17. *Notes* the role of the Commission in promoting the rule of law, respective activity in the Commission at its fifty-first session[57] and the comments transmitted by the Commission, pursuant to paragraph 25 of General Assembly resolution 72/119 of 7 December 2017, highlighting the role in the promotion of the rule of law of the texts adopted or approved by the Commission and of its ongoing work, in particular through wide dissemination of international commercial law, including across the United Nations system;[58]

18. *Notes with satisfaction* that, in paragraph 8 of the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, adopted by consensus as resolution 67/1 of 24 September 2012, Member States recognized the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship and, in this regard, commended the work of the Commission in modernizing and harmonizing international trade law and that, in paragraph 7 of the declaration, Member States expressed their conviction that the rule of law and development were strongly interrelated and mutually reinforcing;

19. *Also notes with satisfaction* that, in paragraph 89 of the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, adopted by the General Assembly by consensus as resolution 69/313 of 27 July 2015, States endorsed the efforts and initiatives of the Commission, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law and at promoting the rule of law at the national and international levels in this field;

20. *Reiterates its request* to the Secretary-General, in conformity with resolutions of the General Assembly on documentation-related matters,[59] which, in particular, emphasize that any invitation to limit, where appropriate, the length of documents should not adversely affect either the quality of the presentation or the substance of the documents, to bear in mind the particular characteristics of the mandate and functions of the Commission in the progressive development and codification of international trade law when implementing page limits with respect to the documentation of the Commission;[60]

21. *Requests* the Secretary-General to continue the publication of Commission standards and the provision of summary records of the meetings of the Commission, including committees of the whole established by the Commission for the duration of its annual session, relating to the formulation of normative texts, and takes note of the decision of the Commission to continue the trial use of digital recordings, in parallel with summary records where applicable, with a view to assessing the experience of using digital recordings and, on the basis of that assessment, taking a decision at a future session regarding the possible replacement of summary records by digital recordings;[61]

22. *Recalls* paragraph 48 of its resolution 66/246 of 24 December 2011 regarding the rotation scheme of meetings between Vienna and New York;

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[57] Ibid., paras. 230–231.
[58] Ibid., chap. XV.
[59] Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.
[60] See resolutions 59/39, para. 9, and 65/21, para. 18; see also *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 124–128.
[61] See *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 276.

23. *Stresses* the importance of promoting the use of texts emanating from the work of the Commission for the global unification and harmonization of international trade law, and to this end urges States that have not yet done so to consider signing, ratifying or acceding to conventions, enacting model laws and encouraging the use of other relevant texts;

24. *Notes with appreciation* the work of the Secretariat on the system for the collection and dissemination of case law on Commission texts in the six official languages of the United Nations (the CLOUT system), notes the resource-intensive nature of the system, acknowledges the need for further resources to sustain and expand it, and in this regard welcomes efforts by the Secretariat towards building partnerships with interested institutions, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to assist the secretariat of the Commission in raising awareness as to the availability and usefulness of the CLOUT system in professional, academic and judiciary circles and in securing the funding required for the coordination and expansion of the system and the establishment, within the secretariat of the Commission, of a pillar focused on the promotion of ways and means of interpreting Commission texts in a uniform manner;

25. *Welcomes* the continuing work of the Secretariat on digests of case law related to Commission texts, including their wide dissemination, as well as the continuing increase in the number of abstracts available through the CLOUT system, in view of the role of the digests and the CLOUT system as important tools for the promotion of the uniform interpretation of international trade law, in particular by building local capacity of judges, arbitrators and other legal practitioners to interpret those standards in the light of their international character and the need to promote uniformity in their application and the observance of good faith in international trade, and notes the satisfaction of the Commission with the performance of the New York Convention website[62] and the successful coordination between that website and the CLOUT system;

26. *Recalls* its resolutions affirming the importance of high-quality, user-friendly and cost-effective United Nations websites and the need for their multilingual development, maintenance and enrichment,[63] commends the fact that the website of the Commission is published simultaneously in the six official languages of the United Nations, and welcomes the continuous efforts of the Commission to maintain and improve its website, including by developing its latest updated version, and to enhance the visibility of its work by utilizing social media features in accordance with the applicable guidelines.[64]

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[62] www.newyorkconvention1958.org.

[63] Resolutions 52/214, sect. C, para. 3; 55/222, sect. III, para. 12; 56/64 B, sect. X; 57/130 B, sect. X; 58/101 B, sect. V, paras. 61–76; 59/126 B, sect. V, paras. 76–95; 60/109 B, sect. IV, paras. 66–80; and 61/121 B, sect. IV, paras. 65–77.

[64] See resolution 63/120, para. 20.

73/198. United Nations Convention on International Settlement Agreements Resulting from Mediation

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its resolution 57/18 of 19 November 2002, in which it noted the adoption by the Commission of the Model Law on International Commercial Conciliation[65] and expressed the conviction that the Model Law, together with the Conciliation Rules of the Commission[66] recommended in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations,

Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,[67]

Noting with satisfaction that the preparation of the draft convention was the subject of due deliberation and that the draft convention benefited from consultations with Governments as well as intergovernmental and non-governmental organizations,

Taking note of the decision of the Commission at its fifty-first session to submit the draft convention to the General Assembly for its consideration,[68]

Taking note with satisfaction of the draft convention approved by the Commission,[69]

Expressing its appreciation to the Government of Singapore for its offer to host a signing ceremony for the Convention in Singapore,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft convention on international settlement agreements resulting from mediation;

2. *Adopts* the United Nations Convention on International Settlement Agreements Resulting from Mediation, contained in the annex to the present resolution;

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[65] Resolution 57/18, annex.

[66] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 106; see also *Yearbook of the United Nations Commission on International Trade Law*, vol. XI: 1980, part three, annex II.

[67] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 238–239; see also A/CN.9/901, para. 52.

[68] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 49.

[69] Ibid., annex I.

3. *Authorizes* a ceremony for the opening for signature of the Convention to be held in Singapore on 7 August 2019, and recommends that the Convention be known as the "Singapore Convention on Mediation";

4. *Calls upon* those Governments and regional economic integration organizations that wish to strengthen the legal framework on international dispute settlement to consider becoming a party to the Convention.

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Annex

United Nations Convention on International Settlement Agreements Resulting from Mediation

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Have agreed as follows:

Article 1
Scope of application

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2
Definitions

1. For the purposes of article 1, paragraph 1:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

2. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

3. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

Article 3
General principles

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4
Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 5
Grounds for refusing to grant relief

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Article 6
Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Article 7
Other laws or treaties

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

Article 8
Reservations

1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

2. No reservations are permitted except those expressly authorized in this article.

3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited with the depositary.

5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

Article 9
Effect on settlement agreements

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

Article 10
Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 11
Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in Singapore, on 7 August 2019, and thereafter at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatories.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 12
Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a “Party to the Convention”, “Parties to the Convention”, a “State” or “States” in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization.

Article 13
Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 14
Entry into force

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

Article 15
Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 16
Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is

specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

73/199. Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation of the United Nations Commission on International Trade Law

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its resolution 57/18 of 19 November 2002, in which it noted the adoption by the Commission of the Model Law on International Commercial Conciliation[70] and expressed the conviction that the Model Law, together with the Conciliation Rules of the Commission[71] recommended in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Believing that the amendments to the Model Law on International Commercial Conciliation will significantly assist States in enhancing their legislation governing the use of modern mediation techniques and in formulating such legislation where none currently exists,

Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,[72]

Noting with satisfaction that the preparation of the amendments to the Model Law was the subject of due deliberation and that they benefited from consultations with Governments as well as with intergovernmental and non-governmental organizations,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for finalizing and adopting the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (amending the Model Law on International Commercial Conciliation);[73]

2. *Requests* the Secretary-General to transmit the text of the Model Law to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to mediation, bearing in mind the desirability of uniformity of the law of mediation procedures and the specific needs

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[70] Resolution 57/18, annex.

[71] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 106; see also *Yearbook of the United Nations Commission on International Trade Law*, vol. XI: 1980, part three, annex II.

[72] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 238–239; see also A/CN.9/901, para. 52.

[73] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), annex II.

of international commercial mediation practice, and invites States that have used the Model Law to advise the Commission accordingly.

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73/200. Model Law on Recognition and Enforcement of Insolvency-Related Judgments of the United Nations Commission on International Trade Law

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

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

Convinced that the law of recognition and enforcement of judgments is becoming more and more important in a world in which it is increasingly easy for enterprises and individuals to have assets in more than one State and to move assets across borders,

Considering that international instruments on the recognition and enforcement of judgments in civil and commercial matters exclude insolvency-related judgments from their scope,

Concerned that inadequate coordination and cooperation in cases of cross-border insolvency, which lead to uncertainties associated with recognition and enforcement of insolvency-related judgments, can operate as an obstacle to the fair, efficient and effective administration of cross-border insolvencies, reducing the possibility of rescuing financially troubled but viable businesses, making it more likely that debtors' assets would be concealed or dissipated and hindering reorganizations or liquidations that would be the most advantageous for all interested persons, including the debtors, the debtors' employees and the creditors,

Convinced that fair and internationally standardized legislation on cross-border insolvency that respects national procedural and judicial systems, as expressed by the provisions of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments,[140] that is acceptable to States with different legal, social and economic systems would contribute to the development of international trade and investment,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for finalizing and adopting the Model Law on Recognition and Enforcement of Insolvency-Related Judgments[140] and its guide to enactment;

2. *Requests* the Secretary-General to transmit the text of the Model Law, together with its guide to enactment, to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to insolvency, bearing in mind the need for internationally harmonized legislation governing and facilitating instances of cross-border insolvency, and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that all States continue to consider implementation of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law.[141]

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[140] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), annex III.

[141] Resolution 52/158, annex.

73/207. The rule of law at the national and international levels

The General Assembly,

Recalling its resolution 72/119 of 7 December 2017,

Reaffirming its commitment to the purposes and principles of the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world, and reiterating its determination to foster strict respect for them and to establish a just and lasting peace all over the world,

Reaffirming that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations,

Reaffirming also the need for universal adherence to and implementation of the rule of law at both the national and international levels and its solemn commitment to an international order based on the rule of law and international law, which, together with the principles of justice, is essential for peaceful coexistence and cooperation among States,

Bearing in mind that the activities of the United Nations carried out in support of efforts of Governments to promote and consolidate the rule of law are undertaken in accordance with the Charter, and stressing the need to strengthen support to Member States, upon their request, in the domestic implementation of their respective international obligations through enhanced technical assistance and capacity-building,

Convinced that the advancement of the rule of law at the national and international levels is essential for the realization of sustained economic growth, sustainable development, the eradication of poverty and hunger and the protection of all human rights and fundamental freedoms, and acknowledging that collective security depends on effective cooperation, in accordance with the Charter and international law, against transnational threats,

Reaffirming the duty of all States to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations and to settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered, in accordance with Chapter VI of the Charter, and calling upon States that have not yet done so to consider accepting the jurisdiction of the International Court of Justice in accordance with its Statute,

Convinced that the promotion of and respect for the rule of law at the national and international levels, as well as justice and good governance, should guide the activities of the United Nations and its Member States,

Recalling paragraph 134 (e) of the 2005 World Summit Outcome,[142]

1. *Recalls* the high-level meeting of the General Assembly on the rule of law at the national and international levels, held during the high-level segment of its sixty-seventh session, and the declaration adopted at that meeting,[143] takes note of the report of the Secretary-General submitted pursuant to paragraph 41 of the declaration,[144] and requests the Sixth Committee to continue its consideration of ways and means of further developing the linkages between the rule of law and the three pillars of the United Nations;

2. *Acknowledges* the efforts to strengthen the rule of law through voluntary pledges, encourages all States to consider making pledges, individually or jointly, based on their national priorities, and also encourages those States that have made pledges to continue to exchange information, knowledge and best practices in this regard;

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[142] Resolution 60/1.
[143] Resolution 67/1.
[144] A/68/213/Add.1.

3. *Takes note* of the annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities;[145]

4. *Encourages* the Secretary-General and the United Nations system to accord high priority to rule of law activities;

5. *Reaffirms* the role of the General Assembly in encouraging the progressive development of international law and its codification, and further reaffirms that States shall abide by all of their obligations under international law;

6. *Also reaffirms* the imperative of upholding and promoting the rule of law at the international level in accordance with the principles of the Charter of the United Nations;

7. *Further reaffirms* its commitment to working tirelessly for the full implementation of the 2030 Agenda for Sustainable Development,[146] and recalls that the goals and targets are integrated and indivisible and balance the three dimensions of sustainable development;

8. *Recognizes* the role of multilateral and bilateral treaties and treaty processes in advancing the rule of law, and encourages States to further consider the promotion of treaties in areas where international cooperation could benefit from treaties;

9. *Welcomes* the dialogue initiated by the Rule of Law Coordination and Resource Group and the Rule of Law Unit in the Executive Office of the Secretary-General with Member States on the topic "Promoting the rule of law at the international level", and calls for the continuation of this dialogue with a view to fostering the rule of law at the international level;

10. *Recognizes* the importance of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law to the furtherance of United Nations rule of law programmes and activities, emphasizes that further technical assistance and capacity-building initiatives, focused on increasing and improving the participation of Member States in the multilateral treaty process, should be examined, and invites States to support these activities;

11. *Stresses* the importance of adherence to the rule of law at the national level and the need to strengthen support to Member States, upon their request, in the domestic implementation of their respective international obligations through enhanced technical assistance and capacity-building in order to develop, reinforce and maintain domestic institutions active in the promotion of rule of law at the national and international levels, subject to national ownership, strategies and priorities;

12. *Reiterates its request* to the Secretary-General to ensure greater coordination and coherence among the United Nations entities and with donors and recipients, and reiterates its call for greater evaluation of the effectiveness of such activities, including possible measures to improve the effectiveness of those capacity-building activities;

13. *Calls*, in this context, for dialogue to be enhanced among all stakeholders, with a view to placing national perspectives at the centre of rule of law assistance in order to strengthen national ownership, while recognizing that rule of law activities must be anchored in a national context and that States have different national experiences in the development of their systems of the rule of law, taking into account their legal, political, socioeconomic, cultural, religious and other local specificities, while also recognizing that there are common features founded on international norms and standards;

14. *Calls upon* the Secretary-General and the United Nations system to systematically address, as appropriate, aspects of the rule of law in relevant activities, including the participation of women in rule of law-related activities, recognizing the importance of the rule of law to virtually all areas of United Nations engagement;

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[145] A/73/253.

[146] Resolution 70/1.

15. *Expresses full support* for the overall coordination and coherence role of the Rule of Law Coordination and Resource Group within the United Nations system, within existing mandates, supported by the Rule of Law Unit and under the leadership of the Deputy Secretary-General;

16. *Requests* the Secretary-General to submit, in a timely manner, his next annual report on United Nations rule of law activities, in accordance with paragraph 5 of its resolution 63/128 of 11 December 2008, addressing, in a balanced manner, the national and international dimensions of the rule of law;

17. *Recognizes* the importance of restoring confidence in the rule of law as a key element of transitional justice;

18. *Recalls* the commitment of Member States to take all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid, encourages further dialogue and the sharing of national practices and expertise in strengthening the rule of law through access to justice, including with regard to the provision of birth registration for all, appropriate registration and documentation of refugees, migrants, asylum seekers and stateless persons, and legal aid, where appropriate, in both criminal and civil proceedings, and in this regard recognizes the role of knowledge and technology, including in judicial systems, and stresses the need to intensify the assistance extended to Governments upon their request;

19. *Stresses* the importance of promoting the sharing of national practices and of inclusive dialogue, welcomes the proposals made by the Secretary-General, inviting Member States to voluntarily exchange national best practices on the rule of law in informal meetings and on an electronic depository of best practices on the United Nations rule of law website, and invites Member States to do so;

20. *Invites* the International Court of Justice, the United Nations Commission on International Trade Law and the International Law Commission to continue to comment, in their respective reports to the General Assembly, on their current roles in promoting the rule of law;

21. *Invites* the Rule of Law Coordination and Resource Group and the Rule of Law Unit to continue their dialogue with all Member States by interacting with them in a regular, transparent and inclusive manner, in particular in informal briefings;

22. *Stresses* the need for the Rule of Law Unit to carry out its tasks in an effective and sustainable manner and the need to provide it with reasonable means required to that effect;

23. *Decides* to include in the provisional agenda of its seventy-fourth session the item entitled “The rule of law at the national and international levels”, and invites Member States to focus their comments during the upcoming Sixth Committee debate on the subtopic “Sharing best practices and ideas to promote the respect of States for international law”.

62nd plenary meeting
20 December 2018

Part Two

STUDIES AND REPORTS ON SPECIFIC SUBJECTS

I. MICRO, SMALL AND MEDIUM-SIZED ENTERPRISES (MSMEs)

A. Report of the Working Group on MSMEs on the work of its twenty-ninth session (Vienna, 16–20 October 2017)

(A/CN.9/928)

[Original: English]

Contents

I. Introduction

1. At its forty-sixth session, in 2013, the Commission requested that a working group should commence work aimed at reducing the legal obstacles encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle.[1] At that same session, the Commission agreed that consideration of the issues pertaining to the creation of an enabling legal environment for MSMEs should begin with a focus on the legal questions surrounding the simplification of incorporation.[2]

2. At its twenty-second session (New York, 10 to 14 February 2014), Working Group I (MSMEs) commenced its work according to the mandate received from the Commission. The Working Group engaged in preliminary discussion in respect of a number of broad issues relating to the development of a legal text on simplified

[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

[2] For a history of the evolution of this topic on the UNCITRAL agenda, see A/CN.9/WG.I/WP.97, paras. 5–20.

incorporation[3] as well as on what form that text might take,[4] and business registration was said to be of particular relevance in the future deliberations of the Working Group.[5]

3. At its forty-seventh session, in 2014, the Commission reaffirmed the mandate of Working Group I, as set out above in paragraph 1.[6]

4. At its twenty-third session (Vienna, 17 to 21 November 2014), Working Group I continued its work in accordance with the mandate received from the Commission. Following a discussion of the issues raised in working paper A/CN.9/WG.I/WP.85 in respect of best practices in business registration, the Working Group requested the Secretariat to prepare further materials based on parts IV and V of that working paper for discussion at a future session. In its discussion of the legal questions surrounding the simplification of incorporation, the Working Group considered the issues outlined in the framework set out in working paper A/CN.9/WG.I/WP.86, and agreed that it would resume its deliberations at its twenty-fourth session beginning with paragraph 34 of that document.

5. At its twenty-fourth session (New York, 13 to 17 April 2015), the Working Group continued its discussion of the legal questions surrounding the simplification of incorporation. After initial consideration of the issues as set out in Working Paper A/CN.9/WG.I/WP.86, the Working Group decided that it should continue its work by considering the first six articles of the draft model law and commentary thereon contained in Working Paper A/CN.9/WG.I/WP.89, without prejudice to the final form of the legislative text, which had not yet been decided. Further to a proposal from several delegations, the Working Group agreed to continue its discussion of the issues included in A/CN.9/WG.I/WP.89, bearing in mind the general principles outlined in the proposal, including the "think small first" approach, and to prioritize those aspects of the draft text in A/CN.9/WG.I/WP.89 that were the most relevant for simplified business entities. The Working Group also agreed that it would discuss the alternative models introduced in A/CN.9/WG.I/WP.87 at a later stage.

6. At its forty-eighth session, in 2015, the Commission noted the progress made by the Working Group in the analysis of the legal issues surrounding the simplification of incorporation and to good practices in business registration, both of which aimed at reducing the legal obstacles encountered by MSMEs throughout their life cycle. After discussion, the Commission reaffirmed the mandate of the Working Group under the terms of reference established by the Commission at its forty-sixth session in 2013 and confirmed at its forty-seventh session in 2014.[7] In its discussion in respect of the future legislative activity, the Commission also agreed that document A/CN.9/WG.I/WP.83 should be included among the documents under consideration by Working Group I for the simplification of incorporation.[8]

7. At its twenty-fifth session (Vienna, 19 to 23 October 2015), the Working Group continued its preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, exploring the legal issues surrounding the simplification of incorporation and on good practices in business registration. In terms of the later, following presentation by the Secretariat of documents A/CN.9/WG.I/WP.93, Add.1 and Add.2 on key principles of business registration and subsequent consideration by the Working Group of A/CN.9/WG.I/WP.93, it was decided that a document along the lines of a concise legislative guide on key principles in business registration should be prepared, without prejudice to the final form that the materials might take. To that end, the Secretariat was requested to prepare a set of draft recommendations to be considered by the Working Group when it resumed its consideration of Working

[3] A/CN.9/800, paras. 22–31, 39–46 and 51–64.
[4] Ibid., paras. 32–38.
[5] Ibid., paras. 47–50.
[6] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134.
[7] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 220 and 225; *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134 and *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.
[8] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 340.

Papers A/CN.9/WG.I/WP.93, Add.1 and Add.2 at its next session.[9] In respect of the legal issues surrounding the simplification of incorporation, the Working Group resumed its consideration of the draft model law on a simplified business entity as contained in working paper A/CN.9/WG.I/WP.89, starting with Chapter VI on organization of the simplified business entity, and continuing on with Chapter VIII on dissolution and winding up, Chapter VII on restructuring, and draft article 35 on financial statements (contained in Chapter IX on miscellaneous matters).[10] The Working Group agreed to continue discussion of the draft text in Working Paper A/CN.9/WG.I/WP.89 at its twenty-sixth session, commencing with Chapter III on shares and capital, and continuing with Chapter V on shareholders' meetings.

8. At its twenty-sixth session (New York, 4 to 8 April 2016), Working Group I continued its consideration of the legal issues surrounding the simplification of incorporation and on key principles in business registration. In respect of the former, the Working Group resumed its deliberations on the basis of working paper A/CN.9/WG.I/WP.89. Following its discussion of the issues in Chapters III and V,[11] the Working Group decided that the text being prepared on a simplified business entity should be in the form of a legislative guide, and requested the Secretariat to prepare for discussion at a future session a draft legislative guide that reflected its policy discussions to date (see A/CN.9/WG.I/WP.99 and Add.1).[12] In respect of key principles in business registration, the Working Group considered recommendations 1 to 10 of the draft commentary (A/CN.9/WG.I/WP.93, Add.1 and Add.2) and recommendations (A/CN.9/WG.I/WP.96 and Add.1) for a legislative guide, and requested the Secretariat to combine those two sets of documents into a single draft legislative guide for discussion at a future session.[13] In addition, the Working Group also considered the general architecture of its work on MSMEs, and agreed that its MSME work should be accompanied by an introductory document along the lines of A/CN.9/WG.I/WP.92, which would form a part of the final text and would provide an overarching framework for current and future work on MSMEs.[14] The Working Group also decided at its twenty-sixth session[15] that it would devote the deliberations at its twenty-seventh session to deliberations on a draft legislative guide on a simplified business entity, and its deliberations at its twenty-eighth session to a consideration of a draft legislative guide reflecting key principles and good practices in business registration.

9. At its forty-ninth session (New York, 27 June to 15 July 2016), the Commission commended the Working Group for its progress in the preparation of legal standards in respect of the legal issues surrounding the simplification of incorporation and to key principles in business registration, both of which aimed at reducing the legal obstacles faced by MSMEs throughout their life cycle. The Commission also noted the decision of the Working Group to prepare a legislative guide on each of those topics and States were encouraged to ensure that their delegations included experts on business registration so as to facilitate its work.[16]

10. At its twenty-seventh session, the Working Group continued its deliberations. As decided at its twenty-sixth session,[17] the Working Group spent the entire twenty-seventh session considering a draft legislative guide on a simplified business entity, leaving consideration of the draft legislative guide on key principles of a business registry for the first week of its twenty-eighth session. The Working Group considered the issues outlined in working papers A./CN.9/WG.I/WP.99 and Add.1 on

[9] See Report of Working Group I (MSMEs) on the work of its twenty-fifth session, A/CN.9/860, para. 73.
[10] Ibid., paras. 76 to 96.
[11] Report of Working Group I (MSMEs) on the work of its twenty-sixth session, A/CN.9/866, paras. 22 to 47.
[12] Ibid., paras. 48 to 50.
[13] Ibid., paras. 51 to 85 and 90.
[14] Ibid., paras. 86 to 87.
[15] Report of Working Group I (MSMEs) on the work of its twenty-sixth session, A/CN.9/866, para. 90.
[16] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 224.
[17] A/CN.9/866, para. 90.

an UNCITRAL limited liability organization (UNLLO), beginning with section A on general provisions (draft recommendations 1 to 6), section B on the formation of an UNLLO (draft recommendations 7 to 10), and section C on the organization of an UNLLO (draft recommendations 11 to 13). The Working Group also heard a short presentation of working paper A/CN.9/WG.I/WP.94 of the French legislative approach known as an "Entrepreneur with Limited Liability" (or EIRL), which represented a possible alternative legislative model applicable to micro and small businesses.

11. At its twenty-eighth session (New York, 1 to 9 May 2017), the Working Group considered both topics currently on its agenda. Those deliberations commenced with a review of the entire draft legislative guide on key principles of a business registry (A/CN.9/WG.I/WP.101), save for the introductory section and draft recommendation 9 (Core functions of a business registry) and its attendant commentary, to which the Working Group agreed to revert at a future session. With respect to its deliberations regarding the creation of a simplified business entity (A/CN.9/WG.I/WP.99 and Add.1), the Working Group continued the work begun at its twenty-seventh session, and considered the recommendations (and related commentary) of the draft legislative guide on an UNLLO in sections D, E and F.

12. At its fiftieth session (Vienna, 3 to 21 July 2017), the Commission commended the Working Group for the progress it had made in its two areas of work on the preparation of a draft legislative guide on an UNLLO and a draft legislative guide on key principles of a business registry. In particular, the Commission welcomed the potential completion of the latter guide on business registration for possible adoption at the fifty-first session of the Commission (scheduled for 25 June to 13 July 2018).[18]

II. Organization of the session

13. Working Group I, which was composed of all States Members of the Commission, held its twenty-ninth session in Vienna from 16 to 20 October 2017. The session was attended by representatives of the following States Members of the Working Group: Argentina, Belarus, Brazil, Canada, China, Colombia, Côte d'Ivoire, Czechia, Ecuador, El Salvador, France, Germany, Indonesia, Israel, Italy, Japan, Kenya, Kuwait, Mauritania, Mexico, Pakistan, Panama, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey and United States of America.

14. The session was attended by observers from the following States: Bolivia (Plurinational State of), Croatia, Cyprus, Dominican Republic, Finland, Luxembourg, Malta, Netherlands, Qatar, Saudi Arabia and Syrian Arab Republic.

15. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: World Bank (WB);

(b) *Intergovernmental organizations*: Gulf Cooperation Council (GCC);

(c) *Invited international non-governmental organizations*: Centro de Estudios de Derecho, Economía y Política (CEDEP); Conseil des Notariats de l'Union Europeene (CNUE); International Bar Association (IBA); the National Law Center for Inter-American Free Trade (NLCIFT); and the Law Association for Asia and the Pacific (LAWASIA).

16. The Working Group elected the following officers:

Chair: Ms. Maria Chiara Malaguti (Italy)

Rapporteur: Mr. Thomas Koshy (Singapore)

17. In addition to documents presented at its previous sessions, the Working Group had before it the following documents:

[18] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 230–235.

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.105);

(b) Note by the Secretariat on a draft legislative guide on key principles of a business registry (A/CN.9/WG.I/WP.106); and

(c) Note by the Secretariat on reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs) (A/CN.9/WG.I/WP.107).

18. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of legal standards in respect of micro, small and medium-sized enterprises.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

19. The Working Group engaged in discussions in respect of the preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, in particular, on a draft legislative guide on key principles of a business registry on the basis of Secretariat document A/CN.9/WG.I/WP.106. The deliberations and decisions of the Working Group are reflected below.

IV. Preparation of legal standards in respect of micro, small and medium-sized enterprises: draft legislative guide on key principles of a business registry

A. Presentation of A/CN.9/WG.I/WP.106 and preliminary observations

20. The Working Group was reminded that the draft legislative guide on key principles of a business registry in A/CN.9/WG.I/WP.106 was the revised version of A/CN.9/WG.I/WP.101, which the Working Group had reviewed at its twenty-eighth session (1 to 9 May 2017). The Secretariat highlighted certain aspects of the draft text, noting that it included changes that the Working Group had agreed should be made to the legislative guide at its previous session, as reflected in the report for that session (A/CN.9/900), and that those changes had all been extensively referenced in footnotes to the text.

21. The Working Group agreed that it would commence its review of the legislative guide from Part I entitled “Objectives of a business registry” (from para. 26 on). It further agreed that the introductory section of the text, from paragraphs 1 to 25, would be considered once the entire text had been considered, but that the definitions in paragraph 13 should be considered as they arose in conjunction with the review of the related portions of the guide.

22. There was some concern expressed in respect of whether the phrases “legally regulated economy” and “extra legal economy” should be used to denote what may elsewhere be referred to as the “formal” and “informal economy”, but it was observed that consideration of that issue should be left to the discussion of paragraphs 21 to 26 of A/CN.9/WG.I/WP.107 at a later stage. However, it was observed that the adoption of that terminology in the texts appeared to suggest that unregistered businesses were necessarily operating in the extra legal economy, which might not be the case. It was noted that the concepts of business registration and of operation of an enterprise in the legally regulated economy were not entirely synonymous, and that a review of the

terminology should be conducted with that in mind. The Secretariat was requested to review the text to ensure that it appropriately reflected instances in which a business operated in the legally regulated economy even though it was not registered.

B. Objectives of a Business Registry

1. Paragraph 26

23. It was noted that paragraph 26 had been inserted into the draft legislative guide to highlight the importance of one-stop shops to facilitate business registration and assist MSMEs, and that, to that end, several additional references to one-stop shops had also been included in the text.

24. After discussion, the Working Group agreed that an additional recommendation should be inserted after paragraph 26 that would read along the following lines: "The system of business registration should facilitate the movement of businesses from the informal sector to the legally regulated economy as part of the system of all registrations that may be required at start-up, which may include registration with, among others, business registry, taxation and social security authorities."

2. Purposes of the business registry: paragraphs 27 to 29 and recommendation 1

25. It was noted that paragraph 28 recognized that not all businesses in every State were required to register, and that paragraph 28 included a reference to paragraph 130, which expanded upon that theme. After discussion, the Working Group determined that any necessary clarification should be made to paragraph 28 to indicate that it was left to each State to determine which business were required to register and to include reference in the commentary to recommendation 19 in addition to paragraph 130. A suggestion to combine recommendation 19 with recommendation 1 received some support but was not taken up by the Working Group, nor was a suggestion to move recommendation 19 closer to the beginning of the text.

26. The Working Group agreed to end recommendation 1(a) after the term "enacting State" and delete the remainder of it so that the provision read "Providing to a business an identity that is recognized by the enacting State; and". The Working Group also supported a proposal to include reference to "receiving, storing and making accessible" to recommendation 1(b) to make the language compatible with the definition of "business registry or business registration system" in paragraph 13.

3. Simple and predictable legislative framework permitting registration for all businesses: paragraphs 30 to 33 and recommendation 2

27. A suggestion was made to eliminate paragraph 31 and merge its content into paragraph 28, to the extent that it was not already reflected there, and that recommendation 19 already addressed the issue that the law should specify which businesses were permitted or required to register. However, the view was also expressed that the issue outlined in paragraph 31 was an important aspect of establishing a "simple and predictable legislative framework", and that the paragraph should thus be retained.

28. The Working Group reconsidered a proposal to move recommendation 19 to the beginning of the draft legislative guide, but there was agreement that leaving recommendation 19 in the context of "Part IV: Registration of a business" would provide greater guidance to enacting States when creating or updating their business registration systems. Instead, it was agreed that paragraph 31 should be retained and that a reference to recommendation 19 should be added to paragraph 31.

29. There was agreement in the Working Group to delete recommendation 2(b), and a suggestion was noted to make necessary changes to the title of recommendation 2 after the elimination of 2(b).

30. Some delegations were of the view that the text in recommendation 2(c) might imply that business registration was mandatory for MSMEs. The Secretariat was

requested to clarify the text and to consider changes along the lines of making recommendation 2(c) "subject to the minimum procedures as required by law."

4. Key features of a business registration system: paragraphs 34 to 39 and recommendation 3

31. The Working Group recalled its earlier decision (see paras. 31–37 A/CN.9/900) that the text of recommendation 3(d) should be retained since reliability was said to be a key feature of a business registration system, regardless of the method that a State used to ensure that reliability. The Working Group, however, requested the Secretariat to adjust recommendation 3(d) in order to clarify that the registry system and the registered information were of good quality and reliable when they were secure and kept current with periodic updates. It was further observed that in redrafting recommendation 3(d) the Secretariat might have to adjust the terminology, since certain terms (e.g. secure, current) might not be used interchangeably in relation to systems and information.

32. The Working Group agreed that the phrase "is not a legal standard" could be deleted from the current definition of "reliable" in paragraph 13. Further, and in keeping with its previous decision that the phrase "good quality and reliable" should be retained in order to ensure adequate reference to the concept of reliability (see para. 33, A/CN.9/900), the Working Group also supported a suggestion that the definition of the term "reliable" in paragraph 13 should be replaced with a definition of the phrase "good quality and reliable" in order to make it more consistent with the revision agreed to the text of recommendation 3(d) (see para. 31 above). The Secretariat was also requested to ensure consistency with respect to the terms: "system", "process" and "information", for example, in paragraph 34, which referred to both "system" and "process", and in the recommendation, which referred only to "system". Additional lack of clarity was observed in respect of: the penultimate sentence of paragraph 36, in terms of whether "certain requirements in the way it is submitted" was intended to refer to paragraphs 37 and 38; and regarding which aspects of the commentary were intended to refer to MSMEs (as noted in recommendation 2(b)), or whether the entire legislative guide was intended as being suited to the needs of MSMEs.

33. A suggestion was made that reference to sex-disaggregated data could be included in paragraph 36 as well as in other appropriate sections of the legislative guide in order to be consistent with most recent best practice. There was support in the Working Group for that suggestion, although its specific implementation was left to the Secretariat.

34. In response to the observation that subparagraph 39(c) did not appear to be consistent with the rest of paragraph 39, which dealt with the security and integrity of the registry record, the Working Group requested the Secretariat to replace the phrase "to deny access to registry services" with text along the lines of "to modify information that has been submitted to the registry".

C. Establishment and functions of the business registry

1. Responsible authority: paragraphs 40 to 43 and recommendation 4

35. After consideration of a possible replacement for the term "competence" in paragraph 43 and recommendation 4, the Working Group approved of paragraphs 40 to 43 and recommendation 4 as drafted.

2. Appointment and accountability of the registrar: paragraphs 44 to 46 and recommendation 5

36. It was observed that in some States, a delegation of power by the registrar to persons appointed to assist in the performance of the registrar's duties was only possible in a limited sense and that, in other States, registrars were elected. In light of those clarifications, the Working Group agreed that the term "should" in the final

sentence of paragraph 45 should be changed to "may", and that the commentary should be adjusted to note that the "appointment" of a registrar was intended to include all methods by which a registrar was selected, including by way of election. With those changes, the Working Group approved of paragraphs 44 to 46 and recommendation 5 as drafted.

3. Transparency in the operation of the business registration system: paragraphs 47 and 48 and recommendation 6

37. The Secretariat was requested to include the concept of simplification into paragraph 47. The suggestion to add "simplified" or "simplified process" somewhere around the phrase "limited number of steps" in the second sentence was noted.

38. The proposal to change "rules or criteria" to "rules, procedures and service standards" was supported by the Working Group, as was a suggestion to include "developed for the operation of the business registration system". The revised recommendation would thus read: "The registrar should ensure that the rules, procedures and service standards that are developed for the operation of the business registration system are made public to ensure transparency of the registration procedures."

4. Use of standard registration forms: paragraph 49 and recommendation 7

39. Although it was noted that the text in footnote 58 was intended to address the request of the Working Group at its twenty-eighth session (para. 43, A/CN.9/900) that the submission of additional materials by businesses registering should be permitted, there was agreement in the Working Group to incorporate the text of footnote 58 into the commentary. A request to include a reference to the fees part of the legislative guide (paras. 199 to 201 and recommendation 39) was also supported by the Working Group, as was a request to insert the word "simple" before "standard registration form."

5. Capacity-building for registry staff: paragraphs 50 to 53 and recommendation 8

40. The Working Group agreed with the substance of paragraphs 50 to 53 and recommendation 8 of the legislative guide as drafted.

6. Core functions of business registries: paragraphs 54 to 62 and recommendation 9

41. After discussion, the Working Group agreed to retain recommendation 9 and the relevant commentary. In that regard, the Secretariat was requested to consider the following suggestions for amendment of the commentary:

(a) The text of paragraph 55 could be improved so as to avoid possible inconsistency and overlap between the different subparagraphs (for instance, it was noted that the phrase "facilitate trade and interactions" in subparagraph (a) could overlap with the phrase "disclose the existence of the business" in subparagraph (b));

(b) The current text of subparagraph 55 (c) could be replaced with text along the lines of "conferring legal existence on legal persons and recording their legal existence in the cases provided by law";

(c) Information on the email address and the name of the business could be added to paragraph 59, which might also clarify that: (i) information on the business contacts could only be made publicly available if the business agreed; and (ii) making information on the business available to the public was not a mandatory requirement for a State. Moreover, the order in which information was presented in paragraph 59 could be reorganized so that information on who was authorized to sign on behalf of the business or served as the business's legal representative was mentioned before information on its telephone number and address of the business, since that information was of greater importance for third parties;

(d) The function of a business registry to publicize the legal effects of the information maintained in the registry could be included; and

(e) The commentary could include reference to the authority of the State to entrust additional functions to the business registry in addition to those listed in the recommendation, without providing any list of such additional functions.

42. The Working Group also raised a number of concerns in respect of the list of subparagraphs to recommendation 9, including the length of the list and the fact that not all business registries performed all of the functions listed. There was support for a suggestion to amend the chapeau of the recommendation along the following lines: "The law should establish the functions of the business registry, which may include:".

43. The Working Group agreed that the list of functions in recommendation 9 should be reduced to the core functions of a business registry, keeping in mind the general principles enunciated in paragraph 55, and that all other functions currently listed in recommendation 9 should be deleted.

44. After further discussion, a proposal was made to revise the text of recommendation 9 as follows:

"The law should establish the core functions of the business registry, including:

"(a) Providing access to the public of relevant information collected by the business registry;

"(b) Registering the business when the business fulfils the necessary conditions established by the law;

"(c) Assigning a unique business identifier to the registered business;

"(d) Sharing information among the requisite public agencies;

"(e) Ensuring that the information in the registry is kept as current as possible[19]; and

"(f) Protecting the integrity of the information in the registry record".

45. The Working Group supported that proposal, with the following amendments: (a) the inversion of subparagraphs (a) and (b); (b) the modification of subparagraph (e) to read "Keeping the information in the business registry as current as possible"; (c) to include a recommendation instructing the registrar to publicize relevant information concerning the establishment of a business, including associated obligations and responsibilities, and the legal effects of information in the business registry; and (d) to include a recommendation along the lines of "Where applicable, assisting businesses in searching and reserving a business name". With those amendments, the text of recommendation 9 was adopted and the Secretariat was requested to modify the commentary, including paragraph 55, to be in line with the amended version of recommendation 9.

7. Storage of and access to information contained in the registry: paragraphs 63 to 65 and recommendation 10

46. A suggestion was made to change the phrase "process and store all information" in recommendation 10 to "process, store and provide access to all information" so as to accord with its title. However, it was observed that such an inclusion might not be necessary in light of Section VI. B. on "Public availability of information" (paras. 172 to 179) and recommendation 32 of the draft legislative guide. It was observed that the intention of paragraphs 63 to 65 and recommendation 10 was not to focus on providing public access to the information, but rather to ensure that information was stored and shared throughout the registry system through full interconnectivity and multiple access points. The Secretariat was requested to amend the commentary to reflect more clearly that focus, including possibly adjusting the

[19] The new suggested text of recommendation 9(e) is intended to encompass the preservation of historical information on the business such as that indicated in recommendation 9 (e) of A/CN.9/WG.I/WP.106.

recommendation along the lines of changing "process and store all information" to "process, store and provide access to information".

D. Operation of the business registry

1. Operation of the business registry: paragraph 66; Electronic, paper-based or mixed registry: paragraphs 67 to 70; Features of an electronic registry: paragraphs 71 to 75; Phased approach to the implementation of an electronic registry: paragraphs 76 to 84; Other registration-related services supported by ICT solutions: paragraphs 85 to 88 and recommendation 11

47. In respect of footnote 69, the Working Group agreed that the draft legislative guide should be careful to accommodate emerging technology that might further improve the operation of a business registry. To that end, there was agreement that the commentary should include reference to "distributed ledger technology" and other technologies that States might consider when reforming their business registry systems.

48. After discussion, the Working Group agreed to keep intact the structure of the draft legislative guide and to request the Secretariat to review the draft legislative guide generally for references to "developing" States and make appropriate adjustments, including, for example, deleting the phrase "in developing countries" in the third sentence of paragraph 67 and replacing it with text along the lines of "in many jurisdictions". There was also agreement in the Working Group to delete the phrase "to inform their risk analysis of" in subparagraph 69(g) and to make editorial adjustments to the remaining text as necessary. The Secretariat was also requested to ensure that all references in the text of the legislative guide to "paper-based" and "electronic" registry systems listed electronic systems first.

2. Electronic documents and electronic authentication methods: paragraph 89 and recommendation 12

49. A view was expressed that online payments should be included in the commentary to recommendation 12, as they, along with the recognition of electronic signatures, and functional equivalence between document types, would form a legal framework for an electronic business registration system. The Working Group determined that the discussion of electronic payments in recommendation 42 did not need to be relocated within the draft legislative guide, but that a cross reference to recommendation 42 could be included in paragraph 89. It was further suggested that the "three pillars" of an electronic registry system, that is: (a) electronic payments; (b) electronic signatures; and (c) electronic documents, should be included in the commentary.

50. A concern was raised by several delegations that legal standards for electronic documents should not be tailored to business registries, but instead should be compatible with the domestic law of the enacting State. It was recalled that "law" as defined by paragraph 13 was not limited to specific rules adopted to establish the business registry, but included the broader body of domestic law that may be relevant to issues relating to the business registry.

51. It was noted that paragraph 89 and footnote 85 provided references to existing UNCITRAL documents on electronic commerce that were meant to provide further guidance to enacting States and many delegations were of the view that recommendation 12 was therefore too detailed. After discussion, the Secretariat was requested to redraft recommendation 12 by retaining 12(a) and combining elements of 12(b)(i) and 12(b)(iv). The Working Group agreed to delete the rest of the recommendation.

3. A one-stop shop for business registration and registration with other authorities: paragraphs 90 to 100 and recommendation 13

52. It was proposed that the definition of "one-stop shop" in paragraph 13 could be broadened to ensure that it included the concept of establishing a single "gateway"

for interaction between a business and the State. There was support for that suggestion, which included requesting the Secretariat to ensure that that concept was sufficiently included in the commentary so as to also satisfy a suggestion that additional reference to "interoperability" might be required in the commentary. A general proposal was also made to include reference to a "single payment form" in the text, to the extent it had not already been reflected in the draft legislative guide.

53. The Working Group agreed to modify paragraph 92 as follows: (a) in the third sentence, the phrase "The most common of these other functions" should be replaced with text along the lines of "A common additional function"; (b) in the final sentence, the phrase "In rare cases," should be replaced with text along the lines of "Other"; (c) additional examples should be added to the final sentence, such as official diaries and journals, intellectual property registries, and import-export registries. It was observed that not all of the examples of other authorities in the commentary in paragraphs 90 to 100 were confined to public authorities, and that care might be taken to note when such potential participants were instead private sector actors.

54. Various proposals were made to adjust the text of recommendation 13, including possibly changing the reference to "a web platform" in paragraph (a) to "an electronic platform". A suggestion to delete the phrase "but at a minimum should include taxation and social services agencies" in paragraph (b) was made. The Working Group agreed to delete the phrase "at a minimum", possibly replacing "but at a minimum should include" with "including, but not limited to". There was also agreement to ensure that the phrase describing the main relevant public authorities should be standardized, possibly as "business registry, taxation and social security authorities" or by using a defined term, and that "business registry" should be added to paragraph (b).

4. Use of unique business identifiers: paragraphs 101 to 109; Allocation of unique business identifiers: paragraphs 110 and 111; Implementation of a unique business identifier: paragraphs 112 to 116; Exchange of information among business registries: paragraphs 117 and 118; Recommendations 14, 15 and 16

55. In keeping with its earlier decisions (see paras. 48 and 54 above), the Working Group reiterated that the word "developed" should be deleted from the opening phrase of paragraph 104, and that the phrase describing the main relevant public authorities with which a business might have to register should be standardized in the text.

56. The Working Group recalled its decision that the definition of "one-stop shop" in paragraph 13 should include a reference to an integrated application form for registration with business registry, taxation and social security authorities that included all of the information required by those agencies (see para. 52 above). The Secretariat was requested to ensure that appropriate references were also included in paragraph 102 of the draft legislative guide.

57. With those suggested amendments, the Working Group agreed with the substance of paragraphs 101 to 118 and recommendations 14 to 16 of the legislative guide.

5. Sharing of protected data between public agencies: paragraph 119 and recommendation 17

58. The Working Group requested the Secretariat to add the phrase "between public agencies" in the first sentence of paragraph 119, after the term "information-sharing", and to consider whether the use of the term "unique business identifier" in recommendation 17 (and possibly elsewhere in the text) and "unique identifier" as defined in paragraph 13 should be made consistent throughout the draft legislative guide.

59. It was further noted that the terms "information" and "data" appeared to be used interchangeably in the draft legislative guide, although the two terms were not completely synonymous, since data usually referred to information collected electronically or used for decision-making. The Secretariat was requested to review the use of those terms and make appropriate changes throughout the text.

60. With those amendments, the Working Group agreed with the substance of paragraph 119 and recommendation 17 of the legislative guide.

E. Registration of a business

1. Scope of examination by the registry: paragraphs 120 to 122; Accessibility of information on how to register: paragraphs 123 to 127 and recommendation 18

61. It was noted that the term "legal framework" in paragraph 120 and elsewhere in the draft legislative guide might not be consistent with the broader definition of "law" in paragraph 13, and there was support for the suggestion that the text should be standardized to use the defined term "law". An additional suggestion was that the phrase "only records facts" in the final sentence of paragraph 120 should be replaced with "only records information submitted to the registry by the registrant". The Working Group also supported the suggestion that the opening phrase "The law should provide that" should be used at the beginning of recommendation 18.

62. The Working Group also agreed to replace the phrase "court-based registration systems" in the first sentence of paragraph 121 (and throughout the text) with an appropriate term along the lines of "verification-based systems" or "systems under the oversight of the judiciary", as it was noted that in many States the court only performed a supervisory role of the business registry, but was not directly involved in the actual management of the registry.

63. In paragraph 122, the Working Group agreed to delete the phrase "and disadvantages" in the first sentence so as to focus only on the advantages of the different registration systems. It was further agreed that: (a) the paragraph could highlight additional advantages of the approval system (such as the protection of third parties); (b) the phrase "and better-suited to deterring corruption by avoiding an opportunity for official decisions to be made with a view towards personal gain" could be replaced with a phrase along the lines of "to avoid the improper use of discretion by registry officials"; (c) the word "usually" in the second sentence should be deleted; and (d) the phrase "Systems in which business registration procedures are entrusted to an administrative body under the oversight of the judiciary have been said to merge" in the final sentence should be replaced with the phrase "Some systems have merged the".

64. After additional discussion, the Working Group agreed to a proposal that paragraph 122 should be replaced with the following text:

> "Both the approval and the declaratory systems have their advantages. Approval systems intend to protect third parties by preventing errors or omissions prior to registration. Courts and/or intermediaries exercise a formal review and, when appropriate, also a substantive review of the prerequisites for the registration of a business. On the other hand, declaratory systems are said to reduce the inappropriate exercise of discretion; furthermore, they may reduce costs for registrants by negating the need to hire an intermediary and appear to have lower operational costs. Some systems have been said to merge advantages of both the declaratory and approval systems by combining ex ante verification of the requirements for establishing a business with a reduced role for the courts and other intermediaries, thus simplifying procedures and shortening processing times."

65. With those amendments, the Working Group agreed with the substance of paragraphs 120 to 127 and recommendation 18.

2. Businesses permitted or required to register: paragraphs 128 to 131 and recommendation 19

66. It was suggested that, in some instances, business registration for MSMEs might not result in an advantage for them and could instead prove burdensome. A proposal was supported by the Working Group to modify the text of paragraph 131 to emphasize the point that as long as a benefit could be gained, a business should not

be discouraged from registering due to high transaction costs and administrative obstacles.

67. The Working Group agreed to modify 19(a) to read: "that businesses of all sizes and legal forms are permitted to register; and". It was also agreed that the concept of "permitted to register" should include registration with all required registries including business, taxation and social security registries (see recommendation 1).

3. Minimum information required for registration: paragraphs 132 to 136 and recommendation 20

68. The Working Group requested the Secretariat to review the text in light of the following drafting proposals:

(a) In paragraph 132, to add the word "information" between the words "certain" and "requirements" in the first sentence and to delete the word "registered" before the word "information" in the second sentence;

(b) To split the reference to "name and address" in paragraph 133 and recommendation 20 into two separate requirements so as to reflect the importance of providing the name of the business;

(c) To consider whether the term "founders" was the correct term in paragraph 133 and possibly elsewhere in the text;

(d) To review paragraphs 134 to 136 to remove any redundancies, since they seemed to consider similar issues, for example, in the discussion of beneficial ownership;

(e) To standardise the terminology used in paragraph 133(c) and recommendation 20(c) with that of paragraph 59; and

(f) To add the unique business identifier, if one had already been obtained, to the information that might be required.

69. There was agreement in the Working Group that gathering information in respect of the sex of the registrant or persons associated with the business could be statistically important, particularly in light of programmes to support women and improve gender balance. However, it was further agreed that such gender information raised privacy issues, should be requested only on a voluntary basis as well as in a non-binary fashion, should be treated as non-public information as to individuals and should be made available only on a statistical basis. Other statistical information that could be requested on a non-compulsory basis could include information on visible minorities or different language groups, again, so as to promote their wider participation in the business world. The Working Group agreed to refer to those issues in paragraph 134.

4. Language in which information is to be submitted: paragraphs 137 to 139 and recommendation 21

70. The Working Group agreed with the substance of paragraphs 137 to 139 and recommendation 21 of the legislative guide as drafted.

5. Notice of registration: paragraph 140 and recommendation 22

71. The Working Group agreed with the substance of paragraph 140 and recommendation 22 of the legislative guide as drafted.

6. Content of notice of registration: paragraph 141 and recommendation 23

72. The Working Group agreed with the substance of paragraph 141 and recommendation 23 of the legislative guide as drafted.

7. Period of effectiveness of registration: paragraphs 142 to 145 and recommendation 24

73. The Working Group agreed with the substance of paragraphs 142 to 145 and recommendation 24 of the legislative guide as drafted.

8. Time and effectiveness of registration: paragraphs 146 to 148 and recommendation 25

74. A request to move the substance of footnote 162 into the commentary was supported by the Working Group. It was suggested that "in that order" could be deleted from recommendation 25(a) as it did not account for instances of States that permitted the processing of expedited registrations subject to an additional fee or when the application was made electronically or when standard forms or documents were used. After discussion, the Working Group agreed to retain recommendation 25 as drafted so as to avoid any unnecessary exercise of discretion on the part of registry staff, but to clarify the commentary to account for such an exception.

9. Rejection of an application for registration: paragraphs 149 to 152 and recommendation 26

75. The Working Group supported a proposal that paragraphs 149 and 150 be moved after paragraph 136, before recommendation 20, in section D ("Minimum information required for registration"), as it was said that such paragraphs dealt with instances in which the registrar would refuse registration because of errors in the entry of information in the application form. Support was also expressed for adjusting the text in paragraph 152 in accordance with that change and to move any reference in that paragraph to the processing of registration forms under section D.

76. In response to concerns expressed in regard to possible ambiguity arising from the use of the concepts of objective and subjective requirements (both in recommendation 26(a) and in paragraph 151), the Working Group agreed to delete the term "objective" in recommendation 26(a) and to add a new subparagraph in the recommendation along the lines of "the registrar should not have the authority to reject an application based on substantive grounds." The Working Group further agreed that the final sentence of paragraph 151 should be adjusted to mirror the new wording of the recommendation and that reference to "substantive legal requirements", if necessary, should be replaced with "substantive grounds".

10. Registration of branches: paragraphs 153 to 155 and recommendation 27

77. The Secretariat was requested to consider whether additional text was required in the commentary to clarify that, in some jurisdictions, branches were not required to register. Subject to that possible amendment, the Working Group agreed with the substance of paragraphs 149 to 152 and recommendation 26 as drafted.

F. Post-registration

1. Paragraphs 156 and 157

78. The Working Group agreed with the substance of paragraphs 156 and 157 of the legislative guide as drafted.

2. Information required after registration: paragraphs 158 and 159 and recommendation 28

79. A proposal to delete the portion of recommendation 28(a) after the phrase "recommendation 20" was supported by the Working Group, and the Secretariat was requested to make any necessary changes to the commentary to reflect the concept deleted, i.e. that, when required by the State, any changes or amendments to information initially or subsequently required must be filed with the business registry. With those adjustments, the Working Group agreed with the substance of paragraphs 158 and 159 and recommendation 28.

3. Maintaining a current registry: paragraphs 160 to 164 and recommendation 29

80. There was agreement in the Working Group that recommendation 29(a) should be adjusted to reflect that "sending an automated request" was only one way the law could require the registrar to ensure that the information in the business registry was kept current, and to reflect other best practices in the recommendation. It was further suggested that the onus be placed on the registrar to proactively identify sources of information to keep the register up to date. With those changes, the Working Group agreed with the substance of paragraphs 160 to 164 and recommendation 29.

4. Making amendments to registered information: paragraphs 165 and 166 and recommendation 30

81. The Working Group agreed with the substance of paragraphs 165 and 166 and recommendation 30 of the legislative guide as drafted.

G. Accessibility and information-sharing

1. Public access to business registry services: paragraphs 167 to 171 and recommendation 31

82. It was noted that paragraphs 167 to 171 and recommendation 31 pertained to the access of a registrant to registry services. The Working Group supported a proposal to eliminate the word "public" from the titles of the section and of recommendation 31. With that change, the Working Group agreed with the substance of paragraphs 167 to 171 and recommendation 31.

2. Public availability of information: paragraphs 172 to 179 and recommendation 32

83. There was broad support within the Working Group to include the phrase "fully and readily" before the word "available" in recommendation 32, as well as to change "will" to "may" at the beginning of the second sentence of paragraph 172. With those adjustments, the Working Group agreed with the substance of paragraphs 172 to 179 and recommendation 32.

3. Where information is not made public: paragraphs 180 and 181 and recommendation 33

84. A possible ambiguity in respect of the phrase "list the types of information" was noted in the text of recommendation 33(a) and the Secretariat was requested to clarify that the registrar may not decide, but should only publicize, the types of information that cannot publicly be disclosed according to applicable law. With that change, the Working Group agreed with the substance of paragraphs 180 and 181 and recommendation 33.

4. Hours of operation: paragraphs 182 to 184 and recommendation 34

85. The Working Group agreed that "these recommendations" in the final sentence of paragraph 182 should provide greater specificity and be changed to text along the lines of "the requirements above". With that change, the Working Group agreed with the substance of paragraphs 182 to 184 and recommendation 34.

5. Direct electronic access to submit registration, to request amendments and to search the registry: paragraphs 185 to 188 and recommendations 35 and 36

86. It was agreed that the phrase "and to search the registry" should be deleted from the title of recommendation 35 and that the phrase "private computer" in the first sentence of paragraph 185 should be changed to text along the lines of "electronic device". The Working Group also agreed to delete "or the assistance of registry staff" from recommendation 35, and to make any necessary clarification to paragraph 186 to ensure that the focus was on the electronic submission of information and not on

the entry of data into the business registry. With those changes, the Working Group agreed with the substance of paragraphs 185 to 188 and recommendations 35 and 36.

6. Facilitating access to information: paragraphs 189 to 194 and recommendation 37

87. As a matter of drafting, the Secretariat was requested to review the use of the defined term "registered information" in recommendation 37 and elsewhere in the text (including in the commentary to recommendation 38), since the definition included protected information, which might not be appropriate in every instance. The Secretariat was requested to redraft paragraph 189 to eliminate information on how to register a business that might also be found in relation to recommendation 18 and to refer in paragraph 192 to "Part VII: Fees". A suggestion to group similar types of information listed in paragraph 189 together in order to make it more reader-friendly was supported by the Working Group.

88. There was support within the Working Group to delete the word "prohibitively" from recommendation 37 and to replace the phrase "to business registration" with text along the lines of "to information on businesses that are registered".

7. Cross-border access to registered information: paragraphs 195 and 196 and recommendation 38

89. The Working Group supported the following drafting proposals: (a) duplication of commentary in the previous section and in paragraph 196 regarding access of information generally should be eliminated; (b) as agreed previously (see para. 61 above), the Secretariat should review the entire text to ensure that all recommendations stated "The law should"; and (c) references in paragraph 196 should distinguish between information contained in the business registry and information about the business registry. With those adjustments, the Working Group agreed with the substance of paragraphs 195 and 196 and recommendation 38.

H. Fees

1. Paragraphs 197 and 198

90. It was observed that the phrases "information products" and "information services" used throughout the part on fees were not defined in paragraph 13, and it was suggested that they might either be defined or referred to consistently throughout the text.

91. Several drafting suggestions were made for paragraph 198, including: (a) to replace the fourth sentence with text along the lines of "Governments seeking to increase MSME registration and to support MSMEs throughout their lifecycle should consider offering registration and post-registration services free of charge."; (b) to delete the fifth sentence and the phrase "For instance," at the beginning of the sixth sentence; and (c) to substitute "encourages businesses to register" with text along the lines of "is not prohibitive for MSMEs" in the third to last sentence. With those adjustments, the Working Group agreed with the substance of paragraphs 197 and 198.

2. Fees charged for registry services: paragraphs 199 to 201 and recommendation 39

92. The Secretariat was requested to review the text to determine whether "registry services" in the title and the text of recommendation 39 might be changed to "business registry services" to render it consistent with the terminology used elsewhere in the draft legislative guide (for example, in paras. 167 and 171) and to distinguish them from other types of governmental registry services; the Working Group otherwise agreed with the substance of paragraphs 199 to 201 and recommendation 39.

3. Fees charged for information: paragraph 202 and recommendation 40

93. There was broad support within the Working Group to split recommendation 40 into two parts, with the first part ending after the phrase "free of charge", and the second part referring to fees that could be charged for "value-added information" (although a better term might be found, which should be rendered consistent with the

term “more sophisticated information services” in paragraph 202) and that such fees could be linked to the notion of cost-recovery.

94. The Secretariat was requested to redraft the commentary and recommendation 40 to reflect the discussion in the Working Group. Suggestions that the commentary might account for different users or include a cross-reference to or reiteration of some of the commentary in paragraph 194 (on bulk information) were noted.

4. Publication of fee amounts and methods of payment: paragraph 203 and recommendation 41

95. The Working Group agreed that text along the lines of “if any” should be inserted after the phrase “fees payable”, and with that change, agreed with the substance of paragraph 203 and recommendation 41.

5. Electronic payments: paragraph 204 and recommendation 42

96. The Working Group reiterated its earlier decision (see para. 49 above) that recommendation 42 should not be relocated to Part III of the legislative guide (“Operation of the business registry”), but that paragraph 89 and recommendation 12 should cross-refer to paragraph 204 and recommendation 42.

97. A suggestion to delete the phrase “Once States have reached a certain level of technological maturity” from the first sentence of paragraph 204 was accepted by the Working Group on the understanding that text reflecting a sensitivity to States subject to the “digital divide” could be reflected elsewhere in the draft legislative guide. In order to accommodate ongoing developments in technology, the Working Group also agreed to replace the reference to “use of mobile payments” in the first sentence of paragraph 204 with a phrase along the lines of “use of mobile payments and other modern forms of technology”. With those amendments, the Working Group agreed with the substance of paragraph 204 and recommendations 42.

I. Liability and sanctions

1. Liability and sanctions: paragraph 205; Liability for misleading, false or deceptive information: paragraph 206 and recommendation 43

98. It was noted that paragraph 209 provided ways in which a business could be informed of its obligation to provide timely and accurate information to the business registry so as to avoid the need for sanctions. A proposal to relocate that paragraph to immediately follow paragraph 205, so that the discussion appeared before the part on sanctions, was noted.

99. It was recalled that the concept of the publication of the legal effects of information maintained in the registry had been suggested for inclusion into the commentary that preceded recommendation 9 and possibly recommendation 1. It was agreed by the Working Group that the concept of opposability of that information to third parties could be incorporated in paragraph 206 as well, since it was related to potential liability to third parties for both supplying misleading, false or deceptive information and failing to supply information. As a matter of drafting, the Secretariat was requested to standardize references to “liability” or “responsibility” and to elaborate on the phrase “such information” in paragraph 206.

100. Several delegations were of the view that recommendation 43 should separate inadvertent failure to submit information from the intentional submission of false and misleading information or intentional withholding of required information, since inadvertent failure to submit ought not be punished to the same extent as wilful actions. After discussion, the Working Group agreed to leave recommendation 43 as drafted but requested the Secretariat to incorporate the discussion of the Working Group into the commentary, particularly noting that the failure to submit necessary information could amount in some cases to contributing to the existence of misleading, false or deceptive information on the business register. It was further

agreed that recommendation 43 left maximum flexibility for the establishment of liability up to the State through the use of the term "appropriate liability".

2. Sanctions: paragraphs 207 to 209 and recommendation 44

101. The Working Group agreed that the last sentence of paragraph 208 should be deleted, since disqualification of directors was said to be a topic pertaining to corporate law rather than business registration.

102. In keeping with its consideration of issues relating to liability, the Working Group agreed to the following adjustments to subparagraph (a) of recommendation 44: (a) to delete the phrase in brackets; (b) to include the term "appropriate" between "establish" and "sanctions"; and (c) to replace the phrase "under the law, including the provision of accurate and timely information to the business registry" with a phrase along the lines of "regarding information to be submitted to the registry in an accurate and timely fashion".

3. Liability of the business registry: paragraphs 210 to 215 and recommendation 45

103. It was suggested that paragraph 211 (in particular the last sentence) could be clarified in order to take into consideration the practice of some States with electronic registration systems where registry staff must nonetheless enter the information submitted by the registrant into the registry. Support for that suggestion was expressed by the Working Group. It was also agreed that the commentary should reflect the fact that in many States the question of business registry liability was a question for other laws of the State and not a question for the law on business registration.

104. After discussion, the Working Group agreed to modify the text of recommendation 45 along the following lines: "The law should establish whether and to what extent the State is liable for loss or damage caused by error or negligence of the business registry…".

J. Deregistration

1. Paragraphs 216 to 219 and recommendations 46 and 47

105. Support was expressed in the Working Group for a proposal to add a new subparagraph (c) to recommendation 46 that encouraged States to adopt simplified procedures for the deregistration of MSMEs. The Working Group also requested the Secretariat to include any necessary changes to reflect that addition in the commentary for recommendation 46. Moreover, the Working Group agreed to specify in paragraph 219 that deregistration should, in principle, be free of charge.

106. In order to widen the scope of recommendation 47 to include those cases in which deregistration was carried out by the registrar upon court order, the Working Group agreed to delete the phrase "at its own initiative". The Working Group further agreed to change the title of recommendation 47 to "Involuntary deregistration".

2. Process of deregistration: paragraphs 220 and 221 and recommendation 48; Time of effectiveness of business deregistration: paragraph 222 and recommendation 49

107. The Working Group agreed to revise the third sentence in paragraph 220 to phrasing along the lines of "without providing third parties the opportunity to protect their rights" and to strike the introductory clause "If there is no objection to the procedure" from the fourth sentence.

108. In terms of structure, the Working Group supported a proposal to eliminate recommendation 49(b) and to combine recommendations 48 and 49, as well as the commentary in sections B ("Process of deregistration") and C ("Time of effectiveness of business deregistration"). The Secretariat was also requested to move the last three sentences of paragraph 218, which addressed written notice, to the commentary for recommendation 48, and to review and eliminate any portions of paragraph 221 on preservation of records if they were repeated in "Part X: Preservation of records".

3. Reinstatement of registration: paragraph 223 and recommendation 50

109. The Working Group agreed with the substance of paragraph 223 and recommendation 50 of the legislative guide as drafted.

K. Preservation of records

1. Paragraphs 224 to 227 and recommendation 51

110. A suggestion to move "Part X: Preservation of records" to a position earlier in the text was not taken up and the Working Group agreed with the substance of paragraphs 224 to 227 and recommendation 51 of the legislative guide as drafted.

2. Amendment or deletion of information: paragraphs 228 and 229 and recommendation 52

111. It was observed that reference to "registry staff" in paragraph 228 and elsewhere in the text might be changed to "registrar", and with that change, the Working Group agreed with the substance of paragraphs 228 and 229 and recommendation 52.

3. Protection against loss of or damage to the business registry record: paragraphs 230 and 231 and recommendation 53

112. It was observed that recommendation 53 should refer to the "registrar" rather than the "business registry", and with that amendment, the Working Group agreed with the substance of paragraphs 230 and 231 and recommendation 53.

4. Safeguard from accidental destruction: paragraph 232 and recommendation 54

113. The Working Group agreed with the substance of paragraph 232 and recommendation 54 of the legislative guide as drafted.

L. Annex: The underlying legislative framework

Flexible legal forms: paragraphs 7 to 10 and recommendation 2/Annex

114. After a discussion in which strongly held divergent views were expressed, the Working Group agreed as follows: (a) the following text should be added to recommendation 2/Annex: "States should consider providing for the optional use of intermediaries for MSMEs."; (b) to add to the end of the second sentence of paragraph 7 the phrase "and less costly" after "much simpler"; and (c) in the final sentence of paragraph 7, to insert a full stop instead of a semicolon after the phrase "through the business registry", to delete "and" and to insert the phrase "There are many States in which" before the phrase "the involvement of a lawyer". The Working Group further agreed that the remainder of the Annex would be the subject of discussion at a future session, but that the drafting of paragraph 7 of the Annex and recommendation 2/Annex should not be revisited by the Working Group.

V. Other matters

115. The Working Group recalled that its thirtieth session would be held in New York from 12 to 16 March 2018. It was confirmed that the Working Group would return at that session to its consideration of a revised text of the draft legislative guide on key principles of a business registry, particularly of the introductory section (paras. 1 to 25 A/CN.9/WG.I/WP.106) and the Annex, but only of those aspects of the text that the Secretariat had been requested by the Working Group to extensively revise. The Working Group also agreed that it would take up the overarching document A/CN.9/WG.I/WP.107 on "Reducing the legal obstacles faced by MSMEs" which set out more generally the context for its work on MSMEs. There was further agreement that once those tasks had been completed, the Working Group would resume its

consideration of the draft legislative guide on an UNLLO found in documents A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1.

B. Note by the Secretariat on a draft legislative guide on key principles of a business registry

(A/CN.9/WG.I/WP.106)

[Original: English]

Contents

Introduction

1. The present legislative guide has been prepared on the understanding that, for the reasons described in document A/CN.9/WG.I/WP.107 (formerly A/CN.9/WG.I/WP.92), it is in the interests of States and of micro, small and medium-sized enterprises (MSMEs) that such businesses migrate to or be created in the legally regulated economy. In addition, this guide is also intended to reflect the idea that entrepreneurs that have not yet commenced a business may be persuaded to do so in the legally regulated economy if the requirements for formally starting their business are not considered overly burdensome. Finally, these materials are prepared on the understanding that, regardless of the particular nature or legal structure of the business, the primary means for an MSME to enter the legally regulated economy in most cases is through registration of their business.

2. As the Working Group may recall, it agreed[1] at its twenty-fifth session that document A/CN.9/WG.I/WP.107, should be prepared as an introductory document that, once adopted, was intended to form a part of the final text and provide an overarching framework for current and future work by UNCTRAL to assist MSMEs in overcoming the legal barriers faced by them during their life cycle. Underpinning that contextual framework would be a series of legal pillars, which would include both legislative guides currently under preparation by the Working Group – the present guide on key principles of a business registry and the other guide on an UNCITRAL limited liability organization[2] – as well as any other materials adopted by UNCITRAL in respect of MSMEs. In summary, A/CN.9/WG.I/WP.107 currently outlines the following themes as key to UNCITRAL's approach to its MSME work:

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[1] As agreed by the Working Group (para. 87, A/CN.9/866) and approved by the Commission (*Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17) para. 222).

[2] See A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1.

(a) The importance of MSMEs in the global economy;

(b) Each State should decide what constitutes a micro, small or medium-sized business in its own economic context, the common factor being that the smallest and most vulnerable businesses require assistance;

(c) Although MSMEs are incredibly disparate in their size, goals, the commercial sector in which they operate and their general nature, they usually face a number of common obstacles;

(d) Improving the business environment assists businesses of all sizes, not only MSMEs;

(e) Participation by MSMEs in the legally regulated economy can assist them in successfully negotiating the obstacles they face;

(f) States should make it simple and desirable for MSMEs to participate in the legally regulated economy by:

(i) Explaining what it means and by setting out the advantages for entrepreneurs, as well as by ensuring appropriate communication and education on those advantages and opportunities;

(ii) Making it desirable for MSMEs to conduct their activities in the legally regulated economy, for example, by offering them incentives for doing so; and

(iii) Making it easy for MSMEs to enter the legally regulated economy by enacting laws that:

a. Facilitate creation and operation of legally recognized simple and flexible legal forms that meet the needs of MSMEs;[3] and

b. Ensure that business registration is accessible, simple and streamlined.

3. In light of that general approach, in order to encourage entrepreneurs to start their business and conduct their activities in the legally regulated economy, States may wish to take steps to rationalize and streamline their system of business registration. The recommendations in this legislative guide are intended to be implemented by States that are reforming or improving their system of business registration. Further, as noted above, the present guide takes the approach that since business registration is the primary conduit through which MSMEs can become visible in the legally regulated economy and be able to access programmes intended to assist them, the business registry should continue to *require* only certain types of businesses to register, but it should *enable* all businesses to register. Moreover, general improvements made by a State to its business registration system may be expected to assist not only MSMEs, but businesses of all sizes, including those already operating in the legally regulated economy. Faster and simpler procedures to register a business will assist in business formation and its operation in the legally regulated economy. For these reasons, simplification and streamlining of business registration has become one of the most pursued reforms by States in all regions and at all levels of development. This trend has generated several good practices, whose features are shared among the best performing economies. In order to assist States wishing to reform their business registration procedures so as to take into consideration the particular needs of MSMEs, or simply to adopt additional good practices to streamline existing procedures, this guide sets out key principles and good practices in respect of business registration, and how to achieve the necessary reforms.

4. Further to discussion in the Working Group and decisions made at its twenty-fifth (October 2015) and twenty-sixth sessions (April 2016),[4] the Secretariat

[3] The Working Group is currently preparing a draft legislative guide aimed at this goal, see A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1.

[4] See para. 73, A/CN.9/860 and para. 51, A/CN.9/866.

prepared a consolidated draft legislative guide (A/CN.9/WG.I/WP.101), which addressed legal, technological, administrative and operational issues involved in the creation and implementation of a business registration system. The draft combined into a single text the draft commentary (A/CN.9/WG.I/WP.93, Add.1 and Add.2) and recommendations (A/CN.9/WG.I/WP.96 and Add.1) considered by the Working Group at its twenty-fifth and twenty-sixth sessions.

5. At its twenty-eighth session (May 2017), the Working Group reviewed that consolidated text (A/CN.9/WG.I/WP.101) save for the introductory section and draft recommendation 9 ("Core functions of a business registry") and its attendant commentary to which the Working Group agreed[5] to revert at a future session. The changes to the text arising from the deliberations of the Working Group at that session have been included in this revised draft legislative guide; guidance to the revisions made is reflected in footnotes throughout the text. In addition, the Secretariat has made editorial adjustments necessary to facilitate the cohesion and consistency of the text. Further to decisions of the Working Group at its twenty-eight session, in some cases the Secretariat has also changed the order of the recommendations and the relevant commentary; the recommendations have been renumbered consecutively and any cross-references adjusted accordingly.

A. Purpose of the present guide

6. Business registries are public entities, established by law, that record and update information on new and existing businesses that are operating in the jurisdiction of the registry, both at the outset and throughout the course of their lifespan.[6] This process not only enables such businesses to comply with their obligations under the domestic legal and regulatory framework applicable to them, but it empowers them to participate fully in the legally regulated economy, including enabling them to benefit from legal, financial and policy support services not otherwise available to unregistered businesses. Moreover, when information is appropriately maintained and shared by the registry, it allows the public to access business information, thus facilitating the search for potential business partners, clients or sources of finance and reducing risk when entering into business partnerships.[7] In performing its functions, the registry can thus play a key role in the economic development of a State. In addition, since businesses, including MSMEs, are increasingly expanding their activities beyond national borders, registries efficiently performing their functions can play an important role in a cross-border context[8] by facilitating access to business information of interested users from foreign jurisdictions (see also paras. 195 and 196 below),[9] which greatly reduces the risks of transacting and contracting.

7. Business registration systems vary greatly across States and regions, but a common thread to all is that the obligation to register can apply to businesses of all sizes depending on the legal requirements applicable to them under domestic law. Approaches to business registration reforms are most often "neutral" in that they aim at improving the functioning of the registries without differentiating between large scale business activities and much smaller business entities. Evidence suggests, however, that when business registries are structured and function in accordance with certain features, they are likely to facilitate the registration of MSMEs, as well as

[5] Agreed by the Working Group at its twenty-eighth session (para. 46, A/CN.9/900 and para. 82, A/CN.9/860).

[6] See L. Klapper, R. Amit, M. F. Guillén, J. M. Quesada, Entrepreneurship and Firm Formation Across Countries, 2007, page 8.

[7] See World Bank and International Finance Corporation, Doing Business, 2015, page 47 and para. 35, A/CN.9/WG.I/WP.92.

[8] See European Commission, Green Paper, The interconnection of business registers, 4 November 2009, page 2.

[9] Council of the European Union, Council conclusions on the interconnection of business registers, 25 May 2010.

operating more efficiently for businesses of all sizes. These features are reflected as recommendations in this legislative guide.

8. This legislative guide draws on the lessons learned through the wave of reforms of business registration systems implemented since 2000 by various developed and developing economies.[10] Through this approach, the guide intends to facilitate not only efficient domestic business registration systems, but also cooperation among registries in different national jurisdictions, with a view to facilitating cross-border access to the registries by all interested users. Promoting the cross-border dimension of business registration contributes to foster transparency and legal certainty in the economy and significantly reduces the cost of businesses operating beyond their national borders (see also paras. 195 and 196 below).[11]

9. The present guide supports the view that transitioning to an electronic or mixed (i.e. paper and electronic) registration system, providing registration and post-registration services at no cost or at low cost, and collecting and maintaining high quality information on registered businesses greatly contribute to promoting the registration of MSMEs. Importantly, establishing a one-stop shop for business registration and registration with other authorities such as tax authorities, social services and the like greatly facilitates registration, particularly in the case of MSMEs, and can be expected to have a significant impact on their likelihood to enter the legally regulated economy. In this regard, it should be noted that the terms "business registry" and "one-stop shop" (i.e. a single interface for business registration) as used in this draft guide are not intended to be interchangeable. When these materials refer to the "business registry", it means the system for receiving, storing and making accessible to the public certain information about business entities. When the term one-stop shop is used, it refers to a single entry point, physical or electronic, that a business can use to achieve not only its registration as a business in the legally-regulated economy, but a single entry point to all other regulatory functions in the State that relate to starting and operating a business, including, for example, registering for tax purposes and for social services associated with the operation of a business.

10. These materials have benefited from various tools prepared by international organizations that have supported such reform processes, in particular, in developing and middle income economies. Data made available through the activity of international networks of business registries that, among other activities, survey and compare the practices of their affiliates in various States around the world have also been referenced. The main sources used in the preparation of this draft legislative guide include:

- How Many Stops in a One-Stop Shop? (Investment Climate, World Bank Group, 2009)
- Outsourcing of business registration activities, lessons from experience (Investment Climate Advisory Services, World Bank Group, 2010)
- Innovative Solutions for Business Entry Reforms: A Global Analysis (Investment Climate, World Bank Group, 2012)
- Reforming Business Registration: A Toolkit for the Practitioners (Investment Climate, World Bank Group, 2013)
- The annual International Business Registers Report (prepared previously by ECRF, and currently by ASORLAC, CRF, ECRF and IACA)[12]

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[10] For further details, see para. 8, A/CN.9/WG.I/WP.85.

[11] See supra, footnote 8, pages 2 ff.

[12] The report is prepared by the following registry organizations: Association of Registrars of Latin America and the Caribbean (ASORLAC); Corporate Registers Forum (CRF); European Commerce Registers' Forum (ECRF); and International Association of Commercial Administrators (IACA). These organizations include State registry officials from around the globe.

- The Business Facilitation Programme website (developed by UNCTAD)[13]
- Guide to the International Business Registers Surveys 2016 (available at http://www.ecrforum.org)
- […]

[*The Working Group may wish to note that reference to these specific resources will be changed in the final text to reference to the international organizations that prepared them*]

11. This legislative guide is addressed to States interested in the reform or improvement of their business registration systems, including all stakeholders in the State that are interested or actively involved in the design and implementation of business registries, as well as to those that may be affected by or interested in the establishment and operation of a business registry, such as:

(a) Policymakers;

(b) Registry system designers, including technical staff charged with the preparation of design specifications and with the fulfilment of the hardware and software requirements for the registry;

(c) Registry administrators and staff;

(d) Registry clientele, including business persons, consumers, and creditors, as well as the general public and all others with an interest in the appropriate functioning of the business registry;

(e) Credit agencies and other entities that will provide credit to a business;

(f) The general legal community, including academics, judges, arbitrators and practising lawyers; and

(g) All those involved in company law reform and the provision of technical assistance in the simplification of business registration, such as international organizations, bilateral donors, multilateral development banks and non-governmental organizations active in the field of business registration.

12. The present guide uses neutral legal terminology so that its recommendations can be adapted easily to the diverse legal traditions and drafting styles of different States. This draft legislative guide also takes a flexible approach, which will allow its recommendations to be implemented in accordance with local drafting conventions and legislative policies regarding which rules must be incorporated in principal legislation and which may be left to subordinate regulation or to ministerial or other administrative rules.

B. Terminology

13. The meaning and use of certain expressions that appear frequently in this draft legislative guide is explained in this paragraph. It is to be noted that whenever expressions such as annual accounts, periodic returns, documents, forms (such as search forms, registration forms or other forms to request registry services), notices, notifications and written materials are used, reference is intended to include both their electronic and paper versions unless otherwise indicated in the text. The most used expressions in this draft legislative guide include the following:

- *Annual accounts*: The term “annual accounts” means financial information on the business’ activities prepared at the end of a financial year of the business (see “periodic returns”).[14]

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[13] UNCTAD is the United Nations Conference on Trade and Development. See http://businessfacilitation.org/index.html.

[14] See Guide to the International Business Registers Surveys 2016, page 2.

- *Branch*: The term "branch" means an entity carrying on business in a new location either within the jurisdiction in which it was formed or in another domestic or cross-border jurisdiction. The branch is not a subsidiary and does not have a separate legal personality from the original or main business.[15]

- *Business name*: The term "business name" means a name registered on behalf of a business.[16]

- *Business registry or business registration system*: The term "business registry or business registration system" means a State's system for receiving, storing and making accessible to the public certain information about businesses.

- *Deregistration*: The term "deregistration" means indicating in the registry that a business is no longer registered.

- *Electronic signature*: The term "electronic signature" means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message.[17]

- *ICT*: The term "ICT" means information and communications technology.

- *Law*: The term "law" means the applicable law in the enacting State and is intended to include both the specific rules adopted to establish the business registry (whether such rules are found in legislation or in administrative regulations or guidelines, see para. 1 in the Annex) and the broader body of domestic law that may be relevant to issues related to the business registry but are found outside of the specific rules establishing the business registry.[18]

- *Legally regulated economy*: The term "legally regulated economy" means that economic activity which takes place in a State within the context of the legal and regulatory regime that the State has established to govern such activity. The legally regulated economy does not include commercial activity that takes place outside of that context (sometimes referred to as the "extra-legal economy"), nor does it include trade in illicit goods or services.

- *Micro, small and medium-sized enterprises (MSMEs)*: The term "MSMEs" means micro, small and medium-sized enterprises as they are defined according to the criteria established by the relevant authority of the State in the law of the State undertaking the business registration reforms.

- *One-stop shop*: The term "one-stop shop" means a physical office, a single interface on an electronic platform or an organization that carries out more than one function relating to the registration of a business with the business registry and other government agencies (e.g. the taxation and social services authorities, and the pension fund) necessary in order for the business to operate in the legally regulated economy.

- *Periodic returns*: The term "periodic returns" means a statement provided annually or at other prescribed intervals which gives essential information about a business' composition, activities, and financial status, and which, subject to applicable law, registered businesses may be required to file with an appropriate authority (see "annual accounts").

- *Protected data*: The term "protected data" means all information that must be kept confidential pursuant to the applicable law of the enacting State.

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[15] See The International Business Registers Report, 2015, page 43.
[16] See supra, footnote 14.
[17] See UNCITRAL Model Law on Electronic Signatures (2001), article 2.
[18] This approach incorporates the Working Group's suggestion at its twenty-eighth session to use the term "law" (para. 21, A/CN.9/900).

- *Registered business*: The term "registered business" means a business that, further to filing an application for registration, has been officially registered in the business registry.
- *Registered information*: The term "registered information" means information submitted to the registry, including protected data and information that will be made public.
- *Registrant*: The term "registrant" means the natural or legal person that submits the prescribed application form and any additional documents to a business registry.
- *Registrar*: The term "registrar" means the person appointed pursuant to domestic law to supervise and administer the operation of the registry.[19]
- *Registration*: The term "registration" means the entry of information required by domestic law into the business registry.
- *Reliable*: A business registration system and the information it contains is "reliable" when the registered data is of good quality and the system may be considered positively in terms of performance. "Reliable" is not a legal standard and does not refer to whether the information is legally binding on the registry, the registrant, the registered business, or third parties.[20]
- *Unregistered business*: The term "unregistered business" means those businesses that are not included in the business registry.
- *Unique identifier*: The term "unique identifier" means a set of characters (numeric or alphanumeric) that is allocated only once to a business and that is used consistently by the public agencies of a State.

C. Legislative drafting considerations

14. States implementing the principles contained in this legislative guide should consider whether to include them in a law, in a subordinate regulation, in administrative guidelines or in more than one of those texts. This matter would be left for enacting States to decide in accordance with their own legislative drafting conventions. In this respect, it should be noted that this guide does not distinguish between those concepts and uses the general term "law" of the enacting State. As noted in the section on terminology, such term is intended to denote both the rules adopted by the enacting State to establish the business registry and those provisions of domestic legislation in the broader sense that are somehow relevant to and touch upon issues related to business registration.[21]

D. The reform process

15. Streamlining business registration in order to meet the key objective of simplifying the registration process as well as making it time and cost efficient and user friendly (both for registrants and stakeholders searching the registry) usually requires undertaking reforms that address the enacting State's legal and institutional framework. It may also be necessary to reform the business processes that support the

[19] At its twenty-eighth session, the Working Group requested that the Secretariat clarify the difference between "authority" and "designated authority" in the legislative guide (para. 40, A/CN.9/900); instead, use of the defined term "registrar" is suggested as a means to clarify those concepts.

[20] The Working Group agreed at its twenty-eighth session (paras. 32-33, A/CN.9/900) that the Secretariat should adjust the definition of "reliable" in paragraph 13 (para. 12 in A/CN.9/WG.I/WP.101) and should ensure that the term was used consistently throughout the text. To that end, the Secretariat has revised the definition (see also para. 35 below and footnote 40).

[21] This paragraph incorporates the Working Group's suggestion at its twenty-eighth session to use the term "law" (para. 21, A/CN.9/900).

registration system. Sometimes reforms are needed in all of these areas. The approach taken in these reforms may vary considerably among States as the design and features of a registration system are influenced by the State's level of development, priorities and legal framework. There are, however, several common issues that States should consider and several similar recommended steps for reform regardless of jurisdictional differences that may exist. These issues are examined below.

1. The reform catalysts

16. Business registration reform is a multifaceted reform process that addresses various aspects of the State apparatus; its implementation requires the participation of a broad range of stakeholders and a thorough understanding of the State's legal and economic conditions, as well as of the practical needs of registry personnel and the intended users of the registry. To be successful, the reform must be driven by the need to improve private sector development and, for this reason, it is advisable that the reform be part of a larger private sector development or public sector modernization programme.[22] It is thus essential to gain an understanding of the importance of business registration in relation to other business environment challenges and of its relationship to other potential reforms. This analysis will require, as crucial preliminary steps, ensuring that domestic circumstances are amenable to a business reform programme, that incentives for such a reform exist and that there is support for such initiatives in the government and in the private sector prior to embarking on any reform effort.

(a) Relevance of a reform advocate

17. Support or even leadership from the highest levels of the State's government is of key importance for the success of the reform process. The engagement of relevant government ministries and political leadership in the reform effort facilitates the achievement of consensus on the steps required. This can be particularly important to facilitate access to financial resources, to make and implement decisions or when it is necessary to move business registry functions from one branch of government to another or to outsource them.[23]

(b) The steering committee

18. In order to oversee the day-to-day progress of the reform and to manage difficulties as they may arise, it is advisable that a steering committee be established to assist the State representative or body leading the reform. In addition to experts with technological, legal and administrative expertise, this committee should be composed of representatives of the public and private sector and should include a wide range of stakeholders, including those who can represent the perspectives of intended users. It may not always be necessary to create such a committee, since it may be possible to use existing mechanisms; in any event, a proliferation of committees is to be avoided, as their overall impact will be weakened.[24]

19. Experience indicates that a steering committee should have clearly defined functions and accountability; it is advisable that its initial setup be small and that it should grow progressively as momentum and stakeholder support increase. Although linked to the high level government body spearheading and advocating for the reform, the committee should operate transparently and independently from the executive branch. In certain jurisdictions, regulatory reform bodies have later been transformed into more permanent institutions that drive ongoing work on regulatory governance and regulatory impact analysis.

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[22] See A. Mikhnev, Building the capacity for business registration reform, 2005, page 16.

[23] For further reference, see Investment Climate, (World Bank Group) Reforming Business Registration: A Toolkit for the practitioners, 2013, page 23.

[24] For further reference, see World Bank Group, Small and Medium Enterprise Department, Reforming Business Registration Regulatory Procedures at the National Level, A Reform Toolkit for Project Teams, 2006, page 39.

20. The steering committee must nurture the reform process and consider how to address concerns raised in respect of it.[25] Concerns could include those arising from bureaucratic inertia, or fears that registry employees may lose their jobs if their ICT skills are weak or if technology replaces human capital. Thus, it is likely to be important for the body overseeing the reform to be able to consider diverse interests and fully inform potential beneficiaries and political supporters.

(c) The project team

21. In collaboration with the steering committee, it is advisable that a project team be assigned the task of designing a reform programme tailored to an enacting State's circumstances and providing technical expertise to implement the reforms. A successful reform will require a team of international and local specialists, with expertise and experience in business registration reform, in legal and institutional reform, and in a variety of technology matters (for example, software design, hardware, database and web specialists).

(d) Awareness-raising strategies

22. States embarking on a reform process should consider appropriate communication strategies aimed at familiarizing businesses and other potential registry users with the operation of the registry and of the legal and economic significance of business registration. This effort should include informing businesses about the benefits of registration and participation in the legally regulated economy (e.g. visibility to the public, the market and the banking system); opportunity to participate in public procurement; legal validation of the business; access to flexible business forms and asset partitioning; possibility of protecting the business' unique name and other intangible assets; opportunities for the business to grow and to have access to a specialized labour force and access to government assistance programmes. The awareness-raising strategy should also ensure that information on compliance with the law, fulfilment of the obligations taken on by registration (e.g. payment of taxes) and potential penalties for non-compliance is similarly clear and easily available.[26]

23. Effective communication may also be expected to encourage the development of new businesses and the registration of existing unregistered businesses, as well as to provide signals to potential investors about the enacting State's efforts towards improvement of the business environment. Awareness-raising strategies should commence early in the reform process and should be maintained throughout it, including after the enactment of the legal infrastructure and implementation of the new business registration system. In coordination with the steering committee, the project team should determine which cost-effective media can best be used: these can include private-public dialogues, press conferences, seminars and workshops, television and radio programmes, newspapers, advertisements, and the preparation of detailed instructions on submitting registration information and obtaining information from the business registry.[27] In order to raise MSME awareness of the reforms to the business registration system, it may be advisable to consider communication strategies tailored specifically to that audience.[28]

(e) Incentives for businesses to register

24. In addition to an efficient awareness-raising campaign, States should consider adding incentives for MSMEs and other businesses to register through the provision of ancillary services for registered businesses (see para. 2(f)(ii) above). The types of incentives will clearly vary according to the specific economic, business and regulatory context. By way of example, they may include: promoting access to credit

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[25] See supra, footnote 23, page 25.

[26] For a more detailed presentation of these issues see section III.A.1 of A/CN.9/WG.I/WP.107 and A/CN.9/WG.I/WP.98, Section D.2. See also paras. 124 and 207 to 209 of this working paper.

[27] See supra, footnote 23, pages 26–27.

[28] See section III.A.2 of A/CN.9/WG.I/WP.107.

for registered businesses; offering accounting training and services as well as assistance in the preparation of a business plan; providing credits for training costs; establishing lower and simplified taxation rates and tax mediation services; providing business counselling services; providing monetary compensation, government subsidies or programmes to foster MSME growth and providing low-cost technological infrastructure.[29]

2. Phased reform process

25. The duration of a reform process can vary considerably, depending on the types of reforms implemented and on other circumstances relevant to the particular economy. While the most comprehensive approach may entail a complete reform of the business registry and the legislation establishing it, this may not be realistic in all cases and enacting States may wish to consider a phased implementation of their reform. Lessons learned from experience in various jurisdictions demonstrate, for instance, that in States with a large number of unregistered businesses, a reform process that adopts a "think small" approach at the outset of the reform process, might be more effective than a reform with a broader focus, which could be introduced at a later stage.[30] For example, if the main objective is to promote the registration of MSMEs at the outset, simple solutions addressing the needs of MSMEs operating at the local level may be more successful than introducing sophisticated automated systems that require high-level technological infrastructures, changes in the legal and institutional framework and that may be more appropriate to larger businesses or businesses operating in the international market. Even when the reform is carried out in more developed jurisdictions, it may be advisable to "start small" and pilot the reforms at a local level (for example, in a district or the capital) before extending them state-wide. Success in a pilot stage can have a strong demonstration effect, and is likely to build support for continued reform.[31]

I. Objectives of a business registry[32]

26. The focus of the present legislative guide is primarily the business registry of a State and the adoption of best practices in order to optimise the operation of the business registration system for its users so that it is simple, efficient and cost-effective. However, in most States, in order for a business to participate in the legally regulated economy, it must usually register not only with the business registry but also with various additional public authorities (see also para. 60 below). In addition to the business registry, these agencies often include taxation and social services authorities. States wishing to facilitate the entry of businesses into the legally regulated economy should thus assess the multiple public agencies with which a business must register in addition to the business registry, and consider ways to reduce the burden on businesses by streamlining those requirements. As examined in greater detail in this legislative guide (see paras. 90 to 100 below), one way to accomplish that goal would be for a State to establish a one-stop shop for business registration and for registration with other public authorities, subject to the legal and institutional organization of the enacting State.

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[29] For a more comprehensive list of incentives, see section III.B of A/CN.9/WG.I/WP.107 and A/CN.9/WG.I/WP.98, section C.6(c).

[30] See Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 26.

[31] For further reference, see supra, footnote 24, page 45.

[32] At its twenty-eighth session, the Working Group agreed that the commentary to this recommendation (recommendation 1 of A/CN.9/WG.I/WP.101) could highlight the importance of developing a one-stop shop in order to facilitate business registration and registration with other authorities (paras. 22, 57 and 144 to 145, A/CN.9/900) bearing in mind concerns raised by some delegations that broadening the concept of "business registration" could have a negative impact on the text and on its scope in general. The Working Group may also wish to consider on this issue the content of A/CN.9/WG.I/WP.107 (formerly A/CN.9/WG.I/WP.92) which is intended to form the overarching introduction to all work on MSMEs.

A. Purposes of the business registry

27. The opening provisions of the law that creates the foundation of a business registry should provide for the establishment of the registry and set out explicitly the purpose of a system for the registration of businesses.

28. The law of the enacting State should establish which businesses are required to register. Currently, many States require only businesses of a certain legal form to register, often focusing on those legal forms that have limited liability status. Requiring such businesses to register puts third parties dealing with them on notice of their limited liability status, as well as providing additional information in respect of them, depending on the requirements of the law establishing the legal form. However, since business registration may be viewed as the main conduit through which businesses of all sizes and legal forms interact with the State and operate in the legally regulated economy, States may wish to permit all such businesses to register. Through registration, a business becomes more visible not only in the marketplace, but also to States, who may then be able to more easily identify MSMEs in need of support, and design appropriate programmes for those purposes. As such, permitting the registration of all sizes and legal forms of business may encourage the registration of MSMEs, assisting them in their growth in addition to facilitating their operation in the legally regulated economy (see also para. 2 above, para. 130 below and A/CN.9/WG.I/WP.107).[33]

29. In light of the above, the following overarching principles should govern an effective system of business registration: (a) enabling businesses of all sizes and legal forms to be visible in the marketplace and to operate in the legally regulated commercial environment; and (b) enabling MSMEs to increase their business opportunities and to improve the profitability of their businesses.[34]

Recommendation 1: Purposes of the business registry[35]

The law should provide that the business registry is established for the purposes of:

(a) Providing to a business an identity that is recognized by the enacting State and enables businesses required to register, and assists those permitted to register, to participate in, and receive the benefits of participating in, the legally regulated economy of the State; and

(b) Making information in respect of registered businesses accessible to the public.

B. Simple and predictable legislative framework permitting registration for all businesses

30. States should set the foundations of their business registry by way of law. In order to foster a transparent and reliable business registration system, with clear accountability of the registrar (see also paras. 44 and 46 below), that law should be simple and straightforward. Care should be taken to limit or avoid any unnecessary

[33] At its twenty-eighth session, the Working Group decided that the commentary to this recommendation (recommendation 1 of A/CN.9/WG.I/WP.101) should reflect that enacting States should decide which businesses were required to register (para. 24, A/CN.9/900).

[34] The Working Group agreed at its twenty-eighth session (para. 23, A/CN.9/900) to add to the commentary of this recommendation any necessary detail on the importance of States assisting MSMEs in light of the content of A/CN.9/WG.I/WP.107 (formerly A/CN.9/WG.I/WP.92), which is intended to form the overarching introduction to all work on MSMEs, and para. 2 and the introductory section of the present text.

[35] At its twenty-eighth session, the Working Group agreed to adjust the drafting of this recommendation (recommendation 1 of A/CN.9/WG.I/WP.101) by substituting a word for "entitles" in subparagraph (a) in order to clarify that the enacting State should decide which businesses should be required to register (para. 24, A/CN.9/900).

use of discretionary power, and to provide for appropriate safeguards against its arbitrary use. However, some discretion should be permitted to the registry in order to ensure the smooth functioning of the system. For instance, subject to the requirements of the law and prior notice to the registrant, the registrar may be allowed to correct errors in the registered information (see also paras. 150 and 228 below).

31. The applicable law in each State should determine which business forms are required to register, and which additional conditions those businesses may have to fulfil as part of that requirement. Since business registration is considered the key means through which all businesses, including MSMEs, can participate effectively in the legally regulated economy, States should enable[36] businesses of all sizes and legal forms to register in an appropriate business registry, or create a single business registry that is tailored to accommodate registration by a range of businesses of different sizes and different legal forms.

32. The law governing business registration should also provide for simplified registration and post-registration procedures in order to promote registration of MSMEs. The goal should be for States to establish registration procedures with only the minimum necessary requirements for MSMEs and other businesses to operate in the legally regulated economy. Of course, businesses with more complex legal forms would be subject to additional information requirements under the law of the enacting State as a consequence of their particular legal form or type of business.[37]

33. Further, regardless of the approach chosen to maintain updated information in the business registry, it would be advisable to make updating the records of MSMEs as simple as possible. This could involve a number of different approaches examined in greater detail below, such as extending the period of time for such businesses to declare a change; harmonizing the information needed when the same information is repeatedly required; or exempting MSMEs from certain obligations in specific cases.[38]

Recommendation 2: Simple and predictable legislative framework permitting registration for all businesses

The law should:

(a) Adopt a simple structure for rules governing the business registry and avoid the unnecessary use of exceptions or granting of discretionary power;

(b) Establish a system for the registration of businesses that permits registration of businesses of all sizes and legal forms; and

(c) Ensure that micro, small and medium-sized enterprises (MSMEs) are subject to the minimum procedural requirements.[39]

C. Key features of a business registration system

34. To be effective in registering businesses of all sizes, a business registration system should ensure that, to the extent possible, the registration process is simple, time and cost efficient, user-friendly and publicly accessible. Moreover, care should be taken to ensure that the public registered information on businesses is easily searchable and retrievable, and that the process through which the registered

[36] At its twenty-eighth session, the Working Group decided to delete the phrase “may wish to consider requiring or enabling” and replace it with “should enable” (para. 27, A/CN.9/900).

[37] At its twenty-eighth session, the Working Group agreed to add the phrase “or type of business” at the end of paragraph 29 (para. 27, A/CN.9/900).

[38] See also paragraphs 160 to 164 in this working paper on “Maintaining a current registry”.

[39] At its twenty-eighth session the Working Group agreed (para. 30, A/CN.9/900) to delete the closing phrase of subparagraph (c) of this recommendation (recommendation 2 of A/CN.9/WG.I/WP.101) (“except where such a business is subject to additional requirements under the law of the enacting State as a consequence of its particular legal form”).

information is collected and maintained as well as the registry system are kept as current, reliable and secure as possible.

35. The reliability of the business registration system and the information contained in the registry is a recurring theme in the present guide. In keeping with the definition of reliable as set out in paragraph 13 above,[40] the reliability of the system refers to its positive performance and dependability in collecting and storing data, while reliable information refers to data that is consistently good in quality. The term does not refer to the method that a State uses to ensure that reliability, and this legislative guide leaves it to each enacting State to determine how best to ensure the reliability of its business registration system and the information it contains in light of its own context and legal tradition. Reliability in this guide does not refer to whether or not the information in the business registry is legally binding on the registry, the registrant, the registered business or on third parties, nor to whether the enacting State uses a declaratory or approval approach in respect of its business registration system. However, the extent to which information in the registry is legally binding and whether the State adopts a declaratory or approval system are aspects that should be made clear by the enacting State in its business registry law and on the business registry itself.

36. Regardless of which registration system is adopted, maintaining high quality, current and reliable information is imperative for the business registry in order to make the information useful for the registry users and to establish users' confidence in business registry services. This applies not only to the information provided when applying to register a business, but also to the information that the entrepreneur submits during the lifetime of the business. It is thus important that the information meets certain requirements in the way it is submitted to the registry and then made available to the public. For these reasons, States should devise provisions that allow the registry to operate according to principles of transparency and efficiency in the way information is collected, maintained and released.

37. The registry can implement certain procedures in order to ensure that the information maintained in the registry is of good quality and reliable.[41] Those procedures, which will be further discussed in the following sections of the present guide, can be grouped into two broad categories. One group comprises those measures aimed at protecting the identity and integrity of a business through the prevention of corporate identity theft or the adoption of identity verification methods for those who provide information to the business registry. A wide range of measures can be implemented in this regard, such as the use of monitoring systems or establishing access through the use of passwords to prevent corporate identity theft; or the use of electronic signatures and electronic certificates to verify the identity of those who submit information to the registry. Business registries usually adopt more than one type of measure.[42]

38. Another group of measures that registries can implement to ensure the good quality and reliability[43] of the registered information pertains to the way information is collected and maintained in the registry and the frequency with which it is updated (see paras. 156 to 164 below). In this regard, ensuring that the registry record is regularly updated is of key importance. In electronic registry systems, the software will usually provide for automated periodic updating as amendments are submitted by businesses. However, when registries use paper-based or mixed systems, the

[40] The Working Group agreed at its twenty-eighth session (para. 32, A/CN.9/900) that the Secretariat should adjust the discussion in this paragraph as necessary to acknowledge the definition of "reliable" in paragraph 13 (para. 12 of A/CN.9/WG.I/WP.101), and should ensure that the term was used consistently throughout the text. To that end, the Secretariat has revised the definition and this paragraph.

[41] At its twenty-eight session, the Working Group agreed to retain the phrase "good quality", although such notion was included in the definition of "reliable" (see para. 33, A/CN.9/900). The Working Group may wish to consider whether it is necessary to retain such reference to "good quality" throughout the text.

[42] See International Business Registers Report 2016, page 128.

[43] See supra footnote 41.

registry staff must ensure that updates to the registry record are entered as soon as practicable, and if possible, in real time or at least once daily (see para. 164 below). To underpin these measures, it is important for States to establish effective enforcement mechanisms upon which registries can rely when a business fails to provide accurate and complete information (see paras. 206 to 209 below).[44]

39. Moreover, in order to enhance the quality and reliability[45] of the information deposited in the registry, enacting States should preserve the integrity and security of the registry record itself. Steps to achieve those goals include: (a) requiring the registry to request and maintain the identity of the registrant; (b) obligating the registry to notify promptly the applicant business about the registration and any changes made to the registered information; and (c) eliminating any discretion on the part of registry staff to deny access to registry services.

Recommendation 3: Key features of a business registration system

The law should ensure that the system for business registration contains the following key features:

(a) The registration process is publicly accessible, simple, user-friendly and time- and cost-efficient;

(b) The registration process is suited to the needs of MSMEs;

(c) The registered information on businesses is easily searchable and retrievable; and

(d) The registry system and the registered information are of good quality and are kept as current, reliable and secure as possible.[46]

II. Establishment and functions of the business registry

40. In order to establish an effective business registration system, several approaches may be taken. However, despite the fact that approaches vary in different States, there is broad agreement on certain key objectives of effective business registration systems. Regardless of differences in the way business registries may operate, efficient business registries have a similar structure and perform similar functions when carrying out the registration of a new business or in recording the changes that may occur in respect of an existing business.

A. Responsible Authority

41. In establishing or reforming a business registry, enacting States will have to decide how the business registry will be organized and operated. Different approaches can be taken to its form,[47] the most common of which is based on oversight by the

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[44] For further reference, see The International Business Registers Report 2015, pages 119 ff. At its twenty-eighth session, the Working Group requested the Secretariat to amend the text as follows: (a) the paragraphs should focus on the general concepts of verification and security of information as well as on best practices to ensure them; (b) cross-references to the concepts expressed in recommendations 28(a), 40 and 41 (as they appeared in A/CN.9/WG.I/WP.101) should be included; and (c) the reference to requiring business to reregister at certain intervals should be deleted since such a practice could be viewed as unduly burdensome on MSMEs (para. 36, A/CN.9/900).

[45] See supra footnote 41.

[46] At its twenty-eighth session, the Working Group agreed to include the phrase “good quality” into subparagraph (d) of this recommendation (recommendation 3 of A/CN.9/WG.I/WP.101) to be consistent with the language of paragraph 35 to delete the square brackets around the subparagraph and to retain the text (paras. 33 and 37, A/CN.9/900).

[47] According to The International Business Registers’ Report 2015, registries are organized in the following ways: 82 per cent of business registries are state-governed; 7 per cent are organized as public-private partnerships; 5 per cent are governed by the judiciary; and 1 per cent are operated by privately owned companies.

government. In such States, a government department or agency, staffed by civil servants, and usually established under the authority of a particular government department or ministry, operates the registration system. Another type of organization of a business registry is one that is subject to administrative oversight by the judiciary. In such contexts, the registration body might be a court or a judicial registry whose function, usually specified in the applicable commercial code, is concerned with verifying the business requisites for registration but does not require prior judicial approval of a business seeking to register.

42. States may also decide to outsource some or all of the registry operations through a contractual or other legal arrangement that may involve public-private partnerships or the private sector.[48] When registration is outsourced to the private sector, it remains a function of the government, but the day-to-day operation of the system is entrusted to privately-owned companies. In one jurisdiction, for instance, such an outsourcing was accomplished by way of appointing a private company, in accordance with the law, as the assistant registrar with full authority to run the registration function.[49] However, operating the registry through public-private partnerships or private sector companies does not yet appear to be as common as the operation of the registry by a government agency.[50] States may also decide to form entities with a separate legal personality, such as chambers of commerce, with the object of managing and developing the business registry,[51] or to establish by law registries as autonomous or quasi-autonomous agencies, which can have their own business accounts and operate in accordance with the applicable regulations governing public agencies. In one State, for example, the business registry is a separate legal person that acts under the supervision of the Ministry of Justice,[52] while in another State the registry is an administratively separate executive agency of a government department, but does not have separate legal status.[53] In deciding which form of organization to adopt, States will have to consider their specific domestic circumstances, evaluate the challenges and trade-offs of the various forms of organization and then determine which one best meets the State's priorities and its human, technological and financial resources.

43. While the day-to-day operation of the registry may be delegated to a private sector firm, the enacting State should always retain the responsibility of ensuring that the registry is operated in accordance with the applicable law. For the purposes of establishing public trust in the business registry and preventing the unauthorized commercialization or fraudulent use of information in the registry record, the enacting State should retain its competence over[54] the registry record. Furthermore, the State should also ensure that, regardless of the daily operation or the structure of the business registry, the State retains the right to control the access to and use of the data in the registry.

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[48] See European Commerce Registers' Forum, International Business Registers Report, 2014, page 15.

[49] For instance, Gibraltar, cited in Investment Climate (World Bank Group), Outsourcing of Business Registration Activities, Lessons from Experience, 2010, pages 55 ff.

[50] Arrangements involving contracting with the private sector to provide business registration services require careful consideration of several legal and policy issues, such as the responsibilities of the government and the private provider, the form of the arrangements, the allocation of risk, and dispute resolution.

[51] See Luxembourg, supra in footnote 49, pages 52 ff. In Luxembourg, the State, the Chamber of Commerce and the Chamber of Crafts formed an economic interest grouping, i.e. an entity with separate legal personality, with the object of managing and developing the business registry.

[52] See Latvia; for further reference see also A. Lewin, L. Klapper, B. Lanvin, D. Satola, S. Sirtaine, R. Symonds, Implementing Electronic Business Registry (e-BR) Services, Recommendations for policymakers based on the experience of the EU Accession Countries, 2007, page 44.

[53] See the United Kingdom of Great Britain and Northern Ireland; for further reference see also Lewin and others, cited in footnote 50 above, page 44.

[54] At its twenty-eighth session, the Working Group requested the Secretariat to replace the word "ownership" with a concept along the lines of "responsibility" or "rights" in order to be more accurate (para. 38, A/CN.9/900).

Recommendation 4: Responsible authority[55]

The law should provide that:

(a) The business registry should be operated by the State or by an authority appointed by that State; and

(b) The State retains its competence over the business registry.

B. Appointment and accountability of the registrar

44. The law of the State should set out[56] the procedure to appoint and dismiss the registrar, as well as the duties of the registrar, and the authority empowered to supervise the registrar in the performance of those duties.

45. To ensure flexibility in the administration of the business registry, the term "registrar" should be understood as referring to a natural or legal person appointed to administer the business registry. States should permit the registrar to delegate its powers to persons appointed to assist the registrar in the performance of its duties.

46. In addition, the legal framework should clearly set out the functions of the registrar in order to ensure the registrar's accountability in the operation of the registry and the minimization of any potential for abuse of authority. In this regard, the applicable law of the enacting State should establish principles for the liability of the registrar and the registry staff to ensure their appropriate conduct in administering the business registry (the potential liability of the registrar and the registry staff are addressed in paras. 210 to 215 below).[57]

Recommendation 5: Appointment and accountability of the registrar

The law should:

(a) Provide that [*the person or entity authorized by the enacting State or by the law of the enacting State*] has the authority to appoint and dismiss the registrar and to monitor the registrar's performance; and

(b) Determine the registrar's powers and duties and the extent to which those powers and duties may be delegated.

C. Transparency in the operation of the business registration system

47. A legal framework that fosters the transparent and reliable operation of the system for business registration has a number of features. It should allow registration to occur with a limited number of steps, and it should limit interaction with registry authorities, as well as provide short and specified turn-around times, be inexpensive, result in registration of a long-term or unlimited duration, apply throughout the jurisdiction and make registration easily accessible for registrants.

48. Registries should also establish "service standards" that would define the services to which users are entitled and may expect to receive, while at the same time providing the registry with performance goals that the registry should aim to achieve.

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[55] At its twenty-eighth session, the Working Group agreed to redraft this recommendation (recommendation 4 of A/CN.9/WG.I/WP.101) in order to clarify that the State should retain responsibility over the organization of the business registry, but that it could entrust the operation of the registry to an authority established for that purpose (para. 39, A/CN.9/900).

[56] Further to a decision of the Working Group at its twenty-eighth session that it is not necessary to distinguish between primary or secondary legislation in the legislative guide, the Secretariat has replaced the opening phrase of the paragraph ("The law or the regulation established … (for further discussion on the topic of primary and secondary legislation, see para. 1 of the Annex below) …" with the current drafting (para. 21, A/CN.9/900).

[57] At its twenty-eighth session, there was support in the Working Group for the suggestion to add a cross-reference to the potential liability of the registrar and registry staff (para. 42, A/CN.9/900).

Such service standards could include, for example, rules on the correction of errors (see paras. 30 above, and 150 and 228 below), rules governing the maximum length of time for which a registry may be unavailable (such as for electronic servicing) and providing advance notice of any expected down time. Service standards contribute to ensure further transparency and accountability in the administration of the registry, as such standards provide benchmarks to monitor the quality of the services provided and the performance of the registry staff.

Recommendation 6: Transparency in the operation of the business registration system

The registrar should ensure that the rules or criteria that are developed are made public to ensure transparency of the registration procedures.

D. Use of standard registration forms

49. Another approach that is often used in association with the previous one to promote transparency and reliability in the operation of the business registry, is the use of standard registration forms paired with clear guidance to the registrant on how to complete them. Such forms can easily be filled out by businesses without the need to seek the assistance of an intermediary, thus reducing the cost and de facto contributing to the promotion of business registration among MSMEs. These forms also help prevent errors in entering the data by business registry personnel, thus speeding up the overall process. In some jurisdictions, the adoption of standardized registration forms has been instrumental in streamlining the registration requirements and disposing of unnecessary documents.[58]

Recommendation 7: Use of standard registration forms

The law should provide that standard registration forms are introduced to enable the registration of a business and the registrar should ensure that guidance is available to registrants on how to complete those forms.

E. Capacity-building for registry staff

50. Once a reform of the business registration system has been initiated, developing the capacity of the personnel entrusted with business registration functions is an important aspect of the process. Poor service often affects the efficiency of the system and can result in errors or necessitate multiple visits to the registry by users.[59] Capacity development of registry staff could not only focus on enhancing their performance and improving their knowledge of the new registration processes, ICT solutions and client orientation, but staff could also be trained in new ways of improving business registration.

51. As seen in various States, different approaches to capacity-building can be followed, from the more traditional training methods based on lectures and classroom activities, to more innovative ways that can be driven by the introduction of new business registration systems. In some jurisdictions, team-building activities and role-playing have been used with some success, since reforms often break barriers

[58] It should be noted that the use of standard registration forms should not preclude a business from submitting to the registrar additional materials and documents required by applicable law for the creation of the business, or in the exercise of the freedom of contract in establishing the business, such as agreements in respect of the internal operation of the business or additional information in respect of its financial state. (This footnote is intended to clarify, as agreed by the Working Group at its twenty-eighth session, that the submission of additional materials by businesses registering should be permitted: para. 43, A/CN.9/900.)

[59] The technical assistance experience of international organizations, in particular of the World Bank, has provided most of the background material upon which section “E” is based. See, in particular, supra, footnote 23, page 37.

between various government departments and require the improvement of the flow of information among them, as well as an understanding of different aspects of the procedures with which specific registry staff may not be familiar.[60] In other cases, States have also opted for developing action plans with annual targets in order to meet standards of performance consistent with global best practices and trends, and they have linked promotions and bonuses for staff to the achievement of the action plan's goals.[61] In other cases, States have decided to introduce new corporate values in order to enhance the public service system, including business registration.[62] Although the relevant governmental authority will usually take the lead in organizing capacity development programmes for the registry staff, the expertise of local legal and business communities could also be enlisted to assist.

52. Peer-to-peer learning as well as the establishment of national and international networks are also effective approaches to build capacity to operate the registry. These tools enable registry staff to visit other jurisdictions and States with efficient and effective business registration systems. In order to maximize the impact of such visits, it is important that they occur in jurisdictions familiar to the jurisdiction undergoing the reform. This approach has been followed with success in several jurisdictions engaging in business registration reform. International forums and networks also provide platforms for sharing knowledge and exchanging ideas among registry personnel around the world for implementing business registration reform.

53. In order to facilitate business registration, it may be equally important to build capacity on the part of intermediaries in States where the services of those professionals are required to register a business (see paras. 121 and 122 below).

Recommendation 8: Capacity-building for registry staff

The registrar should ensure that appropriate programmes are established to develop and strengthen the knowledge and skills of the registry staff on business registration procedures, service standards[63] and the operation of electronic registries, as well as the ability of registry staff to deliver requested services.

F. Core functions of business registries[64]

54. There is no standard approach in establishing a business registry or in streamlining an existing one: models of organization and levels of complexity can vary greatly depending on a State's level of development, its priorities and its legal framework. However, regardless of the structure and organization of the registry, certain core functions can be said to be common to all registries.

55. In keeping with the overarching principles governing an effective business registration system (see para. 29 above), the core functions of business registries are to:

(a) Facilitate trade and interactions between business partners, the public and the State, including when such interactions take place in a cross-border context,

[60] See K. Rada and U. Blotte, Improving business registration procedures at the sub-national level: the case of Lima, Peru, 2007, page 3.

[61] At its twenty-eighth session, the Working Group agreed to delete the phrase "any improvement of the registry's standing in international rankings", after the phrase "annual targets" and replace it with the notion that States aimed to meet "global best practices and trends" (para. 44, A/CN.9/900).

[62] See supra, footnote 23, page 21.

[63] At its twenty-eighth session, the Working Group agreed to include the phrase "service standards" after the term "procedures" (para. 45, A/CN.9/900).

[64] At its twenty-eighth session, the Working Group, in accordance with its deliberation at its twenty-sixth session (para. 82, A/CN.9/866), agreed to postpone the review of this draft recommendation until it had reviewed the rest of the draft recommendations and commentary (para. 46, A/CN.9/900).

through the publication of reliable (see paras. 32 and 33 above), current and accessible information that business must provide in order to be registered;

(b) Record the identity and disclose the existence of a business to other businesses, to the public and to the State (ideally in a comprehensive database);

(c) Provide a legal form to a business which, depending on the applicable law of a State, may include legal personality and limited liability; and

(d) Provide a commercial identity recognized by the State to enable a business to interact with business partners, including potential sources of finance, the public and the State.

56. In a standard registration process, the entry point for entrepreneurs to business registries may be the support provided to them in choosing a unique name for the new business that they wish to establish. When registering, businesses are usually required to have a name which must be sufficiently distinguishable from other business names within that jurisdiction so that the business will be recognized and identifiable under that name. Enacting States are likely to establish their own criteria for determining how to decide whether business names are sufficiently distinguishable from other business names, and in any event, the assignment of a unique business identifier will assist in ensuring the unique identity of the business within and across jurisdictions (see also paras. 101 to 118 below). Business registries usually assist entrepreneurs at this stage with a procedure that can be optional or mandatory, or they may provide business name searches as an information service. Registries may also offer a name reservation service prior to registering a new business, so that no other business can use that name. Such a name reservation service may be provided either as a separate procedure (again, which can be optional or mandatory), or as a service integrated into the overall business registration procedure.

57. Business registries also provide forms and various types of guidance to entrepreneurs preparing the application and other necessary documents for registration. Once the application is submitted, the registry performs a series of checks and control procedures to ensure that all the necessary information and documents are included in the application. In particular, a registry verifies the chosen business name as well as any requirements for registration that have been established in the State's applicable law, such as the legal capacity of the entrepreneur to operate the business. Some legal traditions may require the registry to perform simple control procedures (such as establishing that the name of the business is sufficiently unique), which means that if all of the basic administrative requirements are met, the registry must accept the information as filed and record it. Other legal traditions may require more thorough verification of the information filed, such as ensuring that the business name does not violate any intellectual property requirement or that the rights of businesses with similar names are not infringed before the registry can allocate a business name (in those regimes where the registry is mandated to do so). All such information is archived by the registry, either before or after the registration process is complete.[65]

58. Payment of a registration fee (if any – see paras. 197 to 201 below) must usually be made before the registration is complete. Once a business registration is complete, the registry issues a certificate that confirms the registration and contains information about the business. Since most of the registered information must be disclosed to interested parties, registries make its public components available through various means, including through publication on a website, or in publications such as the National Gazette or newspapers. Where the infrastructure permits, registries may offer, as an additional non-mandatory service, subscriptions to announcements of specific types of new registrations.

59. Registered information that is made available to the public can include basic information about the business, such as the telephone number and address, or, depending on the requirements of applicable law, more specific information on the business structure, such as who is authorized to sign on behalf of the business or who

[65] See supra, footnote 30, page 9.

serves as the business's legal representative. In some States, public access to certain information in the business registry is provided free of charge (in respect of fees for information, see para. 202 below).

60. A new business must usually register with several government agencies, such as taxation and social services authorities, which often require the same information as that gathered by the business registry. In certain States, the business registry provides to entrepreneurs information on the necessary requirements of other agencies and refers them to the relevant agencies. In States with more developed registration systems, businesses may be assigned a registration number that also functions as a unique identifier across public agencies (see paras. 94 to 116 below), which can then be used in all of the interactions that the business has with government agencies, other businesses and banks. This greatly simplifies business start-up since it allows the business registry to exchange more easily information with the other public institutions involved in the process. In several States that have reformed their registration systems, business registries function as one-stop shops to support registration with other authorities. The services operated by such outlets may include providing any necessary licensing, or they may simply provide information on the procedures to obtain such licences and refer the entrepreneur to the relevant agency. This legislative guide takes the view (see paras. 84 to 93 below) that establishing such one-stop shops for business registration and registration with other public authorities is the best approach for States wishing to streamline their business registration system.

61. One important aspect that States should take into account when establishing a business registration system is whether the registry should also be required to record certain procedures that affect the status of the business, for example bankruptcy, merger, winding-up, or liquidation. The approach to such changes in status appears to vary from State to State. For instance, in some States, registries are often also entrusted with the registration of bankruptcy cases. In developing States or economies in transition, registries tend not to perform this function. In certain jurisdictions, registries are also given the task of registering mergers as well as the winding-up and liquidation of businesses.[66] In any event, business registries naturally also record the end of the life span of any business that has permanently ceased to do business by deregistering it.[67]

62. The opening provisions of the law governing business registration may include a provision that lists the various functions of the registry, with cross references to the relevant provisions of the law in which those functions are addressed in detail. The advantage of this approach is clarity and transparency as to the nature and scope of the issues that are dealt with in detail later in the law. The possible disadvantage is that the list may not be comprehensive or may be read as implying unintended limitations on the detailed provisions of the law to which cross reference is made. Accordingly, implementation of this approach requires special care to avoid any omissions or inconsistencies as well as to allow for the registry's interoperability with other registries in the jurisdiction, and for access to the information maintained in the registry.

Recommendation 9: Core functions of business registries

The law should establish that the functions of the business registry include:

(a) Publicizing the means of access to the services of the business registry, and the opening days and hours of any office of the registry (see paras. 125 to 127 and 182 to 184, and recommendations 18 and 34);

(b) Providing access to the services of the business registry (see paras. 189 to 194 and recommendation 37);

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[66] For further reference, see European Commerce Registers' Forum, International Business Registers Report 2014, pages 33 ff.

[67] See paras. 216 to 221 of this legislative guide.

(c) Providing guidance on choosing the appropriate legal form for the business, on the registration process and on the business's rights and obligations in connection thereto (see paras. 49 and 57 and recommendations 7, 31 and 32);

(d) Listing all the information that must be submitted in support of an application to the registry (see paras. 132 to 136 and recommendation 20);

(e) Assisting businesses in searching and reserving a business name (see paras. 56 and 57);

(f) Providing the reasons for any rejection of an application for business registration (see paras. 149 to 152 and recommendation 26);

(g) Registering the business when the business fulfils the necessary conditions established by the law (see para. 140 and recommendation 22);

(h) Ensuring that any required fees for registration have been paid (see paras. 199 to 201 and recommendation 39);

(i) Assigning a unique business identifier to the registered business (see paras. 110 and 111 and recommendation 15);

(j) Ensuring the entry of the information contained in the application submitted to the registry, any amendments thereto and any filing related to that business into the registry record, and indicating the time and date of each registration (see paras. 148, 165 and 166, and recommendations 25 and 30);

(k) Providing the person identified in the application as the registrant of the business with a copy of the notice of registration (see para. 140 and recommendation 22);

(l) Providing public notice of the registration in the means specified by the enacting State (see para. 141 and recommendation 23);

(m) Indexing or otherwise organizing the information in the registry record so as to make it searchable (see paras. 192 and 193 and recommendation 37);

(n) Providing information on the point of contact of the business as established by the law (see paras. 133 and 155 and recommendations 20 and 27);

(o) Sharing information among the requisite public agencies (see para. 119 and recommendation 17);

(p) Monitoring that a registered business has fulfilled and continues to fulfil any obligation to file information with the registry throughout the lifetime of the business (see paras. 158 to 164 and recommendations 28 and 29);

(q) Ensuring the entry of information on the declaration of deregistration of a business in the registry record, including the date of and any reasons for the deregistration (see paras. 216 and 220 and recommendations 46 to 48);

(r) Ensuring that the information in the registry is kept as current as possible (see paras. 160 to 164 and recommendation 29);

(s) Promoting compliance with the law (see paras. 47 and 48 and recommendation 6);

(t) Protecting the integrity of the information in the registry record (see paras. 230 to 232 and recommendation 53 and 54);

(u) Ensuring that information from the registry record is archived as necessary (see paras. 224 to 227 and recommendation 51); and

(v) Offering services incidental to or otherwise connected with business registration (see paras. 85 to 88 and recommendation 11).

G. Storage of and access to information contained in the registry[68]

63. When organizing the storage of the information contained in the business registry, States should be guided by the goals of efficiency, transparency and accessibility. Regardless of how a State decides to store and provide access to the information in its registry system, its goal should be to achieve consistency in the identification and classification of registered businesses, as well as the efficient, non-duplicative collection of data on those businesses. The system should be capable of storing, processing and making information collected anywhere in the system available to users in a timely fashion, even if that information is provided to users in paper format.

64. To achieve these goals, it is important that all business registration offices and repositories of registry information in a State are interconnected regardless of their physical location. Through these means, all information collected or stored anywhere in the system is capable of being shared throughout the system regardless of where or how it is collected, stored or submitted to the registry. This approach will assist the business registration system in processing in a timely fashion the information received, and in making it available to all interested users through multiple access points without regard to their geographic location and without undue delay. In order to function efficiently, the interconnection of the entire business registry system should permit information to be stored and made accessible in digital format and should share such information, possibly in real time, throughout the entire registry system, and providing it to multiple access points (including registry offices, terminals, or using online technology). Access to the entirety of the information stored in the business registry should also allow for its integration with other public registries so as to permit information exchange with those agencies as well (see para. 74 (c) below).

65. Where such an interconnected business registry is set up, streamlining of technical standards and specifications may be required so that the information collected and shared is of similar quality and of a standardised nature. This will include establishing appropriate procedures to handle the exchange of information and communication of errors between the various collection points for and repositories of the information, regardless of their location within the State; providing minimum information technology security standards to ensure, at least, secure channels for data exchange (for instance, the use of “https” protocols); and ensuring the integrity of data while it is being exchanged.

Recommendation 10: Storage of and access to information contained in the registry

The law should establish an interconnected registry system that would process and store all information received from registrants and registered businesses or entered by registry staff.

III. Operation of the business registry

66. As previously noted, business registration can be implemented through many different organizational tools that vary according to jurisdiction. States embarking on a reform process to simplify registration will have to identify the most appropriate and efficient solutions to deliver the service, given the prevailing domestic conditions. Regardless of the approach chosen by the State, aspects such as the general legal and institutional framework affecting business registration, the legal foundation and

[68] As requested by the Working Group at its twenty-eighth session (para. 48, A/CN.9/900), the Secretariat has redrafted the commentary to this recommendation (paras. 59 and 60 of A/CN.9/WG.I/WP.101) to focus less on the contrast between centralized and decentralized systems, but more on how the registry system should be interconnected (regardless of its structure) and have multiple access points.

accountability of the entities mandated to operate the system and the budget needed by such entities should be carefully taken into account. Reform efforts rely to a different extent on a core set of tools, including: the establishment of a one-stop shop for business start-up; the use of technology; and ensuring interconnectivity between the different authorities involved in the registration process (with the possible adoption of a unique business identifier).

A. Electronic, paper-based or mixed registry[69]

67. An important aspect to consider when streamlining a business registration system is the form in which the application for registration should be filed and the form in which information contained in the registry should be stored. Paper-based registration requires sending the documents (usually completed in handwritten form) by mail or delivering them by hand to the registry for manual processing. Hand delivery and manual processing are not unusual in developing States due to a lack of advanced technological infrastructure. In such States, entrepreneurs must personally visit registration offices that are usually located in municipal areas which may not be easily reachable for many MSME entrepreneurs, particularly for those in rural areas. In addition, any copies of the documents required must usually be provided on paper. Paper-based registry systems can facilitate in person communication between the registrant and the registry, and thus may offer an opportunity to clarify aspects of the requirements for registration. However, the labour-intensive nature of this procedure normally results in a time-consuming and expensive process (for example, it may require more than one visit to the business registry), both for the registry and for users, and it can easily lead to data entry errors. Furthermore, paper-based registry systems require considerable storage space as the documents with the registered information may have to be stored as hard copies (although some States using a mixed system may also scan documents and then destroy the paper versions after the expiry of a minimum legal period for their preservation, in this regard see paras. 224 to 227 below). Finally, business registrations transmitted by paper or fax also give rise to delays, since registrants must wait until registry staff manually carry out the business registration and certify it.

68. In comparison, online registration systems allow for improved efficiency of the registry and for more user-friendly services. This approach requires, at a minimum, that the information provided by the registrant be stored in electronic form in a computer database; the most advanced electronic registration systems, however, permit the direct electronic submission of business registration applications and relevant information as well as searches of the registry data over the Internet or via direct networking systems as an alternative to paper-based submissions. The adoption of such systems enhances data integrity, information security, registration system transparency, and verification of business compliance, as well as permitting the avoidance of unnecessary or redundant information storage. Furthermore, when electronic submission of applications is allowed, business registries can produce standard forms that are easier to understand and therefore easier to complete correctly. Although the use of ICT solutions can carry with them risks of software errors, electronic systems do more to reduce those risks by providing automated error checks and other appropriate solutions. Such technology is also instrumental in the development of integrated registration systems and the implementation of unique identification numbers.

[69] At its twenty-eighth session, the Working Group agreed that distributed ledger technology (sometimes referred to as “blockchain technology”) and its potential impact on business registries could be of interest in its current work on MSMEs. The Working Group, however, decided to defer discussion of this topic until a later stage (para. 49, A/CN.9/900).

69. In addition to these features, which result in a more streamlined process and user-friendly services, electronic business registration and access to the business registry also offer the following advantages:

(a) Improved access for smaller businesses that operate at a distance from the registrar's offices;

(b) A very significant reduction in the time and cost required of the entrepreneur to perform the various registration steps, and consequently in the time and cost required before successful registration of a business, as well as in the day-to-day cost of operating the registry;

(c) It permits the handling of increasing demands for company information from other government authorities;

(d) A reduction in the opportunity for fraudulent or improper conduct on the part of registry staff;

(e) A reduction in the potential liability of the registry to users who otherwise might suffer loss as a result of the failure of registry staff to enter accurately registration information;

(f) When direct electronic registration and access to an electronic public registry are allowed, it provides the possibility for the user to access registration and information services outside of normal business hours; and

(g) It provides possible revenue opportunities for the registry from other businesses and financial institutions that seek company information to inform their risk analysis of potential trading counterparties and borrowers.

70. Introducing electronic registration processes, however, often requires an in-depth re-engineering of the way in which the service is delivered, which may involve several core aspects of the State's apparatus in addition to its level of technological infrastructure, including: financial capability, organization and human resources capacity, legislative framework (e.g. commercial code and company law) and institutional setting. Therefore, States launching a reform process aiming at the automation of the business registry would be advised to carry out a careful assessment of the legal, institutional and procedural dimensions (such as legislation to allow for electronic signatures or information security laws, or establishing complex e-government platforms or other ICT infrastructure) in order to identify those areas where reforms are needed and to adopt those technology solutions that are most appropriate to their current needs and capabilities. In several developing States and mid-level economies, only information about registering a business is currently available online, and a functioning electronic registry has not yet been implemented. Making information electronically available is certainly less expensive and less difficult to achieve than is the establishment of an electronic registry, and it does not require any legislative reform or specialized technology. While the adoption of a mixed registration system that combines electronic processing and paper-based manual submission and processing (see para. 84 below) might thus be an appropriate interim solution, it does involve higher maintenance costs, and the ultimate goal should remain the progressive development of fully electronic registration systems (see section C below).

B. Features of an electronic registry

71. When the business registry record is computerized, the hardware and software specifications should be robust and should employ features that minimize the risk of data corruption, technical error and security breaches. Even in a paper-based registry, measures should be taken to ensure the security and integrity of the registry record, but this is more efficiently and easily accomplished if the registry record is electronic. (Regardless of its method of operation, it is important for the registry to have

risk-mitigation measures in place: see paras. 230 and 231 below).[70] In addition to database control programs, software will also need to be developed to manage such aspects as user communications, user accounts, payment of any required fees, financial accounting, computer-to-computer communication, internal workflow and the gathering of statistical data. Software applications enabling data collection would also assist the registry in making evidence-based decisions which would facilitate efficient administration of the system (for example, the collection of data on more frequent requests by registry users would enable evidence-based decisions on how best to allocate registry resources).[71] When the State's technological infrastructure is not sufficiently advanced to allow the features mentioned above to be implemented, it is nevertheless important that the software put in place be flexible enough to accommodate additional and more sophisticated features as they become more feasible in the future.

72. Implementing an online business registration system will require defining the technical standards of the online system, a careful evaluation of the hardware and software needs of the business registry to make those standards operational in the context of the national technological infrastructure, and deciding whether it is feasible to develop the necessary hardware and software in-house or whether it must be purchased from private suppliers. In making that determination, it will be key to investigate whether a ready-made product is available that can easily be adapted to the needs of the State. If different suppliers are used for the hardware and the software, it is important that the software developer or provider is aware of the specifications for the hardware to be supplied, and vice versa.

73. Following more recent technological advances, one option States may want to consider is whether to rely on traditional software or to move to more sophisticated applications such as cloud computing, which is an Internet-based system that allows the delivery of different services, such as storing and processing of data, to an organization's computers through the Internet. The use of cloud computing allows for considerable reduction in the resources needed to operate an electronic registration system, since the registry does not have to maintain its own technological infrastructure. However, data and information security can represent an issue when introducing such a system and it would be advisable for States to conduct a careful risk analysis before establishing a system exclusively based on cloud applications.

74. Additional aspects that States may consider when adopting an online registry should include:

(a) Scalability of the ICT infrastructures, so that the system can handle an increasing volume of clientele over time as well as traffic peaks that may occasionally arise;

(b) Flexibility: the ICT infrastructure of the registry should be easily adaptable to new user and system requirements, and the migration of data from one technology to another may require data-cleansing aspects;

(c) Interoperability: the registry should be designed to allow (even at a later stage) integration with other automated systems, such as other governmental registries operating in the jurisdiction[72] and online or mobile payment portals;

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[70] At its twenty-eighth session, the Working Group requested the Secretariat to highlight the importance of contingency planning for the registry and in that respect include a cross reference to it in the draft guide. The Secretariat suggests that such a reference would best be included here rather than in the following section as originally suggested (para. 52, A/CN.9/900).

[71] For example, "application programming interfaces" (APIs) may be adopted. APIs have a wide variety of possible uses, such as enabling the submission of applications to the registry through simplified procedures, for instance by pre-filling certain fields by default, or allowing users, and equipping systems with the proper software to connect directly to the registry and retrieve information automatically.

[72] See, for instance, paras. 112 to 116 of this legislative guide.

(d) Costs: the ICT infrastructure should be financially sustainable both in terms of initial and operating costs; and

(e) Intellectual property rights: in order to avoid risks deriving from adverse circumstances affecting the intellectual property rights owner, for example, if the owner ceases to operate or is prohibited from doing business with the government, the State should always either be granted ownership of the system or an unrestricted licence to the source code.

75. With regard to the cost of the ICT infrastructure, it should be noted that the level of security needed by an electronic registration system and its relevant cost must be carefully addressed. In particular, it is important to align the risk attached to a specific interaction (between the registry and the business or the registry and other public agencies) with the costs and administration required to make that interaction secure. Low security may deter parties from using electronic services (unless it is mandatory), but costly high security measures could have the same effect.

C. Phased approach to the implementation of an electronic registry

76. The methods used to establish the online system should be consistent with the reforms required as they would determine the success or the failure of the initiative. Moving directly to a full online solution before re-engineering registry business processes would be a mistake in many cases, as the solutions designed would not be able to capture the technology's full benefits.[73] Moreover, subject to the level of development of the implementing State, factors such as the existence and quality of the infrastructure and the literacy rates (including computer literacy) of the intended users should be carefully considered before the adoption of an online system. Several States, for example, must deal with a non-existent or weak communications infrastructure, lack of dependable electricity supplies and Internet connectivity, and a low literacy rate, which may have a disproportionate effect on women and businesses in rural areas. In these instances,[74] technical and capacity-building assistance programmes coordinated by international organizations might be necessary in order to progress towards the goal of a fully automated electronic registry.

77. In locations where Internet penetration is not extensive, a phased-in approach may be an appropriate way forward. Automation would start with the use of simple databases and workflow applications for basic operations, such as name searches or the sharing of information with other government agencies, and then would progress to more sophisticated web-based systems that would enable customers to conduct business with the registry entirely online. These web-based systems could be quite convenient for smaller businesses operating at a distance from the registry, provided that those entrepreneurs were able to access the system. The final phase of the approach would be to accommodate ICT interoperability between those agencies involved in business registration.

78. The simplest approach for States beginning their activity in this area would be to develop a content-rich website that consolidates registration information, provides downloadable forms, and enables users to submit feedback. This simple resource would allow users to obtain information and forms in one place and would make registries more efficient by enabling users to submit email inquiries before going to registry offices with the completed forms. Since this solution does not require a stable Internet connection, it may appeal to States with limited Internet access.

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[73] The technical assistance experience of international organizations, in particular of the World Bank, has provided most of the background material upon which sections "C" and "D" are based. See, in particular, supra, footnote 23, pages 12 ff.

[74] At its twenty-eighth session, the Working Group requested the Secretariat to reflect in this section that factors in addition to Internet penetration were important, including literacy rates, infrastructure issues, types of intended users, and access to and reliance on mobile payment systems which were said to be of importance when establishing online registration systems (para. 52, A/CN.9/900).

79. If only limited Internet bandwidth is available, then automating front-counter and back-office operations prior to moving online would be a suitable approach. If the registry has sub-offices outside its main location (for instance, in rural areas), it would be important to establish a dedicated Internet connection with them. This approach would still require entrepreneurs to visit the registry, but at least it would establish a foundation on which the registry could later develop a more sophisticated web platform. A key factor even at this basic stage would be for the system to be able to digitize historical records and capture key information, such as the names of members or owners and directors, in the registry database.

80. Once the State's technological capacity and Internet penetration allows for digital commerce, then platforms that enable businesses to apply and pay for registration online as well as to file annual accounts and update registration details as operations change can be developed. With regard to online payment of a registration fee, it should be noted that ICT supported solutions would depend on a State's available modes of payment and on the regulatory framework that establishes the modes of payment a public authority can accept. When the jurisdiction has enacted laws that allow for online payment, experience shows that the most efficient option is to combine the filing of the electronic application and the fee payment into one step. Error checks should be included in ICT systems that incorporate this facility, so that applications are not submitted before payments are completed and registry officials can see payment information along with the application.[75] When fee payment is required before registration of the business, this constitutes a separate procedural step and the use of ICT solutions in order to be user-friendly would require streamlining the procedures for filing the applications and for payment (see also para. 74(c) above and 204 below). In some States, the use of mobile payment systems might allow for easier and more effective ways of paying for registration and other related fees. In such cases, the same considerations involved in establishing online payments (e.g. enacting appropriate laws, as well as designing efficient options to combine mobile payments and the filing of registration documents) should be applied in order to develop efficient solutions appropriate to the use of mobile technology.[76]

81. As noted above (see para. 70) when introducing electronic registration systems, States should adopt legislation that facilitates the implementation of these electronic solutions, although the obligation to use such solutions should be considered only when the various stakeholders concerned with the registration process (including the registrant, government agencies, and other relevant authorities) are prepared to comply. Furthermore, when developing such laws, States should take into account that while certain elements of a legal framework can be checked electronically, the most complex aspects of the process may need to be addressed by a registry official.[77]

82. Enacting States should also be aware that establishing an electronic registration system requires a well-designed legal and regulatory framework that promotes simplicity and flexibility and avoids, to the greatest extent possible, discretionary power and the making of exceptions (see para. 30 above). For instance, provisions requiring the interpretation of several documents and the collection of several pieces of information are difficult to adapt to electronic processing; the same applies to the use of discretionary power and complex structures of rules and exceptions.

83. When a State has developed the ICT infrastructure to achieve full business registry automation, the integration of other online registration processes for taxation, social services and other purposes could be considered. Even if no integration with registrations required by other public authorities is built into the system, it would nevertheless be advisable that States implement data interchange capabilities so that the relevant business information could be shared across government agencies (see

[75] See supra, footnote 30, page 13.

[76] The Secretariat suggests including the final two sentences at the end of this paragraph to respond to a request of the Working Group, at its twenty-eighth session, that experiences in some developing States regarding the use of mobile payment systems should be properly reflected in the commentary (para. 52, A/CN.9/900).

[77] See supra, footnote 30, page 14.

para. 74 above). A final improvement would be the development of mechanisms for disseminating business information products to interested parties; such products could substantially contribute to the financial sustainability of the registry (see paras. 189 to 191 and 194 below).[78]

84. One issue that would likely arise when the online registry is able to offer full-fledged electronic services would be whether to abolish any paper-based submission or to maintain both paper-based and online registration. In many jurisdictions, registries choose to have mixed solutions with a combination of electronic and paper documents or electronic and manual processing during case handling. This approach may result in considerable cost for registries, since the two systems require different tools and procedures. Moreover, if this option is chosen, it is important to establish rules to determine the time of registration as between paper-based and electronic submissions. Finally, paper applications must be processed in any case, so that the information included in a hard document can be transformed into data that can be processed electronically; this can be done by scanning the paper-based application for registration (possibly using optical character recognition technology so to make the scanned document electronically searchable). However, in order to ensure that the record made by scanning correctly represents the paper application, the registry will likely have to employ staff to check that record, thus adding a step that increases costs and reduces the benefits of using an online system.[79]

D. Other registration-related services supported by ICT solutions

85. Automation should enable the registry to perform other functions in addition to the processing of applications. Where jurisdictions require user-friendly electronic filing and repopulated forms,[80] for instance, it can assist businesses in the mandatory filing of periodic returns and annual accounts. Electronic filing and automated checks also help reduce processing time by the registry.[81]

86. Electronically supported registration could also assist the registry in deregistration procedures, i.e. notations in the registry that a particular business is no longer registered (see paras. 201 to 205 below). Such procedures usually require an official announcement that a business will be deregistered. The use of ICT can provide for the automation of such announcements, from initiating the process to producing a standard notice, thus helping registries to ensure that businesses are not deregistered before any time limit has elapsed and to reduce processing time. In order to be fully effective, however, adoption of an electronic registration system needs to be supported by streamlined procedures that enable the deregistration of businesses in a simplified and quick way.[82]

87. Further, ICT solutions could be applied to assist in the filing of financial information in machine-readable format (such as eXtensible Business Reporting Language, or XBRL). For example, a platform could be provided to assist in the conversion of paper-based financial statements to XBRL format. Machine-readable financial data facilitates the aggregation and analysis of financial information, which could be of significant value to users of the registry.

88. Solutions using ICT could also support follow-up and enforcement procedures of business registries when businesses fail to comply with registration requirements.

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[78] See supra, footnote 23, page 13.

[79] See supra footnote 30, page 13.

[80] Repopulated forms allow selected fields to be automatically filled based on information previously provided by the registrant or maintained in their user account. When changes in the registrant's information occur, the registrant is not required to fill out the entire form again, but only to enter the relevant changes. Information included in the repopulated form is stored and may be made accessible to and exchangeable with other relevant agencies.

[81] See supra, footnote 30, page 15.

[82] Ibid., page 16.

In one jurisdiction, for instance, the back-office system of the registry monitors the records of businesses and detects whether certain circumstances suggest that the business is not in compliance with statutory requirements. An automatic notice to the business is then produced in order for it to remedy the situation. Should the business fail to do so within the statutory deadline, the ICT solution starts a new procedure to forward the case to the district court, which may make a decision on the compulsory liquidation of the business. Upon issuing an order for compulsory liquidation, the court notifies the registry which deregisters the business.[83]

Recommendation 11: Electronic, paper-based or mixed registry

The law should provide that the optimal medium to operate an efficient business registry is electronic. Should full adoption of electronic services not yet be possible, such an approach should nonetheless be implemented to as great an extent as permitted by the current technological infrastructure of the enacting State, as well as its institutional and legal framework, and expanded as that infrastructure improves.

E. Electronic documents and electronic authentication methods[84]

89. States that enact legal regimes on electronic communications and electronic signatures may wish to consider the legislative texts prepared by UNCITRAL to govern electronic transactions.[85] Such texts establish the principles of technological neutrality and functional equivalence (see also paras. 12 to 15 in the Annex)[86] that are needed to ensure equal treatment between paper-based and electronic communications; they also deal extensively with provisions covering the issues of legal validity of electronic documents and signatures, authentication, and the time and place of dispatch and receipt of electronic messages. Because of the way these texts, and other UNCITRAL legislative texts, are negotiated and adopted, they offer solutions appropriate to different legal traditions and to States at different stages of economic development. Furthermore, domestic legislation based on the UNCITRAL texts on electronic commerce will greatly facilitate cross-border recognition of electronic documents and signatures.

Recommendation 12: Electronic documents and electronic authentication methods

The law should:

(a) Permit and encourage the use of electronic documents as well as of electronic signatures and other equivalent identification methods;

(b) Regulate such use pursuant to the following principles:

(i) Documents cannot be denied legal effect, validity or enforceability solely on the grounds that they are in electronic format, or that they are signed electronically;

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[83] For further reference see Norway, supra, footnote 79.

[84] At its twenty-eighth session, the Working Group agreed with the substance of this recommendation (recommendation 55 of A/CN.9/WG.I/WP.101) and the relevant commentary and to retain them in the legislative guide, but to move them to an appropriate position in the text (para. 143, A/CN.9/900). Further to the decision of the Working Group, the Secretariat has moved the recommendation and commentary, which has been edited, to this location.

[85] Such texts include: the UNCITRAL Model Law on Electronic Commerce (1996); the UNCITRAL Model Law on Electronic Signatures (2001) and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005). For further information, see http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce.html.

[86] The principle of "technological neutrality" means that the provisions of the law are "neutral" and do not depend on or presuppose the use of particular types of technology and can be applied to generation, transmission or storage of all types of information. The principle of "functional equivalence" establishes the criteria under which electronic communications and electronic signatures may be considered equivalent to paper-based communications and hand-written signatures.

(ii) The place of origin of the electronic signature should not determine whether and to what extent the electronic signature is legally effective;

(iii) Different technologies that may be used to communicate, store and sign information electronically should be subject to the same legal treatment; and

(iv) Electronic documents and electronic signatures have the same purpose and function as their paper-based counterparts and are thus functionally equivalent to them; and

(c) Establish criteria to reliably identify the person submitting an electronic document and using an electronic signature or equivalent authentication method.

F. A one-stop shop for business registration and registration with other authorities

90. As discussed above (see para. 60 above), before a business may operate in the legally regulated economy, it is often required to register with several different government agencies in addition to the business registry. Those additional agencies often require the same information that has already been gathered by the business registry. Entrepreneurs must often personally visit each agency and fill out multiple forms. Taxation, justice, employment and social services agencies are usually involved in this process; other administrative offices and institutions, specific to each jurisdiction, may also be involved. This often results in multiple procedures governed by different applicable laws, duplication of information and lack of ownership or full control of the process by the agencies involved. Possibly worse for MSMEs wishing to register, the overall process can require weeks, if not months.[87]

91. The establishment of one-stop shops has thus become one of the most popular reforms to streamline business registration in recent years. One-stop shops are single outlets where entrepreneurs receive all of the information and forms they need in order to complete the necessary procedures to establish their business rather than having to visit several different government agencies.

92. Beyond this general definition, the scope of one-stop shops can vary according to the services offered. Some one-stop shops only provide business registration services, which may still be an improvement if the registration process previously involved a number of separate visits to the relevant authorities; others carry out other functions related to business start-up.[88] The most common of these other functions is tax registration, although there are also examples of one-stop shops dealing with registration for social services and statistical purposes and with obtaining the required licenses from municipal and other authorities.[89] In rare cases,[90] one-stop shops assist entrepreneurs not only with business licences and permits but also with investment, privatization procedures, tourism-related issues and State-owned property management, and may provide access to utilities and banking services.

93. The functions of one-stop shops can be carried out through physical offices or an electronic platform. Physical premises, when in rural areas, are particularly appropriate for businesses with limited access to municipal centres; so, too, are mobile offices, particularly in places that are too remote for States to have physical

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[87] See supra, footnote 24, page 30.

[88] Investment Climate (World Bank Group), How Many Stops in a One-Stop Shop? A Review of Recent Developments in Business Registration, 2009, pages 1 ff.

[89] At its twenty-eighth session of the Working Group, it was suggested that reference could be made to obtaining municipal licenses and access to banking services as examples of additional services that could be linked to the one-stop shop (para. 56, A/CN.9/900).

[90] See Georgia, in World Bank and International Finance Corporation, Doing Business 2011, page 21.

premises.[91] Of course, in addition to physical premises, online business registration can be offered as an option available for registering a business. Online one-stop shops take advantage of solutions supported by ICT, which allow for the rapid completion of several formalities due to the use of dedicated software. Such online portals may provide a fully interconnected system or may still entail separate registration in respect of some requirements, for example, for taxation services.[92]

94. When establishing one-stop shops, in particular those performing functions in addition to business registration, States can choose among different approaches. In the "one door" approach, representatives of different government agencies involved in registration are brought together in one physical place, but the applicant must deal separately with each representative (for example, the business registry official dealing with the approval of the business name, the clerks checking the documents, and the taxation official), although the different agencies liaise among themselves.[93] As may be apparent, this solution is relatively uncomplicated and would normally not require any change in law or ministerial responsibilities, but it would involve establishing effective cooperation between the different government ministries. One issue States should consider when opting for this approach would be how much authority the representatives of each agency should have; for example, should they have the discretion to process the registration forms on site or would they simply be acting on behalf of their agencies and be required to take the documents to their home agencies for further processing?[94] Similarly, it is also important to consider clarifying the lines of accountability of the various representatives from the different agencies to the one-stop shop administrator.[95]

95. Another form of one-stop shop is the so-called "one window" or "one table" version, which offers a higher level of integration of the different agencies involved in the start-up of a business.[96] In this case, the one-stop shop combines the process for obtaining business and other registrations, such as for taxation and social services, with other arrangements, like publishing the registration in a National Gazette or newspapers, when required. All relevant documents are submitted to the one-stop shop administrator who is authorized, and properly trained, to accept them on behalf of the various government agencies involved. Documents are then dispatched, electronically or by hand or courier, to the competent agency for processing. This type of one-stop shop requires detailed coordination between the different government agencies, which must modify their procedures to ensure an effective flow of information. A memorandum of understanding between the key agencies involved may be needed in order to establish the terms in respect of the sharing of business information.[97] In some cases, taking such an approach may also require a change in legislation.[98]

96. A third approach, which is less common, is based upon the establishment of a separate entity to coordinate the business registration function and to deal with other requirements that entrepreneurs must meet, such as making tax declarations, obtaining the requisite licences, and registering with social services authorities. Pursuant to this model, the entrepreneur would apply to the coordinating entity after having registered with the business registry in order to fulfil the various additional aspects of the procedures necessary prior to commencing business operations. Although this approach results in adding a step, it could be useful in some States since it avoids having to restructure the bodies with the main responsibility for business registration.

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[91] See, for instance, the example of Uganda, available at: http://ursb.go.ug/press-release-new-mobile-business-registration-office/. At its twenty-eighth session, the Working Group suggested that reference to the use of mobile offices as additional access points for the one-stop shops be included in the text (para. 56, A/CN.9/900).

[92] See supra footnote 88, page 4.

[93] Ibid., page 3.

[94] Ibid., page 2.

[95] For further details, see para. 42, A/CN.9/WG.I/WP.85.

[96] See supra footnote 88, page 3.

[97] See supra, footnote 24, page 31.

[98] See supra, footnote 88, page 3.

On the other hand, the adoption of such a structure could involve an increase in the cost of the administrative functions and may only reduce timeframes to the extent that it allows the various functions to take place successively or enables participants in the one-stop shop to network with the other agencies to speed up their operations. From the user's perspective, however, the advantage of being able to deal with a single organization remains.[99]

97. Finally, in States with developed ICT infrastructures, the functions of the agencies concerned with registration could be fully integrated through the use of a common database, which is operated by one of the agencies involved and provides simultaneous registration for various purposes, i.e. business registration, taxation, social services, etc. In some jurisdictions, a public agency (such as the tax administration) is responsible for the registration of business entities, or ad hoc entities have been set up to perform such simultaneous registration.[100]

98. Regardless of the approach chosen in the implementation of a one-stop shop, it is important to emphasize that such an arrangement does not require the establishment of a single government agency with authority over all of the other agencies related to the one-stop shop. Instead, it involves designating which government agency has authority over the single integrated interface, while all of the government agencies participating in the one-stop shop retain their functional autonomy.[101]

99. One issue that States should consider when establishing a one-stop shop is its location. It is usually advisable for the one-stop shop to be directly connected to the business registry office, either because it is hosted there or because the registry is part of the one-stop shop. The organization(s) responsible for the one-stop shop could thus be the same as that/those which oversee(s) the business registration process. This approach should take into account whether such organizations are equipped to administer the one-stop shop. Examples from various jurisdictions indicate that where authorities such as executive agencies are responsible for business registration, they possess the skills to perform one-stop shop functions as well. The same can be said of chambers of commerce, government commissions, and regulatory authorities. There are very few examples of courts that have adopted a one-stop shop approach in those States where business registration is court-based.

100. Although one-stop shops do not necessarily require changes in the domestic legal framework, as seen in the paragraphs above, it is important for the operation of such mechanisms to be legally valid, which may involve adapting existing laws to the new structure and method of proceeding. For instance, effective functioning of the one-stop shop may require provisions governing the collection of information by public authorities as well as the exchange of information among such authorities. The extent of the changes will thus vary according to the different needs of States. In addition, one-stop shops should be given a sufficient budget, since they can be quite expensive to establish and maintain, they should be staffed with well-trained personnel, and they should have their performance regularly monitored by the supervising authority in accordance with client feedback.

Recommendation 13: A one-stop shop for business registration and registration with other authorities

The law should establish a one-stop shop for business registration and registration with other public agencies, including designating which public agency should oversee the functioning of the single interface. Such an interface:

(a) May consist of a web platform or physical offices; and

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[99] See Benin and France, supra footnote 88, page 4.

[100] See Albania's National Registration Center, supra, footnote 88, page 4.

[101] The Secretariat suggests the inclusion of this paragraph to respond to concerns expressed at the twenty-eighth session of the Working Group that more clarity was needed in the draft legislative guide on the relationship between the agency overseeing the one-stop shop and the other public agencies participating in that arrangement (para. 58, A/CN.9/900).

(b) Should integrate the services of as many public agencies requiring the same information as possible, but at a minimum should include taxation and social services agencies.

G. Use of unique business identifiers[102]

101. As discussed above (see paras. 60 and 90), in those jurisdictions where the government agencies with which businesses are required to register (for example, for taxation and social services) operate in isolation from each other, it is not unusual for this procedure to result in duplication of systems, processes and efforts. This approach is not only expensive but may also cause errors. Moreover, if each agency assigns a registration number to the business when it registers with that agency, and the use and uniqueness of that number is restricted to the authority assigning it, information exchange among the agencies requires each authority to map the different identification numbers applied by the other agencies. When ICT solutions are used, they can facilitate such mapping, but even they cannot exclude the possibility that different entities will have the same identifier, thus reducing the benefits (in terms of cost and usefulness) obtained from the use of such tools.[103]

102. In recent years, several jurisdictions have thus adopted integrated registration systems in which an application submitted for business registration includes all of the information required by the different agencies. Once completed, the information in the application for business registration is transmitted by the registry to all relevant authorities. Information and any necessary approvals from the other agencies are then communicated back to the registry, which immediately forwards the information and approvals to the entrepreneur.[104] While this is beneficial for all businesses, regardless of their size, it is particularly valuable for MSMEs, which may not have the resources necessary to cope with the compliance requirements of multiple government authorities in order to establish their business.

103. States aiming at fostering such integration among different agencies may wish to consider that in recent years some international organizations have developed tools that facilitate inter-agency cooperation. For instance, one international organization has developed an online system that allows for the interoperability of the various public agencies involved in business registration with minimal or no change at all in the internal processes of the participating agencies nor in their computer systems.

104. Some developed States have introduced a more sophisticated approach, which considerably improves information exchange throughout the life cycle of a business. This approach requires the use of a single unique business identification number or unique identifier, which ties information to a given business and allows for information in respect of it to be shared among different public and private agencies.

105. A unique identifier is structured as a set of characters (they may be numeric or alphanumeric) which distinguishes registered entities from each other. When designing a unique identifier, it may be advisable to build some flexibility in the structure of the identifier (for instance, by allowing the addition of new characters to the identifier at a later stage) so that the identifier can be easily adaptable to new system requirements in a national or international context, or both (see also para. 74 above). The unique identifier is allocated only once (usually upon establishment) to a single business and does not change during the existence of that business,[105] nor after its deregistration. The same unique identifier is used for that business by all agencies,

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[102] At its twenty-eighth session, the Working Group agreed to combine recommendations 13 through 15 of A/CN.9/WG.I/WP.101 into three consecutive recommendations to follow a single commentary (para. 65, A/CN.9/900).

[103] See supra, footnote 88, page 22.

[104] See supra, footnote 23, page 9.

[105] While the unique identifier does not change throughout the lifetime of a business, if the business changes its legal form, a new unique identifier must be allocated.

which permits information about that particular registered entity to be shared within or between the public and private sectors.[106]

106. The experience of States that have adopted unique identifiers has demonstrated their usefulness. As noted above, they permit all government agencies to identify easily new and existing businesses, and cross-check information in respect of them. In addition, the use of unique identifiers improves the quality of the information contained in the business registry, since the identifiers ensure that information is linked to the correct entity even if its identifying attributes (for example name, address, and type of business) change. Moreover, unique identifiers prevent the situation where, intentionally or unintentionally, businesses are assigned the same identification; this can be especially significant where financial benefits are granted to legal entities or where liability to third parties is concerned.[107] Unique identifiers have been found to produce benefits for businesses as well, in that they considerably simplify business administration procedures: entrepreneurs do not have to manage different identifiers from different authorities, nor are they required to provide the same or similar information to different authorities. Introducing unique identifiers can also contribute to improving the visibility of businesses, in particular of MSMEs, with possible partners as well as with potential sources of finance, since it would assist in creating a safe and dependable connection between a business and all of the information that relates to it. This access to relevant information could facilitate the establishment of business relationships, including in the cross-border context.[108]

107. One issue a State may have to consider when introducing unique identifiers is that of individual businesses that do not possess a separate legal status from their owners. In such cases, taxation or other authorities (such as social services) may often prefer to rely on the identifier for the individual, who may be a natural person, rather than on the business identifier. However, States may also opt to assign a separate identifier to a sole proprietor in a business capacity and in a personal capacity.[109]

108. Situations may arise in which different agencies in the same jurisdiction allocate identifiers to businesses based on the particular legal form of the business. States should thus consider adopting a verification system to avoid multiple unique identifiers being allocated to the same business by different public agencies.[110] If the identifier is assigned through a single jurisdictional database the risk of several identifiers being allocated to one business or of several businesses receiving the same identifier is considerably reduced.

109. The effective use of unique identifiers is enhanced by the adoption of full electronic solutions that do not require manual intervention. However, electronic solutions are not a mandatory prerequisite to introducing unique identifiers, as they can also be effective in a paper-based environment.[111] When unique identifiers are connected to an online registration system, it is important that the solution adopted fits the existing technology infrastructure.

(a) Allocation of unique business identifiers

110. The use of unique identifiers requires sustained cooperation and coordination among the authorities involved, and a clear definition of their roles and responsibilities, as well as trust and collaboration between the public and business

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[106] See supra, footnote 30, page 20.

[107] Ibid., page 22.

[108] This point has been moved to this paragraph further to a decision by the Working Group at its twenty-eighth session to relocate some of the concepts from paragraphs 111 to 116 of A/CN.9/WG.I/WP.101 to other parts of the text (para. 71, A/CN.9/900).

[109] Further to comments at the twenty-eighth session of the Working Group that paragraph 100 in A/CN.9/WG.I/WP.101 may also include reference to a separate business identifier being assigned to a sole proprietor in both a business and an individual capacity, the Secretariat suggests including the final sentence at end of the paragraph (para. 61, A/CN.9/900).

[110] See supra, footnote 30, page 21.

[111] Ibid., page 22.

sectors. Since the introduction of a unique identifier does not of itself prevent government agencies from asking a business for information that has already been collected by other agencies, States should ensure that any reform process in this respect start with a clear and common understanding of the reform objectives among all the stakeholders involved. Moreover, States should ensure that a strong political commitment is in place. Potential partners ideally include the business registry, the taxation authority, the statistics office, the social services agency, the pension fund, and any other relevant agencies. If agreement among these stakeholders is elusive, at a minimum, the business registry and taxation authority should be involved. Information on the identifiers in use by the other authorities and within the business sector is also a prerequisite for reform, as is a comprehensive assessment to identify the needs of all stakeholders.

111. In order to permit the introduction of a unique identifier, the domestic legal framework should include provisions on a number of issues including:

(a) Identification of the authority charged with allocating the unique identifier;

(b) Allocation of the unique identifier before or immediately after registration with the authorities involved in business entry;

(c) Listing of the information that will be related to the identifier, including at least the name, address and type of business;

(d) The legal mandate of the public authorities to use the unique identifier and related information, as well as any restrictions on requesting information from businesses;

(e) Access to registered information by public authorities and the private sector;

(f) Communication of business registrations and amendments among the public authorities involved; and

(g) Communication of deregistration of businesses that cease to operate.[112]

(b) Implementation of a unique business identifier

112. Adoption of a unique business identifier normally requires a centralized database linking the businesses to all relevant government agencies whose information and communication systems must be interoperable. This requirement can be a major obstacle when implementing this in practice if the technological infrastructure of the State is not sufficiently advanced.

113. States can introduce the unique business identifier in one of two ways. In the first approach, business registration is the first step and includes the allocation of a unique identifier, which is made available (together with the identifying information) to the other authorities involved in the registration process (for instance, taxation and social services authorities), and which is re-used by those authorities. In the second approach, the allocation of a unique business identifier represents the beginning of the process. The unique identifier and all relevant information are then made available to the government agencies involved in business registration, including the business registry, and is then re-used by all agencies.[113] Either of these two approaches can be followed by the authority entrusted with allocating unique business identifiers, regardless of whether the authority is the business registry, a facility shared by public agencies or the taxation authority. It would be left to the enacting State to determine the format of the unique business identifier and which agency would have the authority to assign it.[114] It is important to note that in some States, the use of a unique

[112] See supra, footnote 23, page 32.

[113] See supra, footnote 30, page 20.

[114] At its twenty-eighth session, the Working Group agreed that the commentary should clarify the role of the enacting State in deciding the format of the unique identifier and which agency should have the authority to allocate them (para. 63, A/CN.9/900).

identifier may be restricted: in some jurisdictions, certain government agencies still allocate their own identification number[115] although the business carries a unique identifier.[116]

114. Introducing a unique business identifier usually requires adaptation both by public authorities in processing and filing information and by businesses in communicating with public authorities or other businesses. A unique business identifier requires the conversion of existing identifiers, which can be accomplished in various ways. Taxation identifiers are often used as a starting point in designing a new identifier, since the records of the taxation authorities cover most types of businesses and are often the most current.[117] Examples also exist in which, rather than introducing a completely new number, the taxation number itself is retained as the unique business number. New identification numbers can also be created using other techniques according to a country's registration procedures. In such a situation, it is important that each business, once assigned a new number, verifies the related identifying information, such as its name, address, and type of activity.[118]

115. In some jurisdictions, advanced interconnectivity among the different agencies involved in the registration process has resulted in a single form for registration with all agencies. Examples exist of consolidated (electronic) registration forms that can be repopulated[119] with information from the different authorities concerned. Integration of registration functions can be facilitated by the use of one common database. In jurisdictions where this approach has been developed, agencies perform regular file transfers to update the database as well as their own records; they have direct access to the common database and use the same back-office systems to update it; and the information registered is regularly verified by trusted staff of the agencies. Such strong coordination among the concerned agencies is often based on regulatory provisions that allocate roles and responsibilities among the various agencies involved. Appropriate funding should also be allocated from the State's budget.[120]

116. As discussed above (see paras. 70 and 96), the interoperability of the ICT systems of different agencies systems could be a major obstacle when implementing unique business identifiers. The ability of different information technology infrastructures to exchange and interpret data, however, is only one aspect of interoperability that States should consider. Another issue is that of semantic interoperability, which can also pose a serious threat to a successful exchange of information among the agencies involved as well as between relevant agencies and users in the private sector. For this reason, it is important to ensure that the precise meaning of the information exchanged is understood and preserved throughout the process and that semantic descriptions are available to all of the stakeholders involved. Measures to ensure interoperability would thus require State action on a dual level: agreement on common definitions and terminology on one hand, and the development of appropriate technology standards and formats on the other. This approach should be based on a mutual understanding of the legal foundation, responsibilities and procedures among all those involved in the process.[121]

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[115] In certain cases, agencies may keep their own numbering system in addition to using the unique identifier because of "legacy data", i.e. an obsolete format of identifying the businesses which cannot be converted into unique identifiers. In order to access such information, the registry must maintain the old identification number for internal purposes. In dealing with the public, however, the government agency should use for all purposes the unique identifier assigned to the business.

[116] See supra footnote 113, page 20.

[117] See Belgium in paragraph 35, A/CN.9/WG.I/WP.85.

[118] For further reference, see Norway, in para. 35, A/CN.9/WG.I/WP.85.

[119] For details on repopulated forms, see footnote 81 above.

[120] For further reference, see Norway, supra, footnote 30, page 23.

[121] Ibid.

(c) Exchange of information among business registries[122]

117. States are increasingly aware of the importance of improving the cross-border exchange of data between registries,[123] and sustained progress in respect of ICT development now allows this aspect to be addressed. Introducing unique business identifiers that enable different public authorities to exchange information about a business among themselves could thus be relevant not only at the national level, but also in an international context. Unique identifiers can allow more efficient cross-border cooperation among business registries located in different States, as well as between business registries and public authorities in different States. Implementation of cross-border exchange of data can result in more dependable information for consumers and existing or potential business partners, including small businesses that provide cross-border services, as well as for potential sources of finance for the business (see paras. 195 and 196 below).

118. Accordingly, States implementing reforms to streamline their business registration system may wish to consider adopting solutions that will, in future, facilitate such information exchanges between registries from different jurisdictions and to consult with States that have already implemented approaches[124] that allow for such interoperability. By way of example, one such reform could include developing a system of business prefixes that would make the legal form of the business immediately recognizable across jurisdictions and in a cross-border sense.

Recommendation 14: Use of unique business identifiers

The law should provide that a unique business identifier should be allocated to each registered business and should:

(a) Be structured as a set of numeric or alphanumeric characters;

(b) Be unique to the business to which it has been allocated; and

(c) Remain unchanged and not be reallocated following any deregistration of the business.

Recommendation 15: Allocation of unique business identifiers

The law should specify that the allocation of a unique business identifier should be carried out either by the business registry upon registration of the business, or before registration by a legally-designated authority. In either case, the unique business identifier should then be made available to all other public agencies sharing the information associated with that identifier, and should be used in all official communication in respect of that business.

Recommendation 16: Implementation of a unique business identifier

The law should ensure that, when adopting a unique business identifier across different public agencies:

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[122] At its twenty-eighth session, the Working Group agreed that recommendation 17 of A/CN.9/WG.I/WP.101 and the relevant commentary (paras. 111 to 116 of A/CN.9/WG.I/WP/101) should be adjusted to focus more on cross-border access to information than on information-sharing (paras. 69 to 71, A/CN.9/900). Having made the requested changes to that recommendation and the relevant commentary in the current text, the Secretariat has retained additional information from those paragraphs and relocated it here.

[123] For instance, there are some regional examples of cross-border information-sharing on businesses between States, but these are cases where the information-sharing was a component of a broader project involving significant economic integration of the relevant States.

[124] Some States with more integrated economies have developed an application that allows users to carry out simultaneous searches of the registries in both States by using their smartphones or mobile devices.

(a) There is interoperability between the technological infrastructure of the business registry and of the other public agencies sharing the information associated with the identifier; and

(b) That existing identifiers are linked to the unique business identifier.

H. Sharing of protected data between public agencies

119. Although unique business identifiers facilitate information-sharing, it is important that they protect sensitive data and privacy. For this reason, when a State introduces interoperability among different authorities, it should address issues of how public agencies should share protected data relating to individuals and businesses so that the sharing does not infringe the right for protection of the data owners. States should thus ensure that all information-sharing among public agencies occurs in accordance with the laws of the State, which should establish the conditions under which such sharing is permitted.[125] Moreover, the law should clearly identify which public agencies are involved, the information shared and the purpose for sharing, and establish that the data owners should be informed that their protected data may be shared among public agencies and for what purpose. In order to further protect data owners, information-sharing should be based on the principle that only the minimum information necessary to achieve the public agency's purpose may be shared and that appropriate measures are in place to protect the rights to privacy of the business.[126] When devising appropriate law or policy on the sharing of protected data between public agencies, it is important for States to consider interoperability among those public agencies (such as the ability of different information technology infrastructures to exchange and interpret data; or the semantic interoperability).

Recommendation 17: Sharing of protected data between public agencies[127]

The law should establish that rules for the sharing of protected data between public agencies pursuant to the unique business identifier system that is adopted:

(a) Conform with the applicable rules in the enacting State on the sharing of protected data between public agencies;

(b) Enable public agencies to access protected data included in the unique business identifier system only in order to carry out their statutory functions; and

(c) Enable public agencies to access protected data included in the unique business identifier system only in relation to those businesses with respect to which they have statutory authority.

IV. Registration of a business

A. Scope of examination by the registry

120. The method through which a business is registered varies from State to State, ranging from those that tend to regulate less and rely on the legal framework that governs business behaviour, to States that opt for ex ante screening of businesses

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[125] At its twenty-eighth session, the Working Group agreed that para. 110 of A/CN.9/WG.I/WP.101 should focus solely on issues of sharing protected data between public agencies and that references to disclosure of information to the public should be considered in relation to recommendations 32 and 33 of A/CN.9/WG.I/WP.101 (para. 67, A/CN.9/900).

[126] For a relevant example, see the website of the Data Protection Commissioner of the Republic of Ireland, available at: www.dataprotection.ie.

[127] At its twenty-eighth session, the Working Group requested the Secretariat to amend the text of the recommendation (in particular, the chapeau and paragraph (a)) so that it referred to "protected data" and recommended that such data should be shared among public authorities only in conformity with the law of the enacting State (para. 68, A/CN.9/900).

before the business may be registered (see also para. 57 above).[128] In this regard, a State aiming at reforming the registration system must first decide which approach it will take so as to determine the scope of the examination that will have to be carried out by the registry. The State may thus choose to have a system where the registry only records facts or a system where the registry is required to perform legal verifications and decide whether the business meets the criteria to register.

121. States opting for ex ante verification of legal requirements and authorization before businesses can register often have court-based registration systems in which the judiciary, notaries and lawyers perform a key role in the registration process.[129] Other States structure their business registration as a declaratory system, in which no ex ante approval is required before business start-up and where registration is an administrative process. In such declaratory systems,[130] registration is under the oversight of a government department or agency, which can choose whether to operate the business registration system itself or to adopt other arrangements (see paras. 41 to 43 above).[131] There are also States that do not fall neatly within either category and in which there is a certain variation in the level and type of verification carried out as well as in the level of judiciary oversight.[132]

122. Both the approval and the declaratory systems have their advantages and disadvantages. Approval systems are usually said to help prevent errors or omissions prior to registration. Courts and other intermediaries exercise a formal review and, when appropriate, also a substantive review of the pre-requirements for the registration of business. By contrast, declaratory systems are said to be easier to manage and better-suited to deterring corruption by avoiding opportunities for official decisions to be made with a view towards personal gain; furthermore, they may reduce costs for registrants by negating the need to hire an intermediary and appear to have lower maintenance costs. Systems in which business registration procedures are entrusted to an administrative body under the oversight of the judiciary have been said to merge advantages of both the declaratory and approval systems by combining ex ante verification of the requirements needed for establishing a business with a reduced role of the courts and other intermediaries, thus simplifying procedures and shortening the processing times.[133]

B. Accessibility of information on how to register

123. In order for the business registry to facilitate trade and interactions between business partners, the public and the State, easy access to business registry services should be provided both to businesses that want to register and to interested stakeholders who want to search the information on the business registry.

124. For businesses wanting to register, surveys often show that many microbusinesses operating outside of the legally regulated economy are not aware of the process of registering or of its costs: often they overestimate time and cost, even

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[128] See supra, footnote 24, page 2.

[129] See supra, footnote 30, pages 25–26.

[130] The Secretariat suggests the deletion of the phrase “verification of an event’s legal status is made after it has taken place, and” to improve the clarity of the paragraph as noted at the twenty-eighth session of the Working Group (para. 74, A/CN.9/900).

[131] See supra, footnote 24, page 28.

[132] See, for instance, Italy and the role of the Chambers of Commerce in business registration. The Secretariat has included the last two sentences of para. 121 in order to fulfil the decision of the Working Group, at its twenty-eighth session, that the commentary should include information on those jurisdictions that use a more nuanced approach between the declaratory and the approval systems (para. 73, A/CN.9/900).

[133] The Secretariat has included the sentence at the end of para. 122 further to a decision of the Working Group at its twenty-eighth session that information should also be provided on jurisdictions that used a more nuanced or hybrid approach between the declaratory and the approval systems (para. 73, A/CN.9/900). (See also footnote 133 above.)

after efforts to simplify the registration process.[134] Easily retrievable information on the registration process (such information could include: a list of the steps needed to achieve the registration; the necessary contacts; the data and documents required; the results to be expected; how long the process will take; methods of lodging complaints; and possible legal recourse), including on the advantages offered by a one-stop shop, where available,[135] in accessing multiple services relating to business registration (see also paras. 90 to 100 above) as well as on the relevant fees can reduce compliance costs, and make the outcome of the application more predictable, thus encouraging entrepreneurs to register. Restricted access to such information, on the contrary, might require meetings with registry officials in order to be apprised of the registration requirements, or the involvement of intermediaries to facilitate the registration process.

125. In jurisdictions with developed ICT infrastructures, information on the registration process and documentation requirements should be available in the registry website or the website of the government agency overseeing the process. Moreover, the possibility of establishing direct contact with registry personnel through a dedicated email account of the registry, electronic contact forms or client service telephone numbers should also be provided (see also para. 196 below). As discussed below, States should consider whether the information included on the website should be offered in a foreign language in addition to official and local languages. States with more than one official language should make the information available in all such languages (see para. 139 below).

126. Lack of advanced technology, however, should not prevent access to information that could be ensured through other means, such as the posting of communication notes at the relevant agency or dissemination through public notices. In some jurisdictions, for instance, it is required to have large signs in front of business registry offices stating their processes, time requirements and fees.[136] In any event, information for businesses that want to register should be made available at no cost.

127. It is equally important that potential registry users are given clear advice on the practical logistics of the registration and the public availability of the information on the business registry, for example, through the dissemination of guidelines and tutorials (ideally in both printed and electronic form) and the availability of in-person information and training sessions. In some States, for instance, prospective users of the system are referred to classroom-based or eLearning opportunities available through local educational institutions or professional associations.[137]

Recommendation 18: Accessibility of information on how to register

The registrar should ensure that information on the business registration process and the applicable fees, if any, is widely publicized, readily retrievable, and available free of charge.

C. Businesses permitted or required to register

128. One of the key objectives of business registration is to permit businesses of all sizes and legal form to be visible in the marketplace and to operate in the legally regulated commercial environment. This objective is of particular importance in assisting MSMEs to participate effectively in the economy, and States should

[134] M. Bruhm, D. McKenzie, Entry Regulation and Formalization of Microenterprises in Developing Countries, 2013, pages 7–8.

[135] It was suggested at the twenty-eighth session of the Working Group that reference could be made here to the importance of one-stop shops, including a cross-reference to the earlier discussion of them in the legislative guide (para. 76, A/CN.9/900).

[136] See Bangladesh and Guinea cited in para. 31, A/CN.9/WG.I/WP.85.

[137] For further reference, see Service Alberta, Canada, at www.servicealberta.com/1005.cfm.

enable[138] businesses of all sizes and legal form to register in an appropriate business registry, or create a single business registry that is tailored to accommodate registration by a range of different sizes and different legal forms of business.

129. As noted above (see para. 31), enabling the registration of businesses that would not otherwise be required to register allows such businesses to benefit from a number of services offered by the State and by the registry, including the protection of a business or a trade name, facilitating access to credit, increasing visibility to the public and to markets and, subject to the legal form chosen for the business which may require it to be registered, the separation of personal assets from assets devoted to business or limiting the liability of the owner of the business.[139] Businesses that voluntarily register must, however, fulfil the same registration obligations (e.g. timely filing of periodic returns, updating of registered information, accuracy of information submitted) as those businesses that are required to register and will be subject to the same penalties for non-compliance with those obligations.[140]

130. Nonetheless, States must also define which businesses are required to register under the applicable law. Laws requiring the registration of businesses vary greatly from State to State, but one common aspect is that they all require registration of a particular legal form of business. The nature of the legal forms of economic entity that are required or permitted to register in a given jurisdiction is, of course, determined by the applicable law.[141] In some legal traditions, it is common to require registration of all businesses, including sole proprietorships, professionals, and government bodies, since they are all said to constitute an economic entity;[142] while in other legal traditions, only corporations and similar entities (with legal personality and limited liability) are required to register.[143] This approach can exclude businesses like partnerships and sole proprietorships from mandatory registration. However, variations on these regimes also exist, and some jurisdictions permit voluntary registration for businesses that would not otherwise be required to register.[144]

131. In several jurisdictions, when entrepreneurs decide to establish and to register their business, they tend to choose the simplest legal form available to them in order to minimize the regulatory and financial burden, as well as the expense of establishing the business. A sole proprietorship or similar type of business with low legal and regulatory requirements is thus often the most popular business form. Some jurisdictions require that even simple business forms such as these be registered, and some jurisdictions have carried out reforms to facilitate the registration process for sole proprietorships or for simplified new types of limited liability entities.

Recommendation 19: Businesses permitted or required to register

The law should specify:

(a) That all businesses are permitted to register; and

(b) Which legal forms of businesses are required to register.

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[138] Further to the decision of the Working Group at its twenty-eighth session, the phrase "should enable" has replaced "may wish to consider requiring or enabling" to ensure consistency with para. 31 above (para. 77, A/CN.9/900).

[139] At its twenty-eighth session, the Working Group requested the Secretariat to clarify the paragraph to clarify that asset partitioning was related to the legal form of the business (see para. 79, A/CN.9/900).

[140] At its twenty-eighth session, the Working Group requested the Secretariat to adjust the text to clarify the scope of the last sentence (para. 80, A/CN.9/900).

[141] See supra, footnote 6, pages 6 ff.

[142] See para. 23, A/CN.9/825.

[143] See supra, footnote 6, page 6. At its twenty-eighth session, the Working Group requested the Secretariat to clarify the final phrase of this paragraph (para. 80, A/CN.9/900).

[144] For further reference, see supra footnote 6, pages 6 ff. In order to clarify the last part of the paragraph, the Secretariat suggests replacing the phrase after "register" ("for example, because they are not economic entities or because they are not engaged in business activities ") with the phrase "such as sole traders and professional associations" (para. 80, A/CN.9/900).

D. Minimum information required for registration

132. As a general rule, businesses must meet certain requirements in order to be registered; those requirements are determined by the State based on its legal and economic framework. In addition, the registered information required usually varies depending on the legal form of business being registered – for example, sole proprietorships and simplified business entities may be required to submit relatively simple details in respect of their business, while businesses such as public and private limited liability companies will be required to provide more complex and detailed information. Although the requirements for registration of each legal form of business will vary according to the applicable law of the relevant jurisdiction, there are, however, some requirements that can be said to be common for many businesses in most States, both during the initial registration process and throughout the life of the business.

133. General requirements for the registration of all legal forms of business are likely to include information in respect of the business and its founders, such as:

(a) The name and address at which the business can be deemed to receive correspondence (such an address can be a "service address" and need not be the residential address of the registrants or the managers of the business);

(b) The name(s) and contact details of the registrant(s);

(c) The identity of the person or persons who may legally bind the business; and

(d) The legal form of business that is being registered.[145]

134. Other information that may be required for registration, depending on the jurisdiction of the registry and the legal form of the business being registered, can include:

(a) The names and addresses of the persons associated with the business, which may include managers, directors and officers of the business;

(b) The name and the address of the owner(s) or the beneficial owner(s);

(c) The rules governing the organization or management of the business; and

(d) Information relating to the capitalization of the business.

135. Depending on the legal form of the business being registered, other details may be required in order to finalize the registration process. In some jurisdictions, proof of the share capital, the name of the chairperson, information on the type of commercial activities engaged in by the business, and agreements in respect of non-cash property constitute information that may also be required by registries in respect of certain legal forms of business.[146] States should however be mindful that requesting a business that intends to register to submit complex and extensive information may result in making registration more difficult and expensive and thus may discourage MSMEs from registering.[147]

136. In addition, in several jurisdictions, registration of shareholder details and any changes therein may be required; in a few cases, registration of shareholder details is carried out by a different authority.[148] In some jurisdictions registration of the identity of the business owner(s) is considered a key requirement;[149] other jurisdictions now make it a practice to register beneficial ownership details and changes in those

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[145] At its twenty-eighth session, the Working Group agreed to delete subparagraph 130(b) of A/CN.9/WG.I/WP.101 (para. 82, A/CN.9/900).

[146] See supra, footnote 44, pages 26 ff.

[147] See supra, footnote 42, page 6.

[148] See supra, footnote 66, page 26.

[149] At its twenty-eighth session, the Working Group requested the Secretariat to reflect the practice of those States in which the identity of the owner is among the minimum information required for business registration (para. 83, A/CN.9/900).

details,[150] although the business registry is not always the authority entrusted with this task.[151] Transparency in the beneficial ownership of businesses can help prevent the misuse of corporate vehicles, including MSMEs, for illicit purposes.[152]

Recommendation 20: Minimum information required for registration

The law should establish the minimum information and supporting documents required for the registration of a business, including at least:

(a) The name and address at which the business can be deemed to receive correspondence or, in cases where the business does not have a standard form address, the precise description of the geographical location of the business;

(b) The identity of the registrant(s);[153]

(c) The identity of the person or persons who are authorized to act on behalf of the business; and

(d) The legal form of the business being registered.

E. Language in which information is to be submitted

137. When requiring the submission of information for business registration, one important issue for the State to consider is the language in which the required information must be submitted. Language can be a barrier and can cause delays in registration if documents need to be translated into the language of the registry.[154] On the other hand, a business can be registered only if the content of the information is legible to the registry staff. For this reason, it is not common for jurisdictions to allow documents or electronic records to be submitted in a non-official language. States, however, may consider whether such documents can be accepted. There are some States that allow all or some of the information relating to the business registration to be submitted in a non-official language. Should States opt for this approach, it would be advisable to establish that the documents or electronic records must be accompanied by a sworn translation into the registry's national language(s) or any other form of authenticating the documents or electronic records that is used in the State.[155]

138. Another issue is whether the documents submitted to the business registry include information, such as names and addresses, which uses a set of characters

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[150] See supra, footnote 44, page 37.

[151] A "beneficial owner" is the natural person(s) who ultimately owns or controls a legal person or arrangement even when the ownership or control is exercised through a chain of ownership or by means of control other than direct control. These vehicles may include not only corporations, trusts, foundations, and limited partnerships, but also simplified business forms, and may involve the creation of a chain of cross-border company law vehicles created in order to conceal their ownership. See also, paras. 47 to 55, A/CN.9/825. The Working Group may wish to consider whether further details on this topic should be included in these materials, possibly as an annex.

[152] It should be noted that the Financial Action Task Force (FATF) Recommendation 24 in respect of transparency and beneficial ownership of legal persons encourages States to conduct comprehensive risk assessments of legal persons and to ensure that all companies are registered in a publicly available company registry. The basic information required is: (a) the company name; (b) proof of incorporation; (c) legal form and status; (d) the address of the registered office; (e) its basic regulating powers; and (f) a list of directors. In addition, companies are required to keep a record of their shareholders or members. (See International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, Part E on Transparency and Beneficial Ownership of Legal Persons and Arrangements, Recommendation 24 (www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf).

[153] At its twenty-eighth session, the Working Group agreed to clarify the content of this recommendation (recommendation 20(b) of A/CN.9/WG.I/WP.101) by replacing the phrase "person or persons registering the business" with the term "registrant(s)" (para. 83, A/CN.9/900).

[154] See supra, footnote 66, page 23.

[155] Ibid., page 24.

different from the characters used in the language of the registry. In this case, the State should provide guidance on how the characters are to be adjusted or transliterated to conform to the language of the registry.

139. A number of States have more than one official language. In these States, registration systems are usually designed to accommodate registration in all official languages. To ensure that information on businesses operating in the State is available to all registrants and searchers, different approaches can be adopted. States may require parties to make their registration in all official languages; or they may permit filing in one language only, but then require the registry to prepare and register duplicate copies in all official languages. Both these approaches, however, may be quite costly and invite error. A more efficient way of dealing with multiple official languages, any one of which may be used to register, would be to allow registrants to carry out registration in only one of those official languages. Such a language could be that of the province or the region where the registry office or the registry sub-office is located and where the registrant has its place of business. This approach would also take into account the financial constraints of MSMEs and, according to circumstances, possible literacy issues, as entrepreneurs may not be equally fluent in all official languages spoken in a State. When such an approach is chosen, however, States should ensure that the registration and public information relating to the registry are available in all official languages of the registry. Whichever approach is taken, however, States will have to consider ways to address this matter so as to ensure that the registration and any subsequent change can be carried out in a cost effective way for both the registrant and the registry and, at the same time, ensure that information can be understood by the registry's users.

Recommendation 21: Language in which information is to be submitted

The law should provide that the information and documents submitted to the business registry must be expressed in the language or languages specified by the enacting State, and in the character set as determined and publicized by the business registry.

F. Notice of registration

140. The enacting State should establish that the business registry must notify the registrant whether or not the registration of the business was effective as soon as practicable, and, in any event, without undue delay. Obligating the registry to promptly notify the applicant business about the registration helps to ensure the integrity and security of the registry record. In States where online registration is used, the registrant should receive an online notification of the registration of the business immediately after all of the requirements for the registration of that business have been successfully fulfilled.

Recommendation 22: Notice of registration

The law should establish that the business registry should notify the registrant whether or not its registration is effective as soon as practicable, and, in any event, without undue delay.

G. Content of notice of registration

141. The notice of registration should include the minimum information in respect of the registered business necessary to provide conclusive evidence that all requirements for registration have been complied with and that the business is duly registered according to the law of the enacting State.

Recommendation 23: Content of notice of registration

The law should provide that the notice of registration may be in the form of a certificate, notice or card, and that it should contain at least [156] the following information:

(a) The unique business identifier of the business;

(b) The date of its registration;

(c) The name of the business;

(d) The legal form of the business; and

(e) The law under which the business has been registered.

H. Period of effectiveness of registration

142. States may adopt one of two approaches in terms of determining the period of effectiveness of the registration of a business. In some States, the registration of the business is subject to a maximum period of duration established by law. It follows that unless the registration is renewed, the registration of the business will expire on the date stated in the notice of registration or upon the termination of the business. [157] This approach imposes a burden on the registrant, which could be particularly problematic for MSMEs, as they often operate with minimal staff and limited knowledge of the applicable rules. Further, if additional information is required and not furnished by the applicant, renewal of the registration could also be refused, thus further threatening the existence of the business.

143. Under the second approach, no maximum period of validity is established for the registered business and the registration is effective until the business ceases to operate and is deregistered. This approach simplifies the intake process and both encourages registration and reduces its burden on businesses, and in particular on MSMEs. However, States that opt for this approach should ensure the adoption of appropriate methods (e.g. sending regular prompts to businesses, establishing advertising campaigns as reminders, or, as a last resort, enforcement procedures) to encourage businesses to keep their registered information current (see paras. 160 to 164 below). [158]

144. In some cases, both approaches have been adopted: a maximum period of registration, subject to renewal, may apply to registered businesses that are of a legal form that does not have legal personality, while an unlimited period of registration may apply to businesses that have legal personality. This duality of approach reflects the fact that the consequences of the expiry of registration of a business that possesses legal personality are likely to be more serious and may affect the very existence of the business and the limited liability protection afforded its owners. [159]

145. Although some jurisdictions require registered businesses to renew their registration periodically, the practice of establishing registration without a maximum period of validity is a more desirable approach in that it meets the needs of businesses

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[156] At its twenty-eighth session, the Working Group agreed to add the phrase “at least” to clarify that reference was being made to a minimum requirement (para. 86, A/CN.9/900).

[157] It should be noted that the general law of the enacting State for calculating time periods would apply to the calculation of the period of effectiveness, unless specific legal provisions applicable to registration provides otherwise. For example, if the general law of the enacting State provides that, if the applicable period is expressed in whole years from the day of registration, the year runs from the beginning of that day.

[158] At its twenty-eighth session, the Working Group agreed to clarify that even without periodic renewal of registration, there were other methods of ensuring that information in the business registry was kept current (para. 87, A/CN.9/900).

[159] See, for example, Singapore at http://www.guidemesingapore.com/incorporation/other/singapore-sole-proprietorship-registration-guide.

for simplified and fast procedures, while relieving them, in particular MSMEs, of a potential burden (see also para. 142 above).[160]

Recommendation 24: Period of effectiveness of registration

The law should clearly establish that the registration is valid until the business is deregistered.[161]

I. Time and effectiveness of registration

146. In the interests of transparency and predictability of a business registration system, States should determine the moment at which the registration of a business or any later change made to the registered information is effective.[162] States usually determine that a business registration or any subsequent change made to it is effective either at the time of the entry of that information into the registry record or when the application for registration or a change of registered information is received by the registry. Whichever approach is chosen, the most important factor is that the State makes it clear at which moment the registration or change is effective. In addition, the effective time of registration of the business or any later change to the registered information should be indicated in the registry record relating to the relevant business.

147. If the registry is designed to enable users to submit information electronically in respect of an application for registration or an amendment without the intervention of registry staff and to use online payment methods for the registration, the registry software should ensure that the information becomes effective immediately or nearly immediately after it is transmitted. As a result, any delay between the time of the electronic transmission of the information and the effective time of registration of the business will be eliminated.

148. In registry systems that allow or require registration information to be submitted to the registry using a paper form, registry staff must enter the information on the paper form into the registry record on behalf of the registrant. In such systems, there will inevitably be some delay between the time when the paper form is received in the registry office and the time when the information set out on the form is entered into the registry record. In these cases, the domestic legislative or regulatory framework should provide that the registry must enter the information received into the registry record as soon as practicable and possibly set a deadline by which the application or the amendments should be registered. In a mixed registry system which allows information to be submitted in both paper and electronic form, registrants who elect to use the paper form should be alerted that this method may result in some delay in the time of effectiveness of the registration.

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[160] At its twenty-eighth session, the Working Group requested the Secretariat (para. 88, A/CN.9/900) to ensure that the commentary emphasized that requiring businesses to reregister might not be good practice, particularly in terms of the potential burden that could be placed on businesses having to meet that requirement. The Secretariat has thus redrafted the commentary to this recommendation (recommendation 24 of A/CN.9/WG.I/WP.101).

[161] At its twenty-eighth session, the Working Group agreed to delete the final phrase of this recommendation (recommendation 24 of A/CN.9/WG.I/WP.101) (para. 89, A/CN.9/900).

[162] In some jurisdictions, businesses may also apply for the protection of certain rights in the period prior to registration, for example, in the provisional registration of the trade name of the business to be registered (see para. 56 above), and the trade name is protected from being used by any other entity until the registration of the business is effective. In such cases, States should be equally clear to establish the moment at which such pre-registration rights are effective and the period of their effectiveness (as agreed should be added at the twenty-eighth session of the Working Group: para. 90, A/CN.9/900).

Recommendation 25: Time and effectiveness of registration

The law should:

(a) Require the business registry to record the date and time that applications for registration are received and to process them in that order as soon as practicable and, in any event, without undue delay;

(b) Establish clearly the moment at which the registration of the business is effective; and

(c) Specify that the registration of the business must be entered into the business registry as soon as practicable thereafter, and in any event without undue delay.

J. Rejection of an application for registration[163]

149. A series of checks and control procedures are required to ensure that the necessary information and documentation is provided in order to register the business, however, the extent of such controls varies according to the jurisdiction. In those legal regimes where the registry performs simple control procedures, if all of the basic legal and administrative requirements established by the domestic legal and regulatory framework are met, the registry must accept the information as filed, record it, and register the business. When the legal regime requires a more thorough verification of the information filed, registries may have to check whether mandatory provisions of the law are met by the content of the application and information submitted, or any changes thereto. Whichever approach is chosen, States should define in their legislative or regulatory framework which requirements the information to be submitted to the registry must meet. In certain jurisdictions, the registrar is given the authority to impose requirements as to the form, authentication and manner of delivery of information to be submitted to the registry.[164] When an MSME is seeking to register, it would be advisable that such requirements be kept to a minimum in order to facilitate the registration process for MSMEs. This will reduce administrative hurdles and help in promoting business registration among such businesses.

150. Registration of MSMEs may also be facilitated if the registry is granted the power to accept and register documents that do not fully comply with the requirements for the form of the submission, and to rectify clerical errors, including its own incidental errors, in order to bring the entry in the business registry into conformity with the documents submitted by the registrant. This will avoid imposing the potentially costly and time-consuming burden of requiring the registrant to resubmit an application for registration. Entrusting the registry with these responsibilities, may be of particular importance if registrants do not have direct access to electronic submission of documents and where their submission, or the entry of data, requires the intervention of the registry staff. In States where it is possible for registrants to submit applications for registration directly online, the electronic registration system is usually designed so as to allow built-in data error checks (see also paras. 185 to 188 below) and to reject automatically an application or a request if it does not comply with the prescribed requirements. When the registry is granted the authority to correct its own errors as well as any incidental errors that may appear in the information submitted in support of the registration of the business, the law of the enacting State should strictly determine under which conditions those responsibilities may be discharged (see also para. 228 below). Clear rules in this regard will ensure the integrity and security of the registry record and minimize any risk of abuse from or corruption by the registry staff (see also paras. 210 to 215 below). The law of the enacting State should thus establish that the registry may only exercise its discretion to correct errors upon having provided prior notification of the intended corrections to the registrant and having received the consent of the registrant in return, although

[163] See footnote 168 below.

[164] See, for instance, Section 1068, UK Companies Act 2006.

this approach could create a delay in the registration of the business while the registry seeks such consent. When the information provided by the business is not sufficient to comply with the requirements for registration, the registry should be granted the authority to request from the business additional information in order to finalize the registration process. The law of the enacting State should specify an appropriate length of time within which the registry should make such a request.

151. States should provide that registries may reject the registration of a business if its application does not meet the objective requirements prescribed by the legislative and regulatory framework for registration.[165] This approach is implemented in several jurisdictions regardless of their legal tradition. In order to prevent any arbitrary use of such power, however, the registry must provide, in writing, a notice of the rejection of an application for registration and the reasons for which it was rejected, and the registrant must be allowed time to appeal against that decision as well as to resubmit its application. Moreover, it should be noted that the authority of the registrar to reject an application should be limited to situations where the application for registration does not meet the objective conditions for registration as required by law. The registrar should not have the authority over the substantive legal requirements for the establishment of a particular legal form of business; such matters should be governed by the law of the enacting State.[166]

152. The rejection of an application for registration is likely to be processed differently depending on whether the registration system is paper-based, electronic or mixed. In cases where the application for registration of a business is submitted in paper form and the reason for its rejection is that the application was incomplete or illegible, there might be some delay between the time of receipt of the application by the registry and the time of communication of its rejection, and the reasons therefor, to the registrant. In a registry system that allows registrants to submit applications and relevant information directly to the registry electronically, the system should be designed, when permitted by the State's technological infrastructure, so as to automatically require correction of the application if it is submitted with an error, and to automatically reject the submission of incomplete or illegible applications, displaying the reasons for the rejection on the registrant's screen. In mixed registry systems which allow applications to be submitted using both paper and electronic means, the design of the electronic medium should include the technical specifications that allow for automatic requests for correction or automatic rejection of an application. Moreover, registrants who elect to use the paper form when such a choice is possible should be alerted that this method may result in some delay between the time of receipt of the application by the registry and the time of communication of any rejection, and the reasons therefor.[167]

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[165] Instances in which the registry improperly accepts an application and registers a business that does not meet the requirements prescribed by law should be governed by the provisions establishing liability of the business registry, if any (see paras. 210 to 215 below). Moreover, the law of the State should establish how rectification of business registration should be carried out in such instances.

[166] At its twenty-eighth session, the Working Group requested the Secretariat to elaborate in the commentary on the difference between rejection of an application based on formalistic and substantive grounds (para. 94, A/CN.9/900). The final two sentences of this paragraph are intended to address those concerns.

[167] In order to clarify the approach to the correction of errors in the three registry systems (paper-based, mixed and electronic) (para. 92, A/CN.9/900), the Secretariat has revised the text as follows: (a) including a new sentence at the beginning of the paragraph; (b) including the phrase "require correction of the application if submitted with an error and to automatically"; and (c) adding the final two sentences at the end of the paragraph.

Recommendation 26: Rejection of an application for registration[168]

The law should provide that the registrar:

(a) Must reject an application for the registration of a business if the application does not meet the objective requirements specified in the law;

(b) Is required to provide to the registrant in written form the reason for any such rejection; and

(c) Is granted the authority to correct its own errors as well as any incidental errors that may appear in the information submitted in support of the registration of the business, provided that the conditions under which the registrar may exercise this authority are clearly established.

K. Registration of branches

153. Registration of branches of a business is common practice in all geographic regions.[169] Most States require the registration of national branches of a foreign business in order to permit those branches to operate in their jurisdiction and to ensure the protection of domestic creditors, businesses and other interested parties that deal with those branches. In several States, registration of a branch of a business established in another domestic jurisdiction is also required or permitted.[170] Registration of a business branch might not appear to be immediately relevant for MSMEs, whose main concern is more likely to be to consolidate their business without exceeding their human and financial capacity. However, this issue is relevant for those slightly larger business entities that, being of a certain size and having progressed to a certain volume of business, look to expand beyond their local or domestic market. In addition, even micro and very small businesses may be highly successful and may wish to expand their operations. For such businesses, establishing branches in a new location either within or outside the jurisdiction in which they were formed may be both an attractive goal and a realistic option. Although it may seem to be a daunting prospect, in fact, when a business expands, it may find that setting up a branch is cheaper and requires fewer formalities than establishing a subsidiary.[171] This is usually the case even when cross-border branches are established.[172]

154. States have their own rules for governing the operation of foreign businesses,[173] and there may be considerable differences among those jurisdictions that permit the registration of branches of foreign businesses in terms of what triggers the obligation to register them. Some approaches are based on a broad interpretation of the concept of foreign establishment, for example, those which include not only a branch, but also any establishments with a certain degree of permanence or recognisability, such as a

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[168] At its twenty-eighth session the Working Group agreed to modify the title of this recommendation (recommendation 26 of A/CN.9/WG.I/WP.101) ("Refusal to register" in A/CN.9/WG.I/WP.101) so that it would refer more specifically to errors in the application for registration (para. 93, A/CN.9/900). The Secretariat suggests that in order to ensure consistency with the new title, the language of subparagraph (a) of this recommendation be amended to use the term "rejection".

[169] See supra, footnote 42, page 42.

[170] At its twenty-eighth session, the Working Group agreed that the commentary to this recommendation (recommendation 27 of A/CN.9/WG.I/WP.101) should include reference to the practice of States that permit or require registration of branches of local businesses and adopt appropriate language therein (para. 96(a), A/CN.9/900). The Secretariat has sought to clarify this aspect in the commentary.

[171] For further reference, see K. E. Sørensen, Branches of companies in the EU: balancing the Eleventh Company Law Directive, national company law and the right of establishment, 2013, page 9.

[172] The Secretariat suggests the inclusion of this sentence for further clarity.

[173] At its twenty-eighth session, the Working Group agreed that the commentary should clarify that each State has its own requirements concerning the operation of foreign businesses (para. 95, A/CN.9/900).

place of business in the foreign State.[174] Other approaches define more precisely the elements that constitute a branch that needs to be registered, which may include the presence of some sort of management, the maintenance of an independent bank account, the relation between the branch and the original or main business, or the requirement that the original or main business has its main office registered abroad.[175] Not all States define the notion of branch in their laws, or state under which circumstances a foreign establishment in the State must be registered: laws may simply refer to the existence of a foreign branch. In these cases, registries may fill the gap by issuing guidelines that clarify the conditions under which such a registration should be carried out.[176] When this occurs, the registration guidelines should not be seen as an attempt to legislate by providing a discrete definition of what constitutes a branch, but rather as a tool to explain the features required by a branch of a business in order to be registered.

155. When simplifying or establishing their business registration system, States should consider enacting provisions governing the registration of branches of businesses from other jurisdictions. Those provisions should address, at minimum, issues such as timing of registration, disclosure requirements, information on the persons who can legally represent the branch and the language in which the registration documents should be submitted.[177] Duplication of names could represent a major issue when registering foreign company branches, and it is important to ensure the identity of a business across jurisdictions. In this regard, an optimal approach could be for a business registry to use unique identifiers to ensure that the identity of a business remains consistent and clear within and across jurisdictions (see paras. 101 to 111 above).

Recommendation 27: Registration of branches[178]

The law should establish:

(a) Whether the registration of a branch of a business is required or permitted;

(b) A definition of "branch" for registration purposes that is consistent with the definition provided elsewhere in the law; and

(c) Provisions regarding the registration of a branch to address the following issues:

(i) When a branch must be registered;

(ii) Disclosure requirements, including: the name and address of the registrants; the name and address of the branch; the legal form of the original or main business seeking to register a branch; and current proof of the existence of the original or main business issued by a competent authority of the State or other jurisdiction in which that business is registered; and

(iii) Information on the person or persons who can legally represent the branch.

V. Post-registration

156. While a key function of a business registry is, of course, the registration of a business, registries typically support businesses throughout their life cycle. Further,

[174] See supra footnote 171, page 12.
[175] Ibid.
[176] Ibid., page 13.
[177] Ibid., page 17. The Working Group may wish to consider whether further details on this topic should be included in a future annex to these materials.
[178] At its twenty-eighth session, the Working Group agreed to redraft this recommendation as follows: (a) subparagraph (c)(i) should indicate when a branch was required to register; (b) subparagraph (c)(ii) should include the legal form of the foreign business registering the branch as well as proof of the existence of the foreign business issued by the competent authority rather than its notice of registration; and (c) subparagraph (c)(iv) should be deleted, as redundant in light of recommendation 21.

once a business's registered information is collected and properly recorded in the business registry, it is imperative that it be kept current in order to continue to be of value to users of the registry. Both the registered business and the registry play roles in meeting these goals.

157. In order for a business to remain registered, it is required to submit certain information during the course of its life, either periodically or when changes in its registered information occur, so that the registry is able to maintain the information on that business in as current a state as possible. The registry also plays a role in ensuring that its information is kept as current as possible, and may use various means to do so, such as those explored in greater detail below. Both of these functions permit the registry to provide accurate business information to its users, thus ensuring transparency and supplying interested parties, including potential business partners and sources of finance, the public and the State, with a trustworthy source of data.

A. Information required after registration[179]

158. In many jurisdictions, entrepreneurs have a legal obligation to inform the registry of any changes occurring in the business, whether these are factual changes (for example, address or telephone number) or whether they pertain to the structure of the business (for example, a change in the legal form of business). Information exchange between business registries and different government agencies operating in the same jurisdiction also serves the same purpose. In some cases, registries publish annual accounts, financial statements or periodic returns of businesses that are useful sources of information in that jurisdiction for investors, clients, potential creditors and government agencies. Although the submission and publication of detailed financial statements might be appropriate for public companies, depending on their legal form, MSMEs should be required to submit far less detailed financial information, if any at all, and such information should only be submitted to the business registry and thus made public if desired by the MSME. However, to promote accountability and transparency and to improve their access to credit or attract investment, MSMEs may wish to submit and make public their financial information.[180] In order to encourage MSMEs to do so, States should allow MSMEs to decide on an annual basis whether to opt for disclosure of such information or not.

159. The submission of information that a business is required to provide in order to remain registered may be prompted by periodic returns that are required by the registry at regular intervals in order to keep the information in the registry current or it may be submitted by the business as changes to its registered information occur. Information required in this regard may include:

(a) Changes in any of the information that was initially required for the registration of the business as set out in recommendation 20;[181]

(b) Changes in the name(s) and address(es) of the person(s) associated with the business;

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[179] At its twenty-eighth session, the Working Group agreed to reverse the order of recommendations 28 and 29 (as they appeared in A/CN.9/WG.I/WP.101) and the related commentary (para. 103, A/CN.9/900).

[180] While MSMEs are not generally required to provide the same flow and rate of information as publicly held firms generally, they may have strong incentives for doing so, particularly as they develop and progress. Indeed, businesses wishing to improve their access to credit or to attract investment may wish to signal their accountability by supplying information about: (1) the business' objectives; (2) principal changes; (3) balance sheet and off-balance sheet items; (4) its financial position and capital needs; (5) the composition of any management board and its policy for appointments and remuneration; (6) forward-looking expectations; and (7) profits and dividends. Such considerations are not likely to trouble MSMEs while they remain small, but could be important for those businesses as they grow.

[181] See supra, footnote 6, page 7.

(c) The submission of financial information in respect of the business, depending on its legal form; and

(d) Depending on the jurisdiction, information concerning insolvency proceedings, liquidation or mergers (see para. 61 above).

Recommendation 28: Information required after registration

The law should specify that after registration, the registered business must file with the business registry at least[182] the following information:

(a) Any changes or amendments to the information that was initially required for the registration of the business pursuant to recommendation 20 or to the current information in the business registry as soon as those changes occur; and

(b) When the law so requires, periodic returns, which may include annual accounts.[183]

B. Maintaining a current registry

160. States should enact provisions that enable the business registry to keep its information as current as possible. A common approach through which that may be accomplished is for the State[184] to require registered businesses to file at regular intervals, for example once a year, a declaration stating that certain core information contained in the register concerning the business is accurate or, as applicable, stating what changes should be made. Although this approach may be valuable as a means of identifying businesses that have permanently ceased to operate and may be deregistered, and may not necessarily be burdensome for larger business with sufficient human resources, it could be quite demanding for less generously staffed MSMEs, in particular if there is a cost associated with making such submissions.

161. Another approach, which seems preferable as it better takes into account the needs of MSMEs, and in particular the less experienced ones, is to require the business to update its information in the registry whenever a change in any of the registered information occurs. The risk of this approach, which is largely dependent on the business complying with the rules, may be that the filing of changes is delayed or does not occur. To prevent this, States could adopt a system pursuant to which regular prompts are sent, usually electronically, to businesses to request them to submit updated information. In order to minimize the burden for registries and to help them make the most effective use of their resources, prompts that registries regularly send out to remind businesses of the periodic returns required of them could also include generic reminders to update registered information. For the same reason, it would be desirable that prompts be sent in electronic format. If the registry is operated in a paper-based or mixed format, it would be desirable for the registry to identify an appropriate means of performing this task: sending paper-based prompts to individual businesses would be time and resource consuming and may not be a sustainable approach. In one State, for instance, where the registry is not operated electronically, reminders to registered businesses to update the information contained in the registry are routinely published in newspapers.[185]

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[182] At its twenty-eighth session, the Working Group agreed to add the phrase “at least” in the chapeau of this recommendation (recommendation 29 of A/CN.9/WG.I/WP.101) (para. 101, A/CN.9/900).

[183] At its twenty-eighth session, the Working Group agreed to reverse the order of the clauses in subparagraph (b) and to start that subparagraph with the phrase “When the law of the enacting State so requires, periodic returns…” (para. 102, A/CN.9/900).

[184] At its twenty-eighth session, the Working Group agreed that requiring businesses to re-register might not be considered a good practice and that this view should be reflected throughout the commentary as necessary (para. 99, A/CN.9/900). The Secretariat has accordingly deleted re-registration as one option that can be used to maintain a current registry.

[185] This is the practice in Sri Lanka. See, for example, http://www.sundaytimes.lk/090503/FinancialTimes/ft322.html.

162. Regardless of the approach chosen to prompt businesses to inform the registry of any changes in their registered information, States may adopt enforcement measures for businesses that fail to meet their obligations to file amendments with the registry. For example, a State could adopt provisions establishing the liability of the registered business to a fine on conviction if changes are not filed with the business registry within the time prescribed by the law (see paras. 207 to 209 below for a discussion in greater detail of liability and sanctions).

163. A more general method that may help mitigate any potential deterioration of the information collected in the business registry would include enhancing the interconnectivity and the exchange of information between business registries and other public registries.

164. Once the registry has received the updated information, it should ensure that all amendments are entered in the registry record without undue delay. Again, the form in which the registry is operated is likely to dictate what might constitute an undue delay. If the registry allows users to submit information electronically without the intervention of the registry staff, the registry software should permit the amendments to become immediately or nearly immediately effective. Where the registry system (whether paper-based, electronic or mixed) requires the registry staff to enter the information on behalf of the business, it should be ensured that all amendments are reflected in the registry as soon as possible, possibly stipulating a maximum time period in which that should be accomplished.[186]

Recommendation 29: Maintaining a current registry

The law should require the registrar to ensure that the information in the business registry is kept current, including through:

(a) Sending an automated request to registered businesses at periodic intervals requiring them to report whether the information maintained in the registry continues to be accurate or to state which changes should be made; and

(b) Updating the registry as soon as practicable following the receipt of amended information and, in any event, without undue delay thereafter.[187]

C. Making amendments to registered information

165. In keeping with the previous discussion (see paras. 146 to 148 above), States should also determine the time at which changes to the information recorded is effective in order to promote transparency and predictability of the business registration system. It would be advisable for the changes to become effective when the information contained in the notification of changes is entered into the registry record rather than when the information is received by the registry, and that the time of the change should be indicated in the registry record relating to the relevant business. In order to preserve information on the history of the business, amendments

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[186] At its twenty-eighth session, the Working Group requested the Secretariat to ensure that the commentary and recommendations 22, 25 and 28 were made consistent (para. 98, A/CN.9/900).

[187] At its twenty-eighth session, the Working Group agreed to replace the phrase "immediately… or as soon as practicable thereafter" in subparagraph (b) of this recommendation (recommendation 28 of A/CN.9/WG.I/WP.101) with the phrase "as soon as practicable, and, in any event, without undue delay" in order to be consistent with the language of recommendations 22 and 25 (para. 98, A/CN.9/900). Furthermore, although the Working Group agreed to reverse the order of the two subparagraphs in this recommendation (recommendation 28 of A/CN.9/WG.I/WP.101) so that the text would focus first on the obligation of the business to update information and then on the obligation of the registry (para. 103, A/CN.9/900), the Secretariat suggests that the original order of the subparagraphs be maintained in order to retain the logic of the steps required of the registry and to better reflect the reversal of recommendations 28 and 29 (as they appeared in A/CN.9/WG.I/WP.101).

to previously registered information should be added to the registry record, without deleting previously entered information.[188]

166. As in the case of business registration, if the registry allows users to submit amendments electronically without the intervention of the registry staff, the amendments should become effective immediately or nearly immediately after they are transmitted to avoid delay. If the registry allows or requires paper-based amendments to be submitted to it and the registry staff enters the amendments into the registry on behalf of the registrant, it should be ensured that the amendments received are entered into the registry record as soon as practicable, and possibly stipulate a maximum time period in which the changes should be registered. In a mixed registry system which allows amendments to be submitted using both paper and electronic means, registrants who elect to use the paper form should be alerted that this method may result in some delay in the time of effectiveness of the amendments.

Recommendation 30: Making amendments to registered information

The law should:

(a) Require the business registry to: (i) process amendments to the registered information in the order in which they are received; (ii) record the date and time when the amendments are entered into the registry record; and (iii) notify the registered business as soon as practicable and in any event, without undue delay, that its registered information has been amended;[189] and

(b) Establish when an amendment to the registered information is effective.

VI. Accessibility and information-sharing

A. Public access to business registry services[190]

167. The rules relating to access to business registry services are typically set out in the law of the enacting State. It is desirable that those laws allow all potential registrants to access the registry services without any discrimination based on grounds such as sex, race, ethnic or social origin, religion, belief, or political view. In the interest of promoting domestic economic growth, an increasing number of States allow registrants who are neither citizens of, nor residents in, the State to register a

[188] At its twenty-eighth session, the Working Group requested the Secretariat to clarify that all registered information about the business (previously registered information and any amendments thereof) should remain visible in the registry record (para. 104, A/CN.9/900).

[189] At its twenty-eighth session, the Working Group agreed to: (a) redraft recommendation 30(a) of A/CN.9/WG.I/WP.101 to reflect the order in which a registry actually proceeds when receiving and processing amendments to registered information, i.e. the registry first processes the amendments received from a business in the order in which they were received (this part was said it could become a first subparagraph of the recommendation); then enters such amendments into the registry record and informs the business (this part was said it could become a second subparagraph of the recommendation); (b) ensure that the phrase "time and date stamp" in subparagraph (a) referred to both electronic and paper media; and (c) change the title of recommendation 30 of A/CN.9/WG.I/WP.101 so that it reflects the changes made (paras. 105 and 106, A/CN.9/900). In respect of clarification of the phrase "time and date stamp", it has been revised following a review of article 13(3) ("Time of effectiveness of the registration of a notice") of the Model Registry Provisions included in article 28 of the UNCITRAL Model Law on Secured Transactions (2016).

[190] At its twenty-eighth session, the Working Group agreed to move relevant paragraphs of the commentary to recommendation 31 of A/CN.9/WG.I/WP.101 to the commentary for recommendation 32 of A/CN.9/WG.I/WP.101, and requested the Secretariat to prepare commentary for this recommendation of A/CN.9/WG.I/WP.101 in respect of access to business registry services (para. 108, A/CN.9/900). Further to that request, the Secretariat has prepared revised commentary for this recommendation.

business, provided that such registrants meet certain requirements and comply with certain procedures established by the law concerning foreign registrants.

168. Access of potential registrants to the services of the business registry should thus only be subject to compliance with minimum age requirements, if any, and with the procedural requirements for the use of such services, such as: that the request for registration be submitted via an authorised medium of communication and using the prescribed form; and that the registrant provide identification in the form requested by the registry (see paras. 133 and 134 above and recommendation 20) and has paid (or made arrangements to pay) any fee for registration, if such fee is required (see paras. 197 and 199 to 202 below).[191]

169. The registry should maintain a record of the identity of the registrant. In order to ensure a simple and straightforward registration process, the evidence of identity required of a registrant should be that which is generally accepted as sufficient in day-to-day commercial transactions in the enacting State. When registries are operated electronically and allow for direct access by users, potential registrants should be given the option of setting up a protected user account with the registry in order to transmit information to the registry. This would facilitate access by frequent users of registration services (such as business registration intermediaries or agents), since they would need to provide the required evidence of their identity only once when initially setting up the account.[192]

170. Once the registrant has complied with the requirements mentioned in para. 168 above (and others that may be established by the law of the State) for accessing the registry, the registry cannot deny access to the registry services. The only scrutiny that the registry may conduct at this stage (which is carried out automatically in an electronic registry) is to ensure that legible information (even if incomplete or incorrect) is entered in the form for business registration. If the registrant did not meet the objective conditions for access to the registration services, the registry should provide the reasons for denying access (e.g. the registrant failed to provide valid identification) in order to enable the registrant to address the problem. The registry should provide such reasons as soon as practicable (in this respect see paras. 150 to 152 above).[193]

171. Certain rules relating to access to business registry services may also be addressed in the "terms and conditions of use" established by the registry. For example, the terms and conditions of access to registry services may include offering registrants the opportunity to open an account with the registry to facilitate quick access to registry services and the payment of fees for those services, if any. The terms and conditions of access may also address the concerns of registrants regarding the security and confidentiality of their financial and other data or the risk of changes being made to registered information without the authority of the business. Assigning a unique user name and a password to the registrant, or employing other modern security techniques would help reduce such risks (see paras. 37 and 38 above), as would requiring the registry to notify the business of any changes made by others in the deposited information.

Recommendation 31: Public access to business registry services

The law should permit any qualified person to access the services of the business registry.[194]

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[191] This approach is consistent with the approach adopted in the UNCITRAL Guide on the Implementation of a Security Rights Registry at paragraphs 95 to 99.

[192] Ibid.

[193] Ibid.

[194] At its twenty-eighth session, the Working Group agreed to delete the phrase "and the information contained in the registry" after the term "registry", in order to make it more consistent with the new structure of this part of the draft legislative guide (para. 109, A/CN.9/900).

B. Public availability of information

172. In keeping with its functions as a collector and disseminator of business-related information, the registry should make publicly available all information on a registered business that is relevant for those that interact with the business (whether they be public authorities or private entities) to be fully aware of the business identity and status of that business. This will allow interested users to make more informed decisions about who they wish to do business with, and for organizations and other stakeholders to gather business intelligence.[195] Moreover, since access to the registered information by general users also enhances certainty of and transparency in the way the registry operates, the principle of public access to the information deposited in the registry should be stated in the law of the enacting State. Evidence shows that in most States, public access to the information in the registry is generally unqualified. Allowing full public access does not compromise the confidentiality of certain registered information, which can be protected by allowing users to access only certain types of information.[196] For these reasons, it is recommended that the registry should be fully accessible to the public, subject only to necessary confidentiality restrictions in respect of certain registered information.

173. While providing public disclosure of the registered information is an approach followed in most States, the way in which stakeholders access information, the format in which the information is presented and the type of information available varies greatly from State to State. This variation is not only a function of the technological development of a State, but of an efficient accessing framework, including that provided by national law.[197] For instance, an aspect on which States may differ concerns the criteria that may be used to search the registry.[198]

174. While this should be decided by the enacting State pursuant to its legislative framework, it is not recommended that States restrict access to search the information on the business registry or that users be required to demonstrate a reason to request access. Such a policy could seriously compromise the core function of the registry to publish and disseminate information on registered entities. Moreover, if a discretionary element is injected into the granting of an information request, equal public access to the information in the registry could be impeded, and some potential users might not have access to information that was available to others.

175. The law of the enacting State can, however, make access to the registry subject to certain procedural requirements, such as requiring users to submit their information request in a prescribed form and pay, or make arrangements to pay, any prescribed fee. If a user does not use the prescribed registry form or pay the necessary fee, the user may be refused access to search the registry. As in the case of refusing access to registration services, the registry should be obliged to give the specific reason for refusing access to information services as soon as practicable so that the user can remedy the problem.

176. Unlike the approach adopted for registrants, the registry should not request and maintain evidence of the identity of a user as a precondition to obtaining access to the information on the business registry since a user is merely retrieving information

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[195] Further to the decision of the Working Group at its twenty-eighth session (see footnote 191 above), the Secretariat has: (a) included the term “more” in the second sentence; and (b) replaced the sentence “This function of a business registry is demonstrably valuable to the economy of a State.” (previously at the end of para. 159 of A/CN.9/WG.I/WP.101) with “… since access to … the law of the enacting State” (previously, at the end of para. 162 of A/CN.9/WG.I/WP.101 (para. 107, A/CN.9/900).

[196] This paragraph was formerly part of the commentary to recommendation 31 of A/CN.9/WG.I/WP.101 (para. 159 of that document), but was moved here as decided by the Working Group at its twenty-eighth session (para. 108, A/CN.9/900).

[197] See supra, footnote 6, page 8.

[198] This paragraph was formerly part of the commentary to recommendation 31 of A/CN.9/WG.I/WP.101 (para. 160 of that document), but was moved here as decided by the Working Group at its twenty-eighth session (para. 108, A/CN.9/900).

contained in registered information from the public registry record. Accordingly, identification evidence should be requested of users only if it is necessary for the purposes of collecting information retrieval fees, if any.

177. The law of the enacting State should also provide that the registry may reject an information request if the user does not enter a search criterion in a legible manner in the designated field but that the registry must provide the grounds for any rejection as soon as practicable, as in the case of non-compliance with the objective conditions for registration by registrants (see paras. 170 and 171 above). In registry systems that allow users to submit information requests electronically to the registry, the software should be designed to prevent automatically the submission of information requests that do not include a legible search criterion in the designated field and to display the reasons for the refusal on the electronic screen.

178. Further, in order to facilitate dissemination of the information, States should be encouraged to abolish or keep to a bare minimum fees to access basic information on the registered entities (see para. 58 above and para. 202 below). This approach may be greatly facilitated by the development of electronic registries that allow users to submit applications or make searches electronically without the need to rely on intermediation by registry personnel. Such an approach is also much cheaper for the registry. Where registration systems are paper-based, users must either visit the registry office and conduct the research on site (whether manually or using ICT facilities that are available) or have information sent to them on paper. In both cases, registry staff may need to assist the user to locate the information and prepare it for disclosure. Again, paper-based information access is associated with delay, higher costs, and the potential for error and for information to be less current.[199]

179. Simply because information is made available for use does not necessarily mean that the information is being used. It would be useful for the State to devise effective means that encourage customers actually to use the information services of the registry. Adoption of electronic registries that allow direct and continuous access for stakeholders (except for periods of scheduled maintenance) will promote the actual use of the information. Communication campaigns on the services available at the registry will also contribute to the active take-up of registry services by potential users.

Recommendation 32: Public availability of information

The law should specify that all registered information is available to the public unless it is protected data under the applicable law.[200]

C. Where information is not made public

180. Access to the business registry should be granted to all interested entities and to the public at large. In order to maintain the integrity and reputation of the registry as a trusted collector of information that has public relevance, access to sensitive data should be controlled to avoid any breach of confidentiality. States should thus put in place proper disclosure procedures. They may do so by adopting provisions that list which information is not available for public disclosure or they may follow the

[199] This paragraph was formerly part of the commentary to recommendation 31 of A/CN.9/WG.I/WP.101 (para. 161 of that document), but was moved here as decided by the Working Group at its twenty-eighth session (para. 108, A/CN.9/900).

[200] The Secretariat suggests revising the text of the recommendation in order to align it with the definition of "protected data" provided in para. 13 above (para. 111, A/CN.9/900 sets out the discussion of the Working Group at its twenty-eighth session regarding this recommendation).

opposite approach and adopt provisions that list the information that is publicly accessible, indicating that information that is not listed cannot be disclosed.[201]

181. Legislation in each State often include provisions on data protection and privacy. When establishing a registry, in particular an electronic registry, States must consider issues concerning the treatment of protected data that is included in the application for registration and its protection, storage and use. Appropriate legislation should be in place to ensure that such data are protected, including rules on how it may be shared between different public authorities (see para. 119 above). States should also be mindful that a major trend towards increased transparency in order to avoid the misuse of corporate vehicles for illicit purposes has resulted from international efforts to fight money-laundering and terrorist and other illicit activities,[202] including the adoption of policies to know one's customer and business counterpart. States should thus adopt a balanced approach that achieves both transparency and the need to protect access to sensitive data maintained in the registry.[203]

Recommendation 33: Where information is not made public

In cases where information in the business registry is not made public, the law should:

(a) Establish which information concerning the registered business is subject to the applicable rules in the enacting State on public disclosure of protected data and require the registrar to list the types of information that cannot be publicly disclosed; and

(b) Specify the circumstances in which the registrar may use or disclose information that is subject to confidentiality restrictions.

D. Hours of operation

182. The approach to the operating days and hours of the registry depends on whether the registry is designed to allow direct electronic registration and information access by users or whether it requires their physical presence at an office of the registry. In the former case, electronic access should be available continuously except for brief periods to undertake scheduled maintenance; in the latter case, registry offices should operate during dependable and consistent hours that are compatible with the needs of potential registry users. In view of the importance of ensuring ease of access to registry services for users, these recommendations should be incorporated in the law of the enacting State or in administrative guidelines published by the registry, and the registry should ensure that its operating days and hours are widely publicized.

183. If the registry provides services through a physical office, the minimum hours and days of operation should be the normal business days and hours of public offices in the State. To the extent that the registry requires or permits the registration of paper-based submissions, the registry should aim to ensure that the paper-based information is entered into the registry record and made available to searchers as soon as practicable, but preferably on the same business day that the information is received by the registry. Information requests submitted in paper form should likewise be processed on the same day they are received. To achieve this goal, the deadline for

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[201] At its twenty-eighth session, the Working Group agreed to delete the two sentences at the end of the paragraph (para. 170 of A/CN.9/WG.I/WP.101), as it was noted that the sharing of information by public authorities had already been dealt with in recommendation 17 (i.e. recommendation 16 in of A/CN.9/WG.I/WP.101) and was dependent on the law of the enacting State rather than on the consent of the business or the registry (para. 112, A/CN.9/900).

[202] See information in respect of FATF Recommendation 24 above in footnote 152 supra.

[203] The Secretariat has added the sentence in respect of transparency (originally the third sentence of para. 110 of A/CN.9/WG.I/WP.101) further to a decision of the Working Group, at its twenty-eighth session, that that concept should be considered in relation to this recommendation (para. 68, A/CN.9/900).

submitting paper-based information requests may be set independently from the business hours.[204] Alternatively, the registry office could continue to receive paper forms (regardless if they are applications for registration or for changes) and information requests throughout its business hours, but set a "cut off" time after which information received may not be entered into the registry record, or information searches performed, until the next business day. A third approach would be for the registry to undertake that information will be entered into the registry record and searches for information will be performed within a stated number of business hours after receipt of the application or information request.

184. The law of the enacting State or administrative guidelines of the registry could also enumerate, in either an exhaustive or an indicative way, the circumstances under which access to registry services may temporarily be suspended. An exhaustive list would provide more certainty, but there is a risk that it might not cover all possible circumstances. An indicative list would provide more flexibility but less certainty. Circumstances justifying a suspension of registry services would include any event that makes it impossible or impractical to provide those services (such as force majeure, for example, fire, flood, earthquake or war, or where the registry provides users with direct electronic access, a breakdown in the Internet or network connection).

Recommendation 34: Hours of operation

The registrar should ensure that:

(a) If access to the services of the business registry is provided electronically, access is available at all times;

(b) If access to the services of the business registry is provided through a physical office:

(i) Each office of the registry is open to the public during [*the days and hours to be specified by the enacting State*]; and

(ii) Information about any registry office locations and their opening days and hours is publicized on the registry's website, if any, or otherwise widely publicized, and the opening days and hours of registry offices are posted at each office;[205] and

(c) Notwithstanding subparagraphs (a) and (b) of this recommendation, the business registry may suspend access to the services of the registry in whole or in part in order to perform maintenance or provide repair services to the registry, provided that:

(i) The period of suspension of the registration services is as short as *practicable*;

(ii) Notification of the suspension and its expected duration is widely *publicized*; and

(iii) Such notice should be provided in advance and, if not feasible, as soon after the suspension as is reasonably practicable.

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[204] For example, the law or administrative guidelines of the registry could stipulate that, while the registry office is open between 9 a.m. and 5 p.m., all applications, changes and search requests must be received by an earlier time (for example, by 4 p.m.) so as to ensure that the registry staff has sufficient time to enter the information included in the application into the registry record or conduct the searches.

[205] At its twenty-eighth session the Working Group agreed to reverse the order of subparagraphs (a) and (b) of this recommendation as it appeared in A/CN.9/WG.I/WP.101 (para. 113, A/CN.9/900).

E. Direct electronic access to submit registration, to request amendments and to search the registry

185. If the State opts to implement an electronic registration system, the registry should be designed, if possible, to allow registry users to submit directly and to conduct searches from any private computer, as well as from computer facilities made available to the public at sub-offices of the registry or other locations. To further facilitate access to business registry services, the registry conditions of use may allow intermediaries (for instance, lawyers, notaries or private sector third-party service providers) to carry out registration and information searches on behalf of their clients when the applicable law allows or requires the involvement of such intermediaries (see also paras. 121 to 122 above).[206] If accommodated by the technological infrastructure of the State, or at a later stage of the reform, States should also consider adopting systems that allow registration, the filing of amendments and searches of the registry to be carried out through the use of mobile technology. This solution may be particularly appropriate for MSMEs in developing economies where mobile services are often easier to access than electronic services.

186. When the registry allows for direct electronic access, the registry user (including intermediaries) bears the burden of ensuring the accuracy of any request for registration or amendment, or of any search of the registry.[207] Moreover, the potential for misconduct on the part of registry staff is greatly minimized, since their duties are essentially limited to managing and facilitating electronic access by users, processing any fees, overseeing the operation and maintenance of the registry system and gathering statistical data.

187. In addition, direct electronic access significantly reduces the costs of operation and maintenance of the system, increases accessibility to the registry (including when registration or searches are carried out through intermediaries, see para. 185 above) and also enhances the efficiency of the registration process by eliminating any time lag between the submission of information to the registry and the actual entry into the database of that information.[208] In some States,[209] electronic access (from the premises of a registrant or a business, or from a branch office of the registry) is the only available mode of access for both registration and information searches. In fact, in many States, where the registration system is both paper-based and electronic, electronic submission is by far the most prevalent mode of data submission and it is used in practice for the vast majority of registrations. As the data to be registered are submitted in electronic form, no paper record is ever generated. A fully electronic system of this kind places the responsibility for accurate data entry directly on the users of the registry. As a result, staffing and operational costs of the registry are minimized and the risk of registry personnel making an error in transcribing documents is eliminated (see also para. 68 above).

188. It is thus recommended that, to the extent possible, States should establish a business registration system that is computerized and that allows direct electronic access by registry clientele. Nonetheless, given the practical considerations involved in establishing an electronic registry, multiple modes of access should be made available to registry clientele at least in the early stages of implementation in order to

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[206] The Secretariat suggests including this reference to provide additional clarity in the paragraph (para. 115, A/CN.9/900).

[207] At its twenty-eighth session, the Working Group requested the Secretariat to rebalance the tone of paragraphs 186 and 187 (paras. 176 and 177 of A/CN.9/WG.I/WP/101) so that the notion of direct electronic access was placed at the core of this sub-section on registry services. Further to this request, the Secretariat has refocused the opening sentence of para. 186 on the advantages of direct electronic access for the registry (para. 115, A/CN.9/900).

[208] In keeping up with the decision of the Working Group at its twenty-eighth session (see footnote 207, supra), the Secretariat has removed any reference to issues of direct control of the registration by the registrant and has accordingly replaced the phrase "by putting…the registrant" after the term "system" with the phrase "increases accessibility …through intermediaries" (para. 115, A/CN.9/900).

[209] For further details, see para. 44, A/CN.9/WG.I/WP.85.

reassure users who are unfamiliar with the system. Finally, to facilitate use, the registry should be organized to provide for multiple points of access for both electronic and paper submissions and information requests. However, even where States continue to use paper-based registries, the overall objective is the same: that is, to make the registration and information retrieval process as simple, transparent, efficient, inexpensive and publicly accessible as possible.

Recommendation 35: Direct electronic access to submit registration, to request amendments and to search the registry

The law should establish that, in keeping with other applicable law of the enacting State, where information and communication technology is available, the submission of applications for the registration of a business and requests for amendment of the registered information of a business are permitted without requiring the physical presence of the registrant or user in the business registry office or the assistance of the registry staff.[210]

Recommendation 36: Direct electronic access to search the registry

The law should establish that, where information and communication technology is available, searches of the registry are permitted without requiring the physical presence of the user in the business registry office or the intermediation of the registry staff.[211]

F. Facilitating access to information

1. Type of information provided

189. Information can be of particular value to stakeholders if it is available to the public, although the type of registered information that is available will depend on the legal form of the business being searched. Information available from the business registry that may be of value includes: the profile of the business and its officers (directors, auditors); annual accounts; a list of the business's divisions or places of business; the notice of registration or incorporation; the publication of the business's memoranda, articles of association, or other rules governing the operation or management of the business; existing names and history of the business; insolvency-related information; information on the business registration process; any share capital; certified copies of registry documents; notifications of events (late filing of annual accounts, newly submitted documents, etc.); related laws and regulations; information on registry fees; and information on the expected turnaround time in the provision of registry services.[212] In addition, some registries prepare reports relating to the operation of the business registry that may provide registry designers, policymakers and academic researchers with useful data (for example, on the volume of registrations and searches, operating costs, or registration and search fees collected over a given period).[213] According to a recent survey, information on business data, annual accounts and periodic returns, as well as information about fees for registry services, are the most popular pieces of information and the most requested by the public.[214]

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[210] At its twenty-eighth session, the Working Group agreed that in order to clarify that business registration should not require the physical presence of the registrant in the registry office, this recommendation could be redrafted along the following lines: "The submission of the application and information to register a business should be permitted using information and communication technology, where available, without requiring physical presence in the business registry office, and subject to the laws of the enacting State" (para. 115, A/CN.9/900).

[211] At its twenty-eighth session, the Working Group requested the Secretariat to add a separate recommendation on direct access to search the business registry (para. 116, A/CN.9/900).

[212] See, supra, footnote 66, pages 77 ff.

[213] See, for example, the Report of the Australian Business Registrar, 2013-2014, available at: abr.gov.au, subpara. 46(c).

[214] For further reference, see supra footnote 66, page 131.

190. If the State is one in which member or shareholder details must be registered, access to such information may also be advisable, as most States that register such details make the relevant information available to the public.[215] A similar approach can be recommended with regard to information on beneficial ownership, although, as previously noted, to date, not many jurisdictions collect information on beneficial ownership. A State may also consider making information on beneficial ownership available to the public in order to allay concerns over the potential misuse of business entities. However, the sensitive nature of the information on beneficial ownership may require the State to exercise caution before opting for disclosure of beneficial ownership without any limitation.[216]

191. Some States not only provide for electronic registration and information searches but also give clients the option of submitting a registration or information search request in other forms. The information is distributed through other channels that can complement the use of the Internet or that may even represent the main method of distribution if an online registration system is not yet fully developed. The following means of sharing information are also used in some States:

(a) Telephone services to provide information on registered businesses and product ordering;

(b) Subscription services to inform subscribers about events pertaining to specified businesses or for announcements of certain kinds of business registrations;

(c) Ordering services to enable access to various products, most often using an Internet browser; and

(d) Delivery services to convey various products, such as transcripts of registered information on a business, paper lists, or electronic files with selected data.

2. Unnecessary barriers to accessibility

192. The registry needs to ensure that searchable information is easily accessible. Even though the information is available, it does not always mean that it is easy for stakeholders to access. There are often different barriers to accessing the information, such as the format in which the information is presented: if special software is required to read the information, or if it is only available in one particular format, it cannot be said to be broadly accessible. In several States, some information is made available in paper and electronic formats; however, information available only on paper likely entails reduced public accessibility. Other barriers that may make information less accessible are charging fees for it, requiring users to register prior to providing access to the information, and if there is a fee connected to the user registration. States should find the most appropriate solutions according to their needs, their conditions and their legal framework.

193. One often overlooked barrier to accessing information, whether in order to register a business or to review data in the registry, is a lack of knowledge of the official language(s). Providing forms and instructions in other languages is likely to make the registry more accessible to users. However, recent evidence shows that, with the exception of Europe, business registries seldom offer such services in languages additional to the official language(s).[217] Although making all information available in additional languages may incur some expense for the registry, a more modest approach may be to consider making information on only core aspects of registration, for instance in respect of instructions or forms, available in a non-official language. In deciding which non-official language would be most appropriate, the registry may wish to base its decision on historical ties, the economic interests of the jurisdiction and the geographic area in which the jurisdiction is situated (see paras. 137 to 139 above).

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[215] Ibid., pages 30 ff, and footnote 44 [2015], pages 35–36.

[216] See information in respect of FATF Recommendation 24 above in footnote 152.

[217] See supra, footnote 44, page 141.

3. Bulk information

194. In addition to making information on individual business entities available, business registries in some jurisdictions also offer the possibility of obtaining "bulk" information,[218] i.e. a compilation of data on selected, or all, registered businesses. Such information can be requested for commercial or non-commercial purposes and is often used by public agencies as well as private organizations (such as banks) that deal with businesses and perform frequent data processing on them. Distribution of bulk information varies according to the needs and capability of the receiving entity. In performing this function, one approach would be for the registry to ensure the electronic transfer of selected data on all registered entities, combined with the transfer of data about all new registrations, amendments, and deregistration during a specified period. Another option for the registry would be to make use of web-based or similar services for system-to-system integration that provides both direct access to selected data on specific entities and name searches. Direct access avoids unnecessary and redundant storage of information by the receiving organization and States where such services are not yet available should consider it as a viable option when streamlining their business registration system.[219] Distribution of bulk information can represent a practicable approach for the registry to derive self-generated funds (see para. 202 below).

Recommendation 37: Facilitating access to information

The law should ensure the facilitation of access to business registration and registered information by avoiding the creation of unnecessary barriers such as: requirements for the installation of specific software; charging prohibitively expensive access fees; or requiring users of information services to register or otherwise provide information on their identity.[220]

G. Cross-border access to registered information[221]

195. The internationalization of businesses of all sizes creates an increasing demand for access to information on businesses operating outside their national borders. However, official information on registered businesses is not always readily available on a cross-border basis due to technical or language barriers. Making such cross-border access as simple and fast as possible is thus of key importance in order to ensure the traceability of businesses, the transparency of their operations and to create a more business-friendly environment.

196. A range of measures can be adopted to facilitate the retrieval of information stored in the business registry by interested users from foreign jurisdictions. Implementing an online business registration system that can allow registration and search requests in at least one foreign language (see also paras. 125 and 139 above) may facilitate cross-border access as it would eliminate the burden for interested users to travel to the jurisdiction where the business is registered and minimize the need for translation of the information into a language that is understandable to the user. In

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[218] See supra, footnote 30, pages 140–141.

[219] See supra, footnote 30, page 14.

[220] At its twenty-eighth session the Working Group agreed to delete the last phrase of the recommendation ("or unduly limiting the languages in which information on the registration process is available") since it was noted that in some jurisdictions it would not be possible to make available information on the registration process in a non-official language of the State (para. 117, A/CN.9/900).

[221] At its twenty-eighth session, the Working Group agreed that the approach in paragraphs 111 to 116 and recommendation 17 of A/CN.9/WG.I/WP.101 should be adjusted to one focusing more on cross-border access to information than on information-sharing and that those issues might best be considered in conjunction with part VI of the draft legislative guide on accessibility and information-sharing (para. 71, A/CN.9/900). Accordingly, the Secretariat has revised para. 115 of A/CN.9/WG.I/WP.101 for insertion in the commentary here, in addition to a new paragraph and a revised text of recommendation 17 as it appeared in A/CN.9/WG.I/WP.101 (see also footnotes 108 and 122 supra).

addition, adopting easy-to-use search criteria and an easy-to-understand information structure would further contribute to simplify access to users from foreign jurisdictions. In this respect, when streamlining their business registration system, States may wish to consider coordinating with other States (at least with those from the same geographic region) in order to adopt approaches that would allow for standardization and comparability across jurisdictions of the information transmitted. Finally, foreign users may also be provided information in at least one foreign language, on how to access the information in the registry, and, as in the case of domestic users of the registry, they should be advised of the possibility of establishing direct contact with registry personnel through a dedicated email account of the registry, electronic contact forms or client service telephone numbers.

Recommendation 38: Cross-border access to registered information

The registrar should ensure that systems for the registration of businesses adopt solutions that facilitate cross-border access to the information in the registry.[222]

VII. Fees

197. Payment of a fee in order to receive registration services can be said to be a standard procedure across jurisdictions. As previously noted, in return for that fee, registered businesses receive access to business registry services and to the many advantages that registration offers them, including receipt of a commercial identity recognized by the State that allows them to interact with business partners, the public and the State (see paras. 50 and 51 above). The most common types of fees are those payable for registration of a business and for the provision of information products, while fines may also generate funding to a lesser extent. In some jurisdictions, registries may also charge an annual fee to keep a business in the registry (these fees are unrelated to any particular activity), as well as fees to register annual accounts or financial statements.[223]

198. Although they generate revenue for the registries, fees can affect a business's decision whether to register, since such payments may impose a burden, in particular on MSMEs. Fees for new registration, for instance, can prevent businesses from registering, while annual fees to keep a company in the registry or to register annual accounts could discourage businesses from maintaining their registered status. States should take these and other indirect effects into consideration when establishing fees for registration services. A registration system aiming to support MSMEs and increase the number of them that register should thus consider the adoption of policies where registration and post-registration services, including access to the information on the business registry, are provided free of charge. Where it might be too onerous on States to implement such policies, States should adopt a balanced approach between recovering capital and operational costs within a reasonable period of time and encouraging MSMEs to register. For instance, in several States that consider business registration as a public service intended to encourage businesses to enter the legally regulated economy rather than as a revenue-generating mechanism, registration fees are often set at a level that encourages businesses to register. In such States, the use of flat fee schedules for registration, regardless of the size of the business, is the most common approach. There are also examples of States that provide business registration free of charge.

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[222] As requested by the Working Group at its twenty-eighth session, the Secretariat has revised the text to focus on cross-border access to information on the business registry (para. 69, A/CN.9/900).

[223] For further reference, see European Commerce Registers' Forum Report 2013, page 72.

A. Fees charged for registry services

199. Striking a balance between the sustainability of the registry operations and the promotion of business registration is a key consideration when setting fees, regardless of the type of fee. One recommended approach, followed in many States, is to apply the principle of cost-recovery, according to which there should be no profit from fees generated in excess of costs. When applying such a principle, States would be required to first assess the level of revenue needed from registry fees to achieve cost-recovery. In carrying out that assessment, account should be taken not only of the initial start-up costs related to the establishment of the registry but also of the costs necessary to fund its operation. By way of example, these costs may include: (a) the salaries of registry staff; (b) upgrading and replacing hardware and software; (c) ongoing staff training; and (d) promotional activities and training for registry users. In the case of online registries, if the registry is developed in partnership with a private entity, it may be possible for the private entity to make the initial capital investment in the registry infrastructure and recoup its investment by taking a percentage of the service fees charged to registry users once the registry is operational.

200. Evidence shows, however, that even when the cost-recovery approach is followed, there is considerable room for variation among States, as that approach requires a determination of which costs should be included, which can be interpreted in many different ways. In one jurisdiction, for instance, fees for new registrations are calculated according to costs incurred by an average business for registration activities over the life cycle of the business. In this way, potential amendments, apart from those requiring official announcements, are already covered by the fee that companies pay for new registration. This approach is said to result in several benefits, such as: (a) rendering most amendments free of charge, which encourages compliance among registered businesses; (b) saving resources related to fee payment for amendments for both the registry and the businesses; and (c) using the temporary surplus produced by advance payment for amendments to improve registry operations and functions. In other cases, jurisdictions have decided to charge fees below the actual costs registries incur in order to promote business registration. In these cases, however, the services provided to businesses would likely be subsidized with public funds.

201. In setting fees in a mixed registry system, it may be reasonable for the State to decide to charge higher fees to process applications and information requests submitted in paper form because they must be processed by registry staff, whereas electronic applications and information requests are directly submitted to the registry and are less likely to require attention from registry staff. Charging higher fees for paper-based registration applications and information requests will also encourage the user community to eventually transition to using the direct electronic registration and information request functionalities. However, in making this decision, States may wish to consider whether charging such fees may have a disproportionate effect on MSMEs that may not have easy access to electronic services.

Recommendation 39: Fees charged for registry services

The law should establish fees, if any, for registration and post-registration services at a level that is low enough that it encourages business registration, in particular of MSMEs,[224] and that, in any event, do not exceed a level that enables the business registry to cover the cost of providing those services.

[224] At its twenty-eighth session, the Working Group agreed to add the phrase “in particular of MSMEs” to emphasize further that business registration should be provided at no cost or for the lowest fee possible for such businesses (para. 119, A/CN.9/900).

B. Fees charged for information

202. In various jurisdictions, fees charged for the provision of information products are a more viable option for registries to derive self-generated funding. Such fees also motivate registries to provide valuable information to their clients, to maintain the currency of their records and to offer additional information services. A recommended good practice for jurisdictions aiming at improving this type of revenue generation would be to avoid charging fees for basic information services such as name or address searches, but to charge for more sophisticated information services or for those that are more expensive for the registry to provide (for example, direct downloading or providing bulk information). Since fees charged for information products are likely to influence users, such fees should be set at a level low enough to make the use of such products attractive to users.[225]

Recommendation 40: Fees charged for information

The law should establish that information contained in the business registry should be available to the public free of charge, but should permit modest fees to be charged at a level that enables the business registry to cover the cost of providing those services,[226] for value-added information products produced or developed by the registry.

C. Publication of fee amounts and methods of payment

203. Regardless of the approach taken to determine the applicable fees, if any, States should clearly establish the amount of the registration and information fees charged to registry users, as well as the acceptable methods of payment. Such methods of payment should include allowing users to enter into an agreement with the business registry to establish a user account for the payment of fees. States in which businesses can register directly online should also consider developing electronic platforms that enable businesses to pay online when filing their application with the registry (see para. 204 below). When establishing registration and information fees, one approach would be for the State to set out the fees in either a formal regulation or more informal administrative guidelines, which the registry can revise according to its needs. If administrative guidelines are used, this approach would provide greater flexibility to adjust the fees in response to subsequent events, such as the need to reduce the fees once the capital cost of establishing the registry has been recouped. The disadvantage of this approach, however, is that this greater flexibility could be abused by the registry to adjust the fees upwards unjustifiably. Alternatively, a State may choose not to specify the registry fees in such a regulation, but rather to designate the administrative or other authority that is mandated to set the registry fees.[227] The State may also wish to consider specifying in the law the types of service that the registry may or must provide free of charge.

Recommendation 41: Publication of fee amounts and methods of payment

The registrar should ensure that fees payable for registration and information services are widely publicized, as are acceptable methods of payment.

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[225] In some States, registries can derive up to forty per cent of their operating revenues by selling such information. For further reference, see supra, footnote 30, page 17.

[226] At its twenty-eighth session, the Working Group agreed that the notion of cost-recovery should be included in the drafting of this recommendation in order to make it more consistent with recommendation 39 (i.e. recommendation 37 in A/CN.9/WG.I/WP.101, see para. 120, A/CN.9/900).

[227] For instance, in the United Kingdom registry fees are set by statutory fee regulations and confirmed by the Parliament. See https://www.gov.uk/government/organisations/companies-house/about/about-our-services#about-fees.

D. Electronic payments[228]

204. Once States have reached a certain level of technological maturity, they should consider developing electronic platforms that enable businesses to pay online, including the use of mobile payments,[229] to access registry services for which a fee is charged. This will require enacting appropriate laws concerning electronic payments in order to enable the registry to accept online payments. By way of example, such laws should address issues like who should be allowed to provide the service and under which conditions; access to online payment systems; liability of the institution providing the service; customer liability and error resolution. Furthermore, such laws should be consistent with the general policy of the country on financial services.

Recommendation 42: Electronic payments

The law should include legislation to enable and facilitate electronic payments.

VIII. Liability and sanctions[230]

205. While each business must ensure that its registered information is kept as accurate as possible by submitting amendments in a timely fashion, the State should have the ability to enforce proper compliance with initial and ongoing registration requirements. Compliance with those requirements is usually encouraged through the availability of enforcement mechanisms such as the impositions of sanctions on businesses that fail to provide timely and accurate information to the registry (see paras. 158 and 159 above).[231]

A. Liability for misleading, false or deceptive information

206. In order to ensure that reliable information is contained in the business registry, States should adopt provisions that establish responsibility for any misleading, false or deceptive information that is submitted to the registry upon registration or amendment of the registered information, and for failure to submit such information when it ought to have been submitted.[232]

Recommendation 43: Liability for misleading, false or deceptive information

The law should establish appropriate liability for any misleading, false or deceptive information that is provided to the business registry or for failure to provide the required information.[233]

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[228] At its twenty-eighth session, the Working Group agreed with the substance of this recommendation (recommendation 56 of A/CN.9/WG.I/WP.101) and the relevant commentary and to retain them in the legislative guide in an appropriate location (para. 143, A/CN.9/900).

[229] Access to mobile payments has been identified in the Working Group as of particular importance in respect of developing States and MSMEs (para. 52, A/CN.9/900, see also para. 80 above).

[230] At its twenty-eighth session, the Working Group agreed to reverse the order of recommendations 40 and 41 of A/CN.9/WG.I/WP.101 so that the issue of "liability" would be discussed before "sanctions" as it was said to be a more logical structure (para. 126, A/CN.9/900). Further to that decision, the concepts expressed in para. 192 of A/CN.9/WG.I/WP.101 (the opening paragraph of subsection "A. Sanctions") have been inserted into para. 205.

[231] For further reference, see Ireland, in D. Christow, J. Olaisen, Business Registration Reform Case Studies, Ireland, 2009, pages 15 ff. Failure to notify the information required after registration, however, will not affect the validity of the registration, but will have legal consequences on the business pursuant to the applicable law of the enacting State.

[232] The commentary has been modified in keeping with the views of the Working Group, as expressed at its twenty-eighth session (paras. 124 and 125, A/CN.9/900).

[233] This recommendation has been revised as agreed by the Working Group at its twenty-eighth session (para. 125, A/CN.9/900).

B. Sanctions

207. The establishment of fines for the breach of obligations related to business registration, such as late filing of periodic returns or failure to record changes in the registered information (see para. 160 above) are measures often adopted by States to enforce compliance. In several cases, fines can also represent a means of revenue generation. Their imposition, however, again requires a balanced approach. Several jurisdictions use fines as disincentives for businesses to operate outside of the legally regulated economy. In some cases, legislative provisions link the company's enjoyment of certain benefits to the timely filing of required submissions; in others, a series of increasing fines for late filing is enforced that can ultimately result in compulsory liquidation. However, if fines are used as the main source of funding for the registry, as occurs in some jurisdictions, it can have a detrimental effect on the efficiency of the registry. Since registries in such jurisdictions lose revenue as a result of improved business compliance, they may have weak motivation to improve the level of compliance. It is thus recommended that States should not consider fines as the main source of revenue of a business registry, but that they establish and impose fines at a level that encourages business registration without negatively affecting the funding of registries when compliance improves.

208. Since the recurrent use of fines to sanction the breach of initial and ongoing registration requirements might discourage businesses, in particular MSMEs, from registering or properly maintaining their registration, States might consider establishing a range of possible sanctions which would apply depending on the seriousness of the violation or, in the case of MSMEs meeting certain conditions established by the law, to forego any sanction for businesses defaulting for the first time. One remedy States may wish to consider is to include in the registry information on sanctions imposed by a court or other designated public authority on directors that have breached their legal duties in managing the business, which may include barring a director from taking part in the management of the business, and on the businesses.

209. Moreover, a system of notices and warnings could be set up in order to alert businesses of the consequences for failing to comply with specific requirements of business registration (for instance, late filing of periodic returns). When the registry is operated electronically, automated warnings and notices could be periodically sent out to registered businesses. In addition, notices and warnings could be visibly displayed on the premises of the registration offices and routinely published in newspapers and magazines. In order to best assist businesses, in particular MSMEs, States could also consider designing training programs, in particular addressing micro and small entrepreneurs, to raise awareness of businesses regarding their responsibility to comply with registration requirements and to advise them on how to discharge that responsibility.[234]

Recommendation 44: Sanctions

The law should:

(a) Establish sanctions (including fines, deregistration and loss of access to services) that may be imposed on a business for a breach of its obligations under the law, including the provision of accurate and timely information to the business registry;[235]

(b) Include provisions pursuant to which a breach of obligation may be forgiven provided it is rectified within a specified time; and

(c) Require the registrar to ensure broad publication of those rules.

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[234] The Secretariat suggests the inclusion of this new paragraph in order to address concerns expressed at the twenty-eighth session of the Working Group that non-compliance with obligations related to business registration requires a more graduated approach for the treatment of violations of differing levels of seriousness (paras. 100, 122 and 123, A/CN.9/900).

[235] The recommendation has been revised in keeping with the changes made to the commentary in light of the views of the Working Group expressed its twenty-eighth session (paras. 100, 122 and 123, A/CN.9/900).

C. Liability of the business registry

210. The law of the State should provide for the allocation of responsibility for loss or damage caused by an error or through negligence in the administration or operation of the business registration and information system.[236]

211. As noted above, users of the registry bear the responsibility for any errors or omissions in the information contained in an application for registration or a request for an amendment submitted to the registry, and bear the burden of making the necessary corrections. If applications for registration and amendment requests are directly submitted by users electronically without the intervention of registry staff, the potential liability of the enacting State would, therefore, be limited to system malfunction, since any other error would be attributable to users. However, if paper-based application forms or amendment requests are submitted, the State must address the existence and extent of its potential liability for the refusal or failure of the registry to enter correctly information contained in the application or amendment.

212. Further, it should be made clear to registry staff and registry users, inter alia, that registry staff are not allowed to give legal advice on the legal requirements for effective registration and amendment requests, or on their legal effects, nor should staff make recommendations on which intermediary (if any) the entrepreneur should choose to perform its registration or any amendments thereto. However, registry staff should be able to give practical guidance with respect to the registration and amendment request processes. In States that opt for a judiciary-based registry system, this measure should of course not be applicable to the judges, notaries and lawyers entrusted with the registration procedures.

213. While it should be made clear that registry staff are not allowed to give legal advice (subject to the type of registration system of the State), the State will also need to address whether and to what extent it should be liable if registry staff nonetheless provide incorrect or misleading information on the requirements for effective registration and amendment requests or on the legal effects of registration.

214. In addition, in order to minimize the potential for misconduct by registry staff, the registry should consider establishing certain practices such as instituting financial controls that strictly monitor staff access to cash payments of fees and to the financial information submitted by clients who use other modes of payment. Such practices may also include the institution of audit mechanisms that regularly assess the efficiency and the financial and administrative effectiveness of the registry. Additional mechanisms to limit the potential for misconduct by registry staff are considered in paragraph 229 below.[237]

215. If States accept legal responsibility for loss or damage caused by system malfunction or error or misconduct by registry staff, they may consider whether to allocate part of the registration and information fees collected by the registry to a compensation fund to cover possible claims, or whether the claims should be paid out

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[236] In Norway, for instance, the registrar may be liable if it supplies incorrect information in transcripts, certificates or public notices, which causes damage to persons who relied on the incorrect information. See The Business Enterprise Registration Act (Act of 15 June 2001, No. 59 and Act of 19 December 2003, No. 120), § 10-3, available at www.brreg.no. In some legal traditions, the liability of the registrar for causing damage through the negligent performance of its obligations is usually dealt with under a general legal doctrine requiring a duty of care.

[237] This new paragraph consists of former subparagraphs (b) and (c) of para. 229 (para. 212 of A/CN.9/WG.I/WP.101). Further to a comment of the Working Group at its twenty-eighth session that those subparagraphs were not properly placed in the context of the Section "Alteration or deletion of information" and could be moved elsewhere (see also footnote 255 below), the Secretariat suggests including that part of the commentary here (para. 139, A/CN.9/900).

of general revenue. States might also decide to set a maximum limit on the monetary compensation payable in respect of each claim.[238]

Recommendation 45: Liability of the business registry

The law should establish whether the business registry may be held liable for loss or damage caused by error or negligence in the registration of businesses or the administration or operation of the registry.

IX. Deregistration

A. Deregistration[239]

216. Deregistration of a business means that a notation has been made in the registry that it is no longer registered, and that it has ceased to operate. In such instances, the public details in respect of the business usually remain visible on the register, but the status of the business has been changed to indicate that it has been removed or that the business is no longer registered. Deregistration occurs once the business, for whatever reason, has permanently ceased to operate, including as a result of a merger, or forced liquidation due to bankruptcy, or in cases where applicable law requires the registrar to deregister the business for failing to fulfil certain legal requirements.

217. States should consider the role of the registry in deregistering a business. In most jurisdictions, deregistration of a business is included as one of the core functions of the registry. It appears to be less common, however, to entrust the registry with the decision whether or not a business should be deregistered as a result of insolvency proceedings or winding-up.[240] In jurisdictions where this function is included, statutory provisions determine the conditions that result in deregistration and the procedures to follow in carrying it out.

218. Because deregistration pursuant to winding-up or insolvency proceedings of a business are matters regulated by laws other than those governing the registration of a business and since such laws vary greatly from State to State, this legislative guide refers only to deregistration of those solvent businesses that the enacting State has deemed dormant or no longer in operation pursuant to the legal regime governing the business registry. In such cases, most States allow for deregistration to be carried out either upon the request of the business (often referred to as "voluntary deregistration") or at the initiative of the registry (frequently referred to as "striking-off"). In order to avoid difficulties for the registrar in determining when an exercise of the power to deregister is warranted because a business is a dormant solvent business or when is no longer in operation, the law should clearly establish the conditions that must be fulfilled. This approach will also avoid a situation where that power may be exercised in an arbitrary fashion. Permitting a registrar to carry out deregistration at its own initiative but pursuant to clear rules permits the maintenance of a current registry and avoids cluttering the record with businesses that do not carry on any activity. When

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[238] A suggestion was made during the twenty-eighth session of the Working Group that the text of the UNCITRAL Model Law on Secured Transactions might provide guidance for the discussion of a legislative recommendation on the liability of the business registry (para. 127, A/CN.9/900). Article 32 of that text sets out three optional approaches to a model provision establishing a limitation on the liability of the secured transactions registry, but the Secretariat suggests that this reference in the commentary to the possibility of setting a limitation on the liability of the business registry may be sufficient for the purposes of the present legislative guide.

[239] At its twenty-eighth session, the Working Group requested the Secretariat to adjust the commentary in paras. 216 to 221 (paras. 201 to 205 of A/CN.9/WG.I/WP.101) by: (a) ensuring that it was consistent with the definition of "deregistration" provided in paragraph 13 of the present guide; (b) differentiating "striking off" by the registry from winding-up; and (c) clarifying the purpose and scope of the entire section (see paras. 129 and 130, and 133, A/CN.9/900).

[240] See supra, footnote 66, page 34, and footnote 44, pages 40 ff.

deregistration is initiated by the registrar,[241] there must be reasonable cause to believe that a registered business has not carried on business or that it has not been in operation for a certain period of time. Such a situation may arise, for example, when the State requires the business to submit periodic reports or annual accounts and a business has failed to comply within a certain period of time following the filing deadline. In any case, the ability of the registrar to deregister a business should be limited to ensuring compliance with clear and objective legal requirements for the continued registration of a business. In several States, before commencing deregistration procedures, the registrar must inform the business in writing of its intended deregistration and allow sufficient time for the business to reply and to oppose that decision. Only if the registrar receives a reply that the business is no longer active or if no reply is received within the time prescribed by law will the business be deregistered. A common requirement for a deregistration to become effective is that notice of it be published.[242]

219. Deregistration may also be carried out upon the request of the business, which most often occurs if the business ceases to operate or has never operated.[243] States should specify in which circumstances businesses can apply for deregistration and which persons associated with the business are authorized to request deregistration on behalf of the business. Voluntary deregistration is not an alternative to more formal proceedings, such as winding-up or insolvency, when those proceedings are prescribed by the law of the State in order to liquidate a business.

Recommendation 46: Voluntary deregistration

The law should:

(a) Specify the conditions under which a business can request deregistration; and

(b) Require the registrar to deregister a business that fulfils those conditions.

Recommendation 47: Deregistration at the initiative of the registrar[244]

The law should specify the conditions pursuant to which a registrar can deregister a business at its own initiative.

B. Process of deregistration

220. Regardless of whether the deregistration is requested by the business or initiated by the registrar, where the business is registered as a separate entity, the registry must issue a public notice of the proposed deregistration and when that deregistration will become effective. Such an announcement is usually published on the website of the registry or in official publications such as the National Gazette or in both. This procedure ensures that businesses are not deregistered without providing creditors and other interested parties (e.g. members of the business) the opportunity to object

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[241] The Secretariat suggests adding the first three sentences at the beginning of this paragraph (formerly the second part of para. 202 of A/CN.9/WG.I/WP.101) further to a request of the Working Group at its twenty-eighth session that the section on deregistration should differentiate between "striking off" by the registrar and winding-up and dissolution of a business and that it should not focus on deregistration as a result of these latter procedures (para. 130, A/CN.9/900).

[242] For further reference, see Lexis PSL Corporate, Striking off and dissolution overview, www.lexisnexis.com/uk/lexispsl/corporate/document/391387/55YB-2GD1-F186-H4MP-00000-00/Strikingoffanddissolutionoverview. See also T. F. MacLaren, in Eckstrom's Licensing in Foreign and Domestic Operations: Joint Ventures, 2015 [as it appears in Westlaw], page 30.

[243] The Secretariat has revised this paragraph of the commentary in keeping with the approach suggested by the Working Group at its twenty-eighth session (paras. 130 and 133, A/CN.9/900).

[244] In keeping with its revision of the section on "Deregistration", the Secretariat has revised the title of the recommendation and subparagraph (a) to reflect the changes to the commentary as well as the decision of the Working Group at its twenty-eighth session that the recommendation should clarify that deregistration is subject to the law of the enacting State (para. 131, A/CN.9/900).

to the procedure in order to protect their rights (the usual practice is to submit a written complaint corroborated by any required evidence to the registry). If there is no objection to the procedure, after the period indicated in the announcement has passed, a notation is made in the registry that the business is deregistered. It should be noted that pending completion of the deregistration procedure, the business remains in operation and will continue to carry on its activities.

221. Registries should retain historical information on businesses that have been deregistered, leaving it to the State to decide the appropriate length of time for which such information should be preserved (see paras. 224 to 227 below). The length of the period of preservation is likely to be influenced by the way in which the registry is structured and operated. Fully electronic registries usually allow for the information to be preserved indefinitely, if the registries have been developed according to technical standards of scalability and flexibility (see paras. 71 to 75 above). When the registry is paper-based or mixed, preserving documents indefinitely may not be a feasible approach, due to the high cost of storage involved. It may thus be desirable for States to establish a minimum period of time for the retention of such documents (see paras. 224 to 227 below). When the State has adopted a unique identifier system, the information related to the business will remain linked to that identifier even if the business is deregistered.

Recommendation 48: Process of deregistration

The law should provide that:

(a) A written notice[245] of the deregistration is sent to the registered business; and

(b) The deregistration is publicized in accordance with the legal requirements of the enacting State.

C. Time of effectiveness of business deregistration

222. The time of effectiveness of the deregistration should be established by way of law, and the status of the business in the registry should indicate the time and date of its effect, in addition to the reasons therefor. The registrar should enter such information in the registry as soon as practicable so that the users of the registry are apprised of the changed status of the business without undue delay.

Recommendation 49: Time and effectiveness of deregistration

The law should:

(a) Specify when the deregistration of a business has legal effect;

(b) Specify that any required notice of the deregistration for that legal form of business must be publicized in accordance with the law; and

(c) Specify the legal effects of deregistration.

D. Reinstatement of registration

223. In several States, it is possible to reinstate the registration of a business that has been deregistered at the initiative of the registrar or upon the request of the

[245] Further to a suggestion at the twenty-eighth session of the Working Group that the term “written” should be understood as applicable to both electronic and paper notices (para. 132, A/CN.9/900), the Secretariat has implemented that approach throughout the draft legislative guide (in this regard, see para. 13 above).

business,[246] provided that the request to the registrar for reinstatement meets certain conditions (in some States this latter procedure is defined as "administrative restoration") or is made by way of a court order. In certain States, both procedures are available and choosing either of them usually depends on the reason for which the business was deregistered or the purpose of restoring the business. The two procedures usually differ in some key aspects, such as who can apply to have the business restored, which business entities are eligible for restoration and the time limit for filing an application for restoration. The requirements for "administrative restoration" in States that provide for both procedures are often stricter than those for restoration by court order. For instance, in such States, only an aggrieved person, which may include a former director or member, can submit an application to the registrar,[247] and the time limit within which the application can be submitted to the registry may be shorter than the time granted to apply for a court order.[248] Regardless of the method(s) chosen by the State to permit reinstatement of the registration of a business, once the registration has been reinstated, the business is deemed to have continued its existence as if it had not been deregistered, which includes maintaining its former business name. In cases where the business name is no longer available as having been assigned to another business registered in the interim, procedures are usually established by the State to govern the change of name of the reinstated business.

Recommendation 50: Reinstatement of registration

The law should specify the circumstances under which and the time limit within which the registrar is required to reinstate a business that has been deregistered.

X. Preservation of records

A. Preservation of records[249]

224. As a general rule, the information in the business registry should be kept indefinitely. The enacting State should decide on the appropriate length of time for which such information should be kept and may choose to apply its general rules on the preservation of public documents.

225. However, the length of the preservation period for records is most often influenced by the way the registry operates, and whether the registry is electronic, paper-based or a mixed system. Those States with paper-based or mixed registration systems, for instance, must decide the length of time for which the paper documents submitted to it should be kept by the registry, in particular in situations where the relevant business has been deregistered (see para. 221 above). Considerations relating to the availability of storage space and the expense of storing such documents would likely play a role in that decision.

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[246] At its twenty-eighth session, the Working Group requested the Secretariat to redraft paragraph 223 (para. 206 of A/CN.9/WG.I/WP.101) and recommendation 50 (recommendation 46 of A/CN.9/WG.I/WP.101) to clearly state what pertains to the processes and law of the business registry and what pertains to other areas of the law (para. 134, A/CN.9/900). Further to the redrafting of paragraphs 216 to 221, the Secretariat has inserted the phrase "at the initiative of the registry or upon request of the business".

[247] See, for instance, the United Kingdom in Companies House, Strike off, dissolution & restoration, 2015, pages 12 and 17, available at https://www.gov.uk/government/organisations/companies-house.

[248] See, for instance, Ireland, in https://www.cro.ie/Termination-Restoration/Overview.

[249] The Secretariat has revised the commentary (previously paras. 208 to 210 of A/CN.9/WG.I/WP.101) further to comments made at the twenty-eighth session of the Working Group that suggesting a time period for preservation of electronic and paper records was not appropriate and that the commentary to this recommendation should instead focus on the importance of preserving the information (para. 137, A/CN.9/900).

226. In the case of electronic registries, the preservation of original documents submitted in hard copy for extended periods of time might not be necessary, provided that the information contained in such documents has been recorded in the registry or that the paper documents have been digitized (through scanning or other electronic processing).

227. Regardless of the way in which the business registry is operated, providing prospective future users with long-term access to information maintained in the registry is of key importance, not only for historical reasons, but also to provide evidence of past legal, financial and management issues relating to a business that might still be of relevance. The preservation of electronic records is likely to be easier and more cost-effective than preserving paper records. In order to minimize the cost and considerable storage space required for the preservation of documents in hard copy, paper-based registries that cannot convert the documents received into an electronic form may adopt alternative solutions (for instance, the use of microfilm) that allow for the transmission, storage, reading, and printing of the information.

Recommendation 51: Preservation of records

The law should provide that documents and information submitted by the registrant and the registered business, including information in respect of deregistered businesses, should be preserved by the registry so as to enable the information to be retrieved by the registry and other interested users.[250]

B. Alteration or deletion of information[251]

228. The law should establish that registry staff may not alter or remove registered information, except as specified by law and that any change can be made only in accordance with the applicable law. However, to ensure the smooth functioning of the registry, in particular when registrants submit registration information using paper forms, registry staff should be authorized to correct its own clerical errors (see paras. 30, 48 and 150 above) made in entering the information from the paper forms into the registry record. If this approach is adopted, notice of this or any other correction should promptly be sent to the registrant (and a notification of the nature of the correction and the date it was effected should be added to the public registry record linked to the relevant business). Alternatively, the State could require the registrar to notify the registrant of its error and that person could then submit an amendment free of charge.

229. Further, the potential for misconduct by registry staff should be minimized by: (a) designing the registry system to make it impossible for registry staff to alter the time and date of registration or any registered information entered by a registrant; and (b) designing the registry infrastructure so as to ensure that it can preserve the information and the documents concerning a deregistered business for as long as prescribed by the law of the enacting State.[252]

Recommendation 52: Alteration or deletion of information

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[250] At its twenty-eighth session, the Working Group requested the Secretariat to address concerns in respect of this recommendation's reference to "perpetuity" and the difference between the time requirements for print and electronic preservation (para. 137, A/CN.9/900). Subparagraphs (b) and (c) of the recommendation have thus been deleted and the remainder of the text has been adjusted accordingly.

[251] At its twenty-eighth session, the Working Group requested the Secretariat to change the text of this recommendation (recommendation 49 of A/CN.9/WG.I/WP.101) and the commentary to "alteration" instead of "amendment" (para. 138, A/CN.9/900).

[252] Further to a request of the Working Group at its twenty-eighth session, former subparagraphs (b) and (c) of paragraph 212 of A/CN.9/WG.I/WP.101 have been relocated to the commentary to recommendation 45 (para. 139, A/CN.9/900) and what was previously subparagraph 43(c) of A/CN.9/WG.I/WP.93/Add.1 was reinstated here as subparagraph (b).

The law should provide that the registrar does not have the authority to alter or delete information contained in the business registry record except in those cases specified in the law.

C. Protection against loss of or damage to the business registry record

230. To protect the business registry from the risk of loss or physical damage or destruction, the State should maintain back-up copies of the registry record. Any rules governing the security of other public records in the enacting State might be applicable in this context.

231. The threats that can affect an electronic registry also include criminal activities that may be committed through the use of technology. Providing effective enforcement remedies would thus be an important part of a legislative framework aimed at supporting the use of electronic solutions for business registration. Typical issues that should be addressed by enacting States would include unauthorized access or interference with the electronic registry; unauthorized interception of or interference with data; misuse of devices; fraud and forgery.[253]

Recommendation 53: Protection against loss of or damage to the business registry record

The law should:

(a) Require the business registry to protect the registry records from the risk of loss or damage; and

(b) Establish and maintain back-up mechanisms to allow for any necessary reconstruction of the registry record.

D. Safeguard from accidental destruction

232. An aspect that may warrant consideration by States is that of natural hazards or other accidents that can affect the processing, collection, transfer and protection of the data housed in the electronic registry and under the responsibility of the registry office. Given user expectations that the business registry will function reliably, the registrar should ensure that any interruptions in operations are brief, infrequent and minimally disruptive to users and to States.[254] For this reason, States should devise appropriate measures to facilitate protection of the registry. One such measure could be to develop a business continuity plan that sets out the necessary arrangements for managing disruptions in the operations of the registry and ensures that services to users can continue. In one State, for instance, the registry has established a "risk register", i.e. a dynamic document that is updated as changes in the operation of the registry occur. Such a risk register allows the registry staff to identify possible risks for the registration service as well as the appropriate mitigation measures. Designated staff are required to report on an annual basis the threats to the registry and the relevant actions taken to mitigate such threats.[255]

Recommendation 54: Safeguard from accidental destruction

The law should provide that appropriate procedures should be established to mitigate risks from force majeure, natural hazards, or other accidents that can affect the processing, collection, transfer and protection of data housed in electronic or paper-based business registries.

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[253] See supra, footnote 30, page 49.

[254] Ibid., page 49.

[255] For instance, this is the practice in the United Kingdom Companies' House.

Annex*

The underlying legislative framework

A. Changes to underlying laws and regulations

1. Business registration reform can entail amending either primary legislation or secondary legislation or both. Primary legislation concerns texts such as laws and codes that must be passed by the legislative bodies of a State. Reforms that consider this type of legislation thus require the involvement of the legislature and, for this reason, can be quite time-consuming. Secondary legislation is that body of texts composed of regulations, directives and other similar acts made by the executive branch within the boundaries laid down by the legislature. Reform of secondary legislation does not need to be reviewed by the legislature and thus it can be carried out in a shorter time frame. Therefore, when domestic circumstances allow, the use of secondary legislation may be a more attractive option than the reform of primary legislation.

2. Business registration reform can entail amending different aspects of the domestic legislation of a State. In addition to legislation that is meant to prescribe the conduct of business registration, States may need to update or change laws that may simply affect the registration process in order to ensure that such laws respond to the needs of MSMEs and other businesses. There is no single solution in this process that will work for all States, since the reforms will be influenced by a State's legislative framework. However, the reforms should aim at developing a domestic legal framework that supports business registration with features such as: transparency and accountability, clarity of the law and the use of flexible legal entities.

3. Regardless of the approach chosen and the extent of the reform, changes in the domestic legal framework should carefully consider the potential costs and benefits of this process, as well as the capacity and the will of the government and the human resources available. An important preparatory step of a reform programme involves a thorough inventory and analysis of the laws that are relevant to business registration [1] with a view to evaluating the need for change, the possible solutions, and the prospects for effective reform. In some cases, this assessment could result in deferring any major legislative reform, particularly if significant gains to the process of simplification can be achieved by the introduction of operational tools.[2] Once it has been decided what changes should be made and how, ensuring their implementation is equally important. In order to avoid the possible risk of unimplemented reforms, the government, the reform steering committee and the project teams should carefully monitor the application of the new legal regime. The following paragraphs offer some examples of approaches that can be taken to streamline domestic laws and regulations with a view to simplifying business registration and to making it more accessible to MSMEs.

B. Clarity of the law

4. For jurisdictions wishing to facilitate business start-up, in particular of MSMEs, it is important to review the existing legal framework so as to identify possible impediments to the simplification of the registration process. The nature of the reform would depend on the status of the domestic legal framework, and a variety of examples based on States' experiences are available.[3]

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* At its twenty-eighth session, the Working Group agreed with the substance of the sections reproduced in this Annex (Chapter XI, Sections A through E of A/CN.9/WG.I/WP.101) and recommendations 52 to 54 of A/CN.9/WG.I/WP.101, but decided to move them into an annex to the legislative guide (para. 142, A/CN.9/900).

[1] See World Bank Group, Small and Medium Enterprise Department, Reforming Business Registration Regulatory Procedures at the National Level, A Reform Toolkit for Project Teams, 2006, page 40.

[2] Ibid., page 74.

[3] Ibid., para. 65.

5. These reforms may include decisions by States to shift the focus of the law towards privately held businesses, as opposed to public limited companies, particularly if the former currently account for the majority of the firms in the State. Reforms could also include the decision to move the legal provisions pertaining to small businesses to the beginning of any new law on business forms in order to make such provisions easier to find or to use simpler language in any updated legislation.[4]

6. One particularly relevant reform that would especially serve the purpose of clarity of the law would be a comprehensive review of the legal framework on business registration and a resulting unification of the various rules into a single piece of legislation. This could also allow for some flexibility to be built into the system, with the adoption of certain provisions as regulations or simply providing for the development of the necessary legal basis in order to introduce legal obligations by way of regulation at a later stage.[5]

Recommendation 1/Annex: Clarity of the law

The law should, to the extent possible, consolidate legal provisions pertaining to business registration in a single legislative text, which is clearly written and uses simple language that can be easily understood.

C. Flexible legal forms[6]

7. Evidence suggests that entrepreneurs tend to choose for their business the simplest legal form available when they decide to register and that States with rigid legal forms have an entry rate considerably lower than States with more flexible requirements. In States that have introduced new and simplified legal forms for business, the registration process for those new business types is much simpler. Entrepreneurs are not required to publish their rules governing the operation or management of their business in the Official Gazette; instead, these can be posted online through the business registry; and the involvement of a lawyer, notary or other intermediary is not obligatory for the preparation of documents or conducting a business name search.[7]

8. Legislative changes to abolish or reduce the minimum paid in capital requirement[8] for businesses also tend to facilitate MSME registration, since micro and small businesses may have limited funds to meet a minimum capital requirement, or they may be unwilling or unable to commit their available capital in order to establish their business. Instead of relying on a minimum capital requirement to protect creditors and investors, some States have implemented alternative approaches such as the inclusion of provisions on solvency safeguards in their legislation; conducting solvency tests; or preparing audit reports that show that the amount a company has invested is enough to cover the establishment costs.[9]

9. Introducing new simplified forms of limited liability and other types of businesses is often coupled with a considerable reduction or complete abolition of the minimum capital requirements that other legal forms of business are required to deposit upon formation. In several States that have adopted simplified business entities, the minimum capital requirement has been abolished completely, and in other

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[4] Ibid., para. 66. For further details, see para. 56, A/CN.9/WG.I/WP.85.

[5] For further reference, see Investment Climate (World Bank Group), Business Registration Reform case study: Norway, 2011.

[6] The Working Group may wish to note parallel work that it is undertaking in respect of an UNCITRAL limited liability organization (A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1).

[7] For further reference, see, for example, Greece in V. Saltane, J. Pan, Getting Down to Business: Strengthening Economies through Business Registration Reforms, 2013, page 2, as well as other examples, such as Colombia (see A/CN.9/WG.I/WP.83).

[8] For a more thorough discussion on minimum capital requirements and simplified business entities, see paras. 75 to 79, A/CN.9/825 as well as paras. 46 and 47, A/CN.9/WG.I/WP.99/Add.1.

[9] For further details, see para. 28, A/CN.9/WG.I/WP.85.

cases, initial registration or incorporation has been allowed upon deposit of a nominal amount of capital. In other States, progressive capitalization has been introduced, requiring the business to set aside a certain percentage of its annual profits until its reserves and the share capital jointly total a required amount.[10] In other cases, progressive capitalization is required only if the simplified limited liability entity intends to graduate into a full-fledged limited liability company, for which a higher share capital would be required. There is however no obligation to do so.[11]

10. Another reform that would be conducive to improved business registration is to provide freedom to entrepreneurs to conduct all lawful activities without requiring them to specify the scope of their venture.[12] This is particularly relevant in those jurisdictions where entrepreneurs are required to list in their articles of association the specific activity or activities in which they intend to engage so as to restrain firms from acting beyond the scope of their goals and, according to certain literature, to protect shareholders and creditors. Allowing for the inclusion in the articles of association (or other rules governing the operation or management of a business) of a so-called "general purpose clause" which states that the company's aim is to conduct any trade or business and grants it the power to do so, facilitates business registration. This approach is far less likely to require additional or amended registration in the future, as businesses may change their focus since entrepreneurs could change activities without amending their registration, provided that the new business activity is a lawful one and that the appropriate licences have been obtained. Additional options to the inclusion of a general purpose clause, which would support the same goal, could be passing legislation that makes unrestricted objectives the default rule in the jurisdiction, or abolishing any requirement for businesses, in particular those that are privately held, to state objectives for registration purposes.[13]

Recommendation 2/Annex: Flexible legal forms

The law should permit flexible and simplified legal forms for business in order to facilitate and encourage registration of businesses of all sizes, including those forms considered in the [UNCITRAL legislative guide on an UNCITRAL limited liability organization].

D. Primary and secondary legislation to accommodate the evolution of technology

11. Since information technology is a field marked by rapid technological evolution, it would be advisable to establish guiding legal principles in the primary legislation, leaving secondary legislation to stipulate the specific provisions regulating the detailed functioning and the requirements of the system.[14] Once the business registration process is fully automated, States should establish provisions (preferably in the secondary legislation) or policies that discipline government-to-government data exchange in order to avoid any lack of cooperation among different agencies.

Recommendation 3/Annex: Primary and secondary legislation to accommodate the evolution of technology

The law should establish guiding legal principles in relation to electronic registration in primary legislation, and should set out specific provisions on the

[10] See Italy, para. 29, A/CN.9/WG.I/WP.85.

[11] For further reference, see, for instance, Germany, presentation by Dr. Leif Boettcher, Federal Ministry of Justice on "Simplified business forms in the context of small and medium enterprises, the German approach" at the UNCITRAL International Colloquium on Microfinance (16–18 January 2013), available at http://www.uncitral.org/uncitral/en/commission/colloquia/microfinance-2013-papers.html.

[12] This is a feature on which the Working Group has already agreed in its discussion of a legislative text on a simplified business entity (para. 70, A/CN.9/825). See also paras. 31–34, A/CN.9/WG.I/WP.99.

[13] For further details, see para. 52, A/CN.9/WG.I/WP.85.

[14] See main text, supra, footnote 30, page 7.

detailed functioning and requirements of the electronic system in secondary legislation.

E. Electronic documents and electronic authentication methods

12. Entering information into an online registry is a business-to-government transaction that should be subject to the same treatment, under domestic legislation, as any other electronic transaction.[15] Therefore, if an appropriate domestic legislative framework for electronic transactions is not in place, a preliminary step for a reform aimed at supporting electronic business registration would be to recognize and regulate the use of such electronic transactions. Among other things, States should adopt laws permitting electronic signatures and the submission of electronic documents.[16] In some States, for instance, the use of an advanced electronic signature is mandatory when transmitting information to a business registry. When laws on electronic communication are enacted, they should establish, at minimum, principles of non-discrimination, technological neutrality and functional equivalence allowing for equal treatment of paper-based and electronic information. The principle of non-discrimination ensures that a document would not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form. The principle of technological neutrality mandates the adoption of provisions that are neutral with respect to the technology used. The principle of functional equivalence lays out criteria under which electronic communications and electronic signatures may be considered equivalent to paper-based communications and hand-written signatures.

13. Further, it would be advisable that the laws include provisions to mitigate the risks that the use of ICT can carry with it and that can affect the validity, and in certain jurisdictions the legal validity, of the information transmitted through the electronic means. The most common risks include: confirming the identity of the entrepreneur filing for registration (referred to as “authentication”); preventing conscious or unconscious alteration of information during transmission (referred to as “integrity”); ensuring that sending and receiving parties cannot deny having sent or received the transferred message (referred to as “non-repudiation”) and preventing disclosure of information to unauthorized individuals or systems (referred to as “confidentiality”).[17] In those States where the law does not require business registries to check the veracity of the information submitted during the registration process, these risks may be more problematic as it can be relatively easy to manipulate registration systems and filing processes.

14. Verifying the identity of the registrant and ensuring the integrity of the application and the supporting information are key elements to ensure trust in ICT-supported registration systems and their corresponding use. Consequently, States should carefully consider the requirements that electronic signatures and electronic documents should have in order to minimize any risk of corporate identity theft[18] and the transmission of invalid information.

15. Whether or not the adoption of legislation on electronic signatures is premature due to the technological infrastructure of the State, various other techniques can

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[15] See A. Lewin, L. Klapper, B. Lanvin, D. Satola, S. Sirtaine, R. Symonds, Implementing Electronic Business Registry (e-BR) Services, Recommendations for policymakers based on the experience of EU Accession Countries, 2007, page 47.

[16] UNCITRAL has adopted several texts dealing with electronic commerce. Those texts and relevant information on them can be found on the UNCITRAL website at: http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce.html (see also para. 89 above).

[17] See main text, supra, footnote 30, page 12.

[18] Corporate identity theft can occur through the theft or misuse of key business identifiers and credentials, manipulation or falsification of business filings and records, and other related criminal activities. Despite the use of the term “corporate”, corporations are not the only business entities that are victimized by this crime. Any type of business or organization of any size or legal structure, including sole proprietorships, partnerships and limited liability companies can be targets of business identity theft.

prevent corporate identity theft and ensure security. The experience of several States has laid the groundwork for practices that may be replicated in other regions. Simple methods include the use of user names and passwords; electronic certificates; biometric verification (for example, fingerprints); monitoring systems and email systems that notify registered users about changes or whenever documents are filed on their business record; and the implementation or increase of penalties for false or misleading information submitted to the commercial registries. In order to facilitate MSME registration, States may wish to opt for the adoption of such simple ways of ensuring the authentication of the identity of business entrepreneurs.

F. Dispatch and receipt of electronic messages[19]

16. Another issue to consider when implementing a business registry through the use of ICT solutions is that electronic registries may make it difficult to ascertain the time and place of dispatch and receipt of information. This is an aspect that may acquire relevance due to the time sensitivity of certain submissions, such as establishing the exact time and place at which a business has been registered. For this reason, it is important to have clear rules that define the time of "dispatch" and "receipt" of electronic messages. If such rules are not clearly defined in a State's legislative framework, or if they are not defined with the specificity required for the purposes of time-sensitive registration applications, then ad hoc laws addressing the issues of dispatch and receipt may be required.

[19] See supra, footnote 15, page 48.

C. Note by the Secretariat on reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs)

(A/CN.9/WG.I/WP.107)

[Original: English]

Contents

Introduction

1. At its twenty-sixth session (April 2016), the Working Group considered document A/CN.9/WG.I/WP.92 (paras. 86 to 88, A/CN.9/866) which had been prepared by the Secretariat to provide the overall context for work prepared by the United Nations Commission on International Trade Law (UNCITRAL) in respect of micro, small and medium-sized enterprises (MSMEs). While the Working Group did not have sufficient time to consider A/CN.9/WG.I/WP.92 in detail, there was broad support for the proposal that a document along those lines could accompany its MSME work as an introduction to the final text and that it could provide an overarching framework for UNCITRAL's current and future work on MSMEs. Further, the Working Group was of the view that, once specifically considered and adopted by the Working Group and the Commission, that contextual framework could be underpinned by legal standards that would provide legislative pillars to the framework; importantly, such an approach would accommodate expansion through the addition of other legislative texts regarding MSMEs as such texts might be adopted by the Commission. Those views were noted by the Commission at its forty-ninth session (2016), at which the Working Group was commended for the progress that it had made on its work to date.[1]

2. This working paper is a revised version of A/CN.9/WG.I/WP.92, taking into account the general views expressed by the Working Group at its twenty-sixth session (paras. 86 to 88, A/CN.9/866), as well as appropriate material drawn from the contribution by the United Nations Conference on Trade and Development (UNCTAD) in document A/CN.9/WG.I/WP.98. Necessary amendments have also been made in light of the development by the Working Group of the draft legislative guides on key principles of a business registry (A/CN.9/WG.I/WP.106) and on an UNCITRAL limited liability organization (A/CN.9/WG.I/WP.99 and Add.1).

[1] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 222 and 224.

I. Micro, small and medium-sized enterprises (MSMEs)

3. At its forty-sixth session, in 2013, UNCITRAL decided to commence work on reducing the legal obstacles faced by MSMEs throughout their life cycle, and in particular, specified that such work should focus on MSMEs in developing economies. This matter was placed on UNCITRAL's work programme for Working Group I, which was requested to begin its mandate with a focus on the legal questions surrounding the simplification of incorporation.[2] In taking up this topic, UNCITRAL has decided to focus its attention, at least initially, on the reduction of legal obstacles that MSMEs face at the beginning of their life cycle.

4. In light of the disadvantaged position in which many MSMEs are found globally, undertaking this work emphasizes the relevance and importance of UNCITRAL's work and programmes for the promotion of the rule of law at the national and international levels and for the implementation of the international development agenda. These include the achievement of the Sustainable Development Goals, which, of course, build upon the successes of the Millennium Development Goals, and which specifically note the encouragement of the formalization and growth of MSMEs in target 3 of goal 8 to "Promote inclusive and sustainable economic growth, employment and decent work for all". The global community has recognized both the importance of fair, stable and predictable legal frameworks for: generating inclusive, sustainable and equitable development, economic growth and employment; stimulating investment; and facilitating entrepreneurship, as well as UNCITRAL's contribution to the attainment of those goals through its efforts to modernize and harmonize international trade law.[3] Work aimed at supporting and fostering the establishment and growth of MSMEs further underpins UNCITRAL's contribution in providing internationally acceptable rules in commercial law, and supporting the enactment of those rules to assist in strengthening the economic fibre of States.

5. The international community has underscored the importance of business law as one of four pillars key to strengthening the legal empowerment of the poor, many of whom rely upon micro and small businesses for their livelihood.[4] In addition to other pillars (such as access to justice and the rule of law; property rights; and labour rights), business rights are seen as important to empower the less advantaged, not only in terms of their employment by others, but in developing micro and small businesses of their own. Business rights may be regarded as a composite of existing rights of groups and individuals to engage in economic activity and market transactions, and which include the right to start a business in the legally regulated economy without facing arbitrarily enforced regulations or discrimination, removing unnecessary barriers that limit economic opportunities, and protecting business investments, regardless of their size.[5] Measures that have been called for to strengthen business rights include:

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[2] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

[3] See, for example, "Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels", United Nations General Assembly resolution A/RES/67/1 (67th session, 2012), para. 8; and "Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)", United Nations General Assembly resolution A/RES/69/313 (69th session, 2015), Annex, para. 89.

[4] See, for example, "Making the Law Work for Everyone", Volume I, Report of the Commission on Legal Empowerment of the Poor (2008) (downloadable at https://www.un.org/ruleoflaw/blog/document/making-the-law-work-for-everyone-vol-1-report-of-the-commission-on-legal-empowerment-of-the-poor/). The findings of this Commission formed an integral part of the United Nations Development Programme's (UNDP) Initiative on Legal Empowerment of the Poor (www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/legal_empowerment.html) and have contributed to similar work on Legal Empowerment of the Poor in international organizations such as the World Bank Group.

[5] Ibid., pp. 30–31.

(a) Guaranteeing basic business rights, including the right to sell, the right to have a workspace and the right to have access to the necessary infrastructure and services (for example, to electricity, water and sanitation);

(b) Strengthening, and making effective, economic governance in order to permit entrepreneurs to easily and affordably establish and operate a business, permit them access to markets, and permit them to exit a business;

(c) Expanding the accessibility of entrepreneurs to limited liability entities and to other legal mechanisms that allow owners to separate their business and personal assets;

(d) Promoting inclusive financial services that offer savings, credit, insurance, pensions and other tools for risk management; and

(e) Expanding the access of entrepreneurs to new business opportunities through specialized programmes to familiarize entrepreneurs with new markets, assisting them in creating links with other businesses of all sizes, and in complying with regulations and requirements.[6]

6. The experience of UNCITRAL may assist in the identification of the legal and regulatory framework that can best assist entrepreneurs and MSMEs in establishing business rights, thereby reducing some of the legal obstacles that such businesses face.

A. The importance of MSMEs in the global economy

7. UNCITRAL's decision to work on reducing the legal obstacles faced by MSMEs recognizes the importance of such enterprises to the economic health of the States in which they are found, and to the global economy more generally. This importance is underscored by a number of key facts that illustrate that MSMEs are seen as the backbone of the economy in both the developed and the developing world.

8. The total number of MSMEs worldwide is estimated to be between 425 to 520 million businesses, of which 365 to 445 million (around 85 per cent) are in emerging markets. Those small and medium-sized enterprises (SMEs) operating within the legally regulated economy total 36 to 44 million globally and 25 to 30 million in emerging markets, while an additional 55 to 70 million microenterprises operate within the legally regulated economy of emerging markets. Of the total estimated MSMEs operating in emerging markets, 285 to 345 million (approximately 77 per cent) are thought to be operating outside of the legally regulated economy.[7] In addition, SMEs (operating both within and outside of the legally regulated economy) account for 72 per cent of total employment and 64 per cent of Gross Domestic Product (GDP) in developed economies, while they represent 47 per cent of employment and 63 per cent of GDP in low-income countries. SMEs operating outside of the legally regulated economy are estimated to provide 48 per cent of all jobs in emerging market countries, and 25 per cent of all jobs in developed countries, but account for only 37 per cent and 16 per cent of GDP in these markets, respectively.[8]

9. It may also be instructive to review some of the statistics on such enterprises on a regional and subregional basis. In the European Union (EU), 99 per cent of all businesses are SMEs, which provide two out of three private sector jobs and contribute to more than half of total value-added created by business in the EU. Further, nine out of ten SMEs in the EU are microenterprises (defined in the EU as

[6] Ibid., pp. 8–9.
[7] World Bank Group Study, http://www.worldbank.org/en/topic/financialsector/brief/smes-finance.
[8] "IFC Jobs Study: Assessing Private Sector Contributions to Job Creation and Poverty Reduction", 2013, pp. 10–11 (https://www.ifc.org/wps/wcm/connect/0fe6e2804e2c0a8f8d3bad7a9dd66321/IFC_FULL+JOB+STUDY+REPORT_JAN2013_FINAL.pdf?MOD=AJPERES).

having fewer than 10 employees), thus illustrating that the mainstays of Europe's economy are micro firms.[9]

10. Microenterprises are no less influential in other developed States. For example, the United States of America has 25.5 million micro-businesses (defined as enterprises having fewer than 5 employees, including the owner), or 92 per cent of all businesses. In 2011, the direct, indirect and induced effect of microenterprises had an impact on over 40 million jobs in the United States: directly accounting for 26 million jobs; indirectly supporting 1.9 million jobs through business purchases; and having an induced effect (through the personal purchasing power of owners and employees of micro-businesses) on an additional 13.4 million jobs.[10]

11. MSMEs are also of great importance in regions of the world where a large number of developing States are found. SMEs represent 99 per cent of all enterprises in the Association of Southeast Asian Nations (ASEAN) region, and contribute from 30 to 60 per cent of the GDP.[11] In the States of the Asia-Pacific Economic Cooperation (APEC), SMEs account for around 97 per cent of all businesses and employ over half of the work force.[12] In the Caribbean Community and Common Market (CARICOM), MSMEs provide more than 50 per cent of GDP and account for 70 per cent of the jobs,[13] while in Latin America, over 18.5 million MSMEs provide employment to about 70 per cent of the regional workforce and contribute almost 50 per cent of the region's GDP.[14] According to the African Development Bank (AfDB), SMEs in Africa, account for more than 45 per cent of employment and contribute 33 per cent to GDP.[15]

B. Defining MSMEs

12. There is no standardized international definition of what constitutes an MSME, since each economy will define its own parameters for each category of business size by taking into account its own specific economic context. For the purposes of work undertaken by UNCITRAL, it is not necessary or advisable to seek consensus on a definition for each category of MSME, since any legislative texts produced will be applied by States or regional economic groups to their MSMEs as defined by each of them, based on each unique economic context. The important common factor from State to State is that MSMEs, regardless of how they are defined in that jurisdiction, are enterprises that, by virtue of being the smallest and most vulnerable, face a number of common obstacles regardless of the particular jurisdiction in which they are found. For that reason, these materials do not offer guidance on how a State should define the different categories of MSMEs.[16]

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[9] See European Commission's Annual report on European SMEs 2015/16: SME recovery continues (https://ec.europa.eu/jrc/sites/jrcsh/files/annual_report_-_eu_smes_2015-16.pdf).

[10] See, for example, "Bigger than you think: The Economic Impact of microbusinesses in the United States", Association of Enterprise Opportunity (AEO), September 2014 (http://microenterprisealabama.org/wp-content/uploads/2014/09/Bigger-Than-You-Think-The-Economic-Impact-of-Microbusiness-in-the-United-States-copy.pdf).

[11] P. Manawanitkul, Enabling Environment for Microbusiness – ASEAN Experience, Presentation delivered at the International Joint Conference on "Enabling Environment for Microbusiness and Creative Economy, organized by UNCITRAL, the Ministry of Justice in the Republic of Korea and the Korean Legislation Research Institute, Seoul, 14-15 October 2013.

[12] See www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Small-and-Medium-Enterprises.aspx.

[13] See www.oas.org/en/media_center/press_release.asp?sCodigo=E-061/12.

[14] Available at www.informeavina2008.org/english/develop_case2_SP.shtml.

[15] See the African Development Group News and Events page, "The AfDB SME Program Approval: Boosting Inclusive Growth in Africa", 2013, available at www.afdb.org/en/news-and-events/article/the-afdb-sme-program-approval-boosting-inclusive-growth-in-africa-12135.

[16] States may wish to note the definitions of the different categories of businesses included in MSMEs that have been established either by various States or by regional economic groups. Those definitions tend to be based on a number of elements, considered separately or along with other factors, including: (i) the number of employees at a specific point in time, such as the end

C. The nature of MSMEs

13. MSMEs are incredibly varied in nature. They may consist of sole entrepreneurs, small family businesses or larger enterprises with several or many employees, and may operate in virtually any commercial sector, including in the service industry and the artisanal and agricultural sectors.

14. Moreover, MSMEs may be expected to vary depending on the local economic conditions, cultural traditions and the different motivations and characteristics of the entrepreneurs establishing them. Enterprises that have entered the legally regulated economy may also take various legal forms, depending on the options available to them under applicable law, and on how those different forms may meet their needs.

15. In addition, although MSMEs may be seen, particularly in the context of developing economies, mainly as a source of livelihood for the working poor, such enterprises need not be static; in fact, MSMEs may also serve a dynamic purpose as a source of entrepreneurial talent in an economy. Indeed, their importance in the world economy suggests that providing for and fostering the growth of MSMEs is a key goal in order to achieve economic progress, innovation and success.

16. However, despite their disparate nature, certain characteristics of MSMEs may be broadly shared. Some of these similarities may include, among others:

(a) Being and remaining small operations;

(b) Facing burdensome regulatory hurdles, which tend to have a disproportionate effect on them;

(c) Reliance on family and friends for loans or risk-sharing;

(d) Limited access to capital or to banking services;

(e) Employees, if any, are often drawn from family and friends and may be unpaid and unskilled, including having limited administrative capacity;

(f) Markets may be limited to relatives, close friends and local contacts;

(g) Vulnerability to arbitrary and corrupt behaviour;

(h) Limited access to dispute settlement which puts them at a disadvantage in disputes with the State or with larger businesses;

(i) A lack of asset partitioning, so business failure often means that personal assets are also lost;

(j) Vulnerability to financial distress; and

(k) Difficulty in transferring or selling a business and in profiting from both tangible and intangible assets (such as client lists or relationships with customers).[17]

D. Creating sound business environments for all businesses

17. Efforts to assist MSMEs at the start of their life cycle might first begin with consideration of the business environment in which an MSME will be conducting its affairs. A “business environment” may be defined in a number of different ways, but could be said to comprise the policy, legal, institutional and regulatory conditions that govern business activities, as well as the administration and enforcement mechanisms established to implement government policy, and the institutional arrangements that influence the way key actors operate. These key actors may include government

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of the financial or calendar year; (ii) the amount of annual revenue or turnover generated by the enterprise, or the balance sheet total of the business; (iii) the asset base of the business; (iv) the total monthly wages paid by the enterprise; or (v) the amount of capital invested in the enterprise.

[17] See, for example, supra note 4, pp. 8–9, 38–39 and 70–73.

agencies, regulatory authorities, business organizations, trade unions, and civil society organizations. All of these factors contribute to affect business performance.[18]

18. Sound business environments clearly have a positive influence on economic growth and poverty reduction. Views differ as to the significance and measurability of the link between the business environment, on one hand, and economic growth and poverty reduction, on the other. However, poor business environments may not provide sufficient incentive and opportunity for entrepreneurs to carry on their commercial activities in the legally regulated economy where their enterprise is more likely to thrive. In addition, poor business environments tend to be more susceptible to corruption and usually have a disproportionate gender impact, since the businesses most vulnerable in a weak business environment are micro-businesses, which are often owned by women.[19]

19. It should be noted that the quality of the business environment varies not only as between States but within their different regions as well. Such regional variations make it unlikely that a single solution will provide the answer for improving the business environment in every State. Similarly, the challenges faced by entrepreneurs, particularly by MSMEs, vary depending on the context in which they are doing business. However, the two concepts are linked, since many of the challenges faced by MSMEs are similar to those considered detrimental to a favourable business environment in general, including: burdensome regulation, high economic inequality, low institutional quality, low quality of public infrastructure, and a lack of access to credit and other resources.[20]

20. Improving the quality of the business environment and assisting MSMEs in overcoming the particular challenges facing them often require a State to take measures towards legal and policy reform. These reforms may include, among others, providing for a simple and effective system of business registration, as well as providing for a range of simplified and flexible business forms so as to meet the varied needs of MSMEs. States most often initiate such business reforms in order to: facilitate business start-up and operations, stimulate investment opportunities, and increase growth rates and employment. Such reforms require careful planning and commitment on the part of the State, as well as the involvement of many different entities at various administrative and governmental levels.[21]

II. The extralegal economy

21. As outlined above in paragraph 16, MSMEs generally face a number of key challenges, some of which are caused, and many of which are exacerbated, by operating in the extralegal economy.[22] As noted above, developing States host over 85 per cent of the large number of MSMEs in business globally; of these, an estimated 77 per cent of MSMEs operate in the extralegal economy, which is sometimes referred to as the "informal" economy.

22. "Informality" is by no means a uniform concept. Many "informal" businesses actually operate in fixed premises and according to locally accepted commercial rules. In addition, they may be well-known by local authorities, pay some form of local taxes, and may even engage in cross-border trade. Others, on the other hand, may have little interaction with the State.

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[18] Donor Committee for Enterprise Development (DCED), 2008, "Supporting Business Environment Reforms", p. 2.

[19] Ibid., p. 3; see also, "Making the Law Work for Everyone", Volume I, Report of the Commission on Legal Empowerment of the Poor, supra note 4.

[20] See K. Kushnir, M. L. Mirmulstein and R. Ramalho, "Micro, small and medium enterprises around the world: How many are there, and what affects their count?", 2010, World Bank/IFC.

[21] See Donor Committee for Enterprise Development (DCED), Supporting Business Environment Reforms: Practical Guidance for Development Agencies, Annex: How Business Environment Reform Can Promote Formalisation, 2011.

[22] See, for example, A. M. Oviedo, M. R. Thomas, K. K. Özdemir, Economic Informality, causes, costs and polices – a literature survey, 2009, pp. 14 et seq.

23. Although measurement tools are imperfect and no clear boundaries exist between formal (or legally regulated) and informal (or extralegal) sectors, businesses can be viewed as operating on a formality-informality (or legal-extralegal) spectrum. They can be qualified as more or less formal or informal according to the extent to which their operations fall within the ambit of a State's official laws or take place outside of its official structures. Reference in these materials to the "legally regulated economy" thus refers to the sector of the economy characterized by activities that are conducted within the ambit of formal regulation and structure and commercial activity that falls outside of this scope will be referred to as "extralegal" rather than "informal". Moreover, since the entry point for businesses wishing to access the legally regulated economy is often by way of registration with a commercial or business registry, extralegal enterprises will refer to those that are not entered into the official commercial or business registry of a State, such registration will be considered in these materials to be the main conduit through which businesses are encouraged to operate in the legally regulated economy.

24. It should also be noted that the extralegal economy is not related to illegal or criminal activity. Illegal activities are contrary to the law, but informal activities are extralegal, in that they are not officially declared and do not occur in the context of the legal and regulatory regime that should govern such activities. The discussion in these materials is limited to extralegal commercial activities and does not address trade in illicit goods or services.

25. In addition, extralegal commercial activity may be mainly of a different nature in some States, such as in developed economies. In such States, the extralegal economy may consist mainly of formal firms and workers that underreport their income to tax authorities, or that use undeclared labour in certain business domains.[23] These types of extralegal activities are not the focus of these materials.

26. It is also important to note that although extralegal commercial activity, particularly in the developing world, may exist largely as a result of economic necessity (as noted above in respect of MSMEs in general)[24] components of the extralegal economy may also be seen as quite dynamic and as an incubator for business potential that in fact provides economies with a large number of potential contributors to business development. In fact, businesses operating in the extralegal economy may be seen to provide a pool of talent and an important base of operations from which entrepreneurs can access, and graduate into, the legally regulated economy. There is increasing recognition that the extralegal sector is growing and that it should not be considered a marginal or peripheral sector, but rather as an important building block of a State's overall economy.[25]

27. In fact, a majority of the world's working population operates in the extralegal economy; that number is projected to grow to two-thirds of the global work force by 2020.[26] Although the very nature of such enterprises prevents the identification of precise statistics, estimates of the regional prevalence of extralegal economic activity as a percentage of GDP are as follows: 38 per cent in sub-Saharan Africa; 18 per cent in East Asia and the Pacific; 36 per cent in Europe and Central Asia; 35 per cent in Latin America and the Caribbean; and 27 per cent in the Middle East and North Africa. By way of comparison, the level of the extralegal economy as a percentage of GDP is estimated at 13 per cent in high-income Organisation for Economic Co-Operation and Development (OECD) States, and at 17 per cent globally.[27]

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[23] Ibid., pp. 6 et seq.

[24] See para. 15 above.

[25] See, for example, UNCTAD's information on business facilitation (www.businessfacilitation.org/topics/formalization/).

[26] "How to formalize the informal sector: Make formalization easy and desirable", UNCTAD, (www.businessfacilitation.org/topics/formalizing-the-informal-sector.pdf).

[27] "Economic Developments in Africa Report, 2013: Intra-African Trade: Unlocking Private Sector Dynamism", UNCTAD, pp. 65–66 (http://unctad.org/en/PublicationsLibrary/aldcafrica2013_en.pdf).

28. The institution of reforms to improve the business environment, as noted above in paragraphs 17 to 20, may encourage and facilitate the creation of enterprises through official registration and the migration of extralegal businesses to the legally regulated economy. However, in order to achieve success, policies that encourage businesses to enter the legally regulated economy should take into account the different motivations and characteristics of entrepreneurs operating in the extralegal sector. Such motivations will vary depending on the economy, and may include: micro and small businesses that cannot access the legally regulated economy due to high entry barriers and costs (including taxes and other social contributions) or lack of information; subsistence entrepreneurs that lack alternative job opportunities; and those entrepreneurs that consider that the costs of entering the legally regulated economy outweigh the benefits they expect to receive.[28]

29. Variations in the size and characteristics of the extralegal economy are also apparent from region to region. An analysis of one region, for example, indicates high levels of extralegal commercial activity, partially due to the fact that the extralegal economy is where most new jobs are found, and in which many entrepreneurs must trade by necessity.[29] In this region, a job, an enterprise and a household are often the same thing,[30] and lack of entrepreneurial skills, access to credit, and infrastructure are seen as the most restrictive constraints to growth. In other regions, the extralegal sector tends to behave like a typical small business sector, and is often the main entry point for young, uneducated workers seeking employment, as well as for those seeking part-time work.[31] Other regions have experienced growth of the extralegal economy in recent years, apparently driven by a lack of jobs in the legally regulated sector and reduced demand for goods and services from those employed in that sector.[32]

30. The debate on the reasons for the extralegal sector, on its effect on national economies and on how to approach the issue has been vibrant for decades and has in recent years had a major influence on policymaking. The view that extralegal commercial activity is the result of burdensome regulation and costly procedures required by the State for businesses to enter the legally regulated economy, and that a reduction of those barriers will help extralegal MSMEs move towards a higher degree of business registration, has generated strong momentum for reforming regulations and laws in order to simplify business entry into the legally regulated economy.[33] A wide array of policies have been designed and implemented in several States and regions of the world, since, as noted earlier, the variable nature of the extralegal sector, and the different levels of development of States, render elusive the identification of a single optimal approach. The most successful interventions have been comprehensive policy packages that aimed at achieving various goals, such as economic growth, social protection, and inclusion, and which often include:

(a) Reducing the costs of a business entering (and remaining in) the legally regulated sector, which include entry costs, taxes, fees and social contributions, and costs of compliance;

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[28] M. Jaramillo, “Is there demand for formality among firms?”, Discussion paper, 2009, pp. 2 et seq; see also “Enterprise Surveys – Enterprise Note Series: Formal and Informal Microenterprises”, World Bank Group, Enterprise Note No. 5, 2009.

[29] See Sub-Saharan Africa; UNIDO, GTZ, 2008, Creating an enabling environment for private sector development in sub-Saharan Africa, p. 16.

[30] See Sub-Saharan Africa, Donor Committee for Enterprise Development (DCED), 2009, Business Environment Reforms and the Informal Economy – Discussion Paper, p. 2.

[31] See Latin American and Caribbean States; Donor Committee for Enterprise Development (DCED), 2009, Business Environment Reforms and the Informal Economy – Discussion Paper, p. 2.

[32] See Asia and southeast Europe; Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), website, Toolkit: Learning and Working in the informal economy, www.giz.de/expertise/html/10629.html.

[33] Supra, note 28, pp. 2 et seq.

(b) Improving the benefits of entering the legally regulated economy by reducing the bureaucracy and expense involved in obtaining fixed premises, and obtaining access to business development services and new markets;

(c) Improving the general business environment, so that policies to reduce costs and to improve the benefits of entering the legally regulated economy also assist firms already operating in that sector; and

(d) Strengthening the enforcement of a State's legal regime in order to encourage entry to the legally regulated economy.[34]

III. Making entry into the legally regulated economy simple and desirable for MSMEs

31. In order to encourage MSMEs to start their business in the legally regulated economy or to move their extralegal businesses into that sector, States may wish to consider how best to effectively convey to MSMEs the availability and advantages of that approach. In addition, States should also consider what steps they can take to motivate such behaviour by making it a desirable, easily accessible process, which will pose the least burden possible on the MSME.

A. Explain what entering the legally regulated economy means

32. To ensure widespread understanding of the advantages available to MSMEs, steps must be taken to explain to them the meaning of participating in the legally regulated economy and to provide clear and accessible information to them on how to achieve that aim. The State should consider how best to effectively convey relevant information to MSMEs, including how such businesses can register in the jurisdiction (whether they are required or merely encouraged to do so), the minimum requirements for registration and any other information necessary for them to operate in the legally regulated economy. This information should advise entrepreneurs of the benefits of official registration, as well as which legal business forms are available to them and the advantages of each, and which additional registrations might be necessary, for example for the purposes of licensing, taxation, social services, and the like. Ideally, a business should be able to use a single physical or electronic interface (a "one-stop shop") to register simultaneously with all necessary public authorities. Information in respect of these matters should be specifically adapted so that it is clear and easily understandable for the target audience, and it should be conveyed in a manner that is tailored for them.

1. The advantages of the legally regulated economy

33. Part of the message that must be conveyed to MSMEs in order to persuade them to operate their businesses in the legally regulated economy is to explain to them the advantages of that approach. The following sections outline the advantages of encouraging businesses to operate in the legally regulated economy for both the State and for entrepreneurs.

(a) Advantages for the State

34. States have a clear interest in encouraging MSMEs to operate in the legally regulated economy. One of the reasons often cited for that interest is in terms of taxation, since encouraging MSMEs to migrate to, or to operate in, the legally regulated economy will broaden the tax base of the State.[35] It may also help reduce any friction that may exist with enterprises that are already operating in the legally

[34] International Labour Organization (ILO), GIZ, Enterprise formalization: fact or fiction?, A quest for case studies, 2014, p. 24.

[35] States may wish to note that reduced taxation rates and administration may be an incentive offered to MSMEs to join the legally regulated economy, and that too great an emphasis on expanding the tax base may be counterproductive.

regulated economy and are tax contributors, but that must compete for market share with extralegal businesses. However, there are additional reasons for the State to take action to encourage businesses to operate in the legally regulated economy, such as, depending upon the specific economic sector, ensuring consumer protection and in generally engendering trust in business and commerce in the State for stakeholders including consumers, business partners and banks.

35. Other advantages to the State may be less direct, but are no less valuable. For example, providing previously extralegal businesses with the means to enter the legally regulated economy will permit those MSMEs to grow, to create jobs, and to increase their earnings and contribution to the creation of wealth and the reduction of poverty in the State. Businesses that enter the legally regulated economy can be expected to attract more qualified employees and to stay in business longer, thus making investment in the training of personnel and the acquisition of capital more profitable. The increase in the number of businesses registered will mean that there is more and better economic data available by way of the business registry, and that information exchange in respect of such businesses will increase and become more transparent. All of these effects will have an overall positive impact on the economy of the State.[36]

(b) Advantages for entrepreneurs

36. States must also ensure to convey clearly and effectively to MSMEs and entrepreneurs the benefits of doing business in the legally regulated economy. The following factors are often cited as key advantages for MSMEs that operate in that commercial context.

(a) Visibility to the public and to markets

Registering a business is the primary means through which it becomes visible to the public and to markets, thus providing a means for exposure to potential clients and business contacts, and an expansion of market opportunities. This membership in the marketplace may provide opportunities both in terms of becoming a supplier of goods and services and in accessing them under favourable conditions, and can dramatically improve the profitability of the business. Moreover, such visibility enables, and reduces the costs of, MSMEs trading in economic circles beyond their relatives, friends and local contacts, thus opening up new markets for them.

(b) Visibility to the banking system and financial institutions

Business registration can also provide an enterprise with improved access to banking and financial services, including to bank accounts, loans and credit. This permits MSMEs to move away from financial reliance on relatives and friends and makes it easier for them to raise capital from a broader group of investors, as well as lowering the cost of that capital. This, in turn, permits businesses to expand, to make new investments, to diversify their risk, and to take up new business opportunities.

(c) Public procurement

In most States, public procurement contracts are only available to those businesses that are registered and are part of the legally regulated economy. Access to such contracts may be enhanced for certain groups, since some States have developed specific programmes to ensure that a certain percentage of public procurement contracts are granted to less entitled entrepreneurs, including women, youth, the disabled and the elderly.

(d) Legal validation

Officially registering a business permits it to operate commercially in the jurisdiction and provides the entrepreneur with documentation proving that status, and that the business is in compliance with the registration requirements. This status also permits registered businesses to enter into and enforce contracts more easily, and to have access to justice for commercial purposes, including in respect of reorganization or

[36] See, for example, supra, note 22, pp. 14 et seq.

liquidation. In some legal systems, registration provides additional legal rights for the entrepreneur operating in the commercial sector, including flexible provisions on commercial contracts, specialized commercial court divisions, a relaxation of certain requirements in terms of legal form, and the like.

(e) Legal compliance

While related to the concept of legal validation, compliance with the law can itself be seen as an advantage, since it alleviates entrepreneurial anxiety in respect of operating extralegally, and makes it less likely that fines may be imposed. Being in compliance with the law will also reduce the business' vulnerability to corruption and bribery, and should assist the entrepreneur by providing recourse in cases of tax and other inspections.

(f) Access to flexible business forms and asset partitioning

Through registration, the entrepreneur will be entitled to choose the legal form available in the jurisdiction that is best suited for the business, and ideally, the State will provide for a range of legal business forms for that purpose. Most jurisdictions have at least one legal form that permits the entrepreneur to separate personal finances from business finances; such asset partitioning can be invaluable to a business, particularly if financial difficulty is encountered, as the entrepreneur is not in danger of losing all personal assets, and the value of the business assets can be maximized in the case of reorganization or liquidation. Moreover, the value of a business with separate assets may be greater and can be more readily transferred.

(g) Unique name and intangible assets

Business registration usually requires an enterprise to operate under a sufficiently unique business name. This unique name translates through the business registry and other means into a market identity that can develop a value of its own, and that can be traded to a subsequent owner. Other intangible assets that can add to the value of a business and can be traded, particularly in the case of asset partitioning and a separate legal business identity, include client lists and commercial relationships.

(h) Opportunities for growth

In addition to the advantages of visibility set out above, business registration provides an enterprise with access to a much larger business network, which can permit it to grow the business and operate it on a much greater scale. Some States permit a registered business to become a member of the Chamber of Commerce or other trade organization, which can greatly enhance an enterprise's opportunities for development.

(i) Opportunities for specialization of labour

Registered businesses tend to be less constrained in their hiring practices and may be able to hire employees outside of family and friends. This can permit the business to have access to a larger pool of talent and to permit specialization among employees to make better use of their talent and improve overall productivity.

(j) Access to government assistance programmes

Many States provide specific assistance programmes for MSMEs or for specific types of disadvantaged entrepreneurs. Registration in the legally regulated economy will permit an enterprise to access all forms of government assistance available to such businesses.

(k) Empowerment and emancipation effects

Registration of businesses owned by women, youth, the disabled, the elderly and other less advantaged groups may have important empowerment and emancipation effects. This may be particularly so in respect of women entrepreneurs, many of whom are micro entrepreneurs and who are often exposed to greater risk as a result of corruption and abuse of authority.

(l) Longer term gains

Business registration is also the main conduit for the growth of an enterprise into cross-border trading. It is also possible that, in the longer term, and particularly through the use of electronic commerce and Internet facilities, robust business registration will lead to an increase in cross-border trading and foreign investment – advantages not only for the enterprise, but for the State as well.

2. Communication and education

37. Communication of, and education on, the advantages of legal and policy reforms undertaken by the State to assist MSMEs will be key to the success of those reforms. While this might seem a relatively small detail, in the context of States and regions in transition or with remote areas, all potential entrepreneurs may not be well-served by mass media or have dependable and regular access to telecommunications or the Internet. In such contexts, the potential obstacles to communication and education, and thus to the success of the reforms, can be expected to be more numerous.

38. An additional consideration for a State in developing communication and education strategies should be to consider that many micro entrepreneurs may face literacy challenges and that particular steps may need to be taken to overcome this hurdle. For example, pictograms could be used in addition to text in order to inform potential businesses of the programmes and advantages offered to them. Additional options could include using other culturally significant means of communicating with such groups, including through songs and storytelling. One example demonstrates how,[37] in order to publicize its programmes aimed at fostering micro entrepreneurs, a State launched a national campaign illustrating the benefits of those programmes by way of broadcasting on radio and television a simple and interesting scenario using well-known national actors performing in the national languages of the State.

39. In designing its communication and education plan, a State must be cognizant of the potential impediments outlined above and think practically how best to bridge such gaps. Possible solutions could include:

(a) Providing for mobile education and communication efforts, and for mobile business registration and facilitation counters, so as to enable travel to the entrepreneur's location;

(b) Using trade organizations or informal workers' associations to assist in publicizing the programmes;

(c) Using mass media that is broadly available, including radio, television and print media, as well as posters and billboards;

(d) Making blanket announcements via text on mobile phones; this may be particularly effective in areas where mobile payments are being used;

(e) Ensuring that communication and education is in the local language;

(f) Making use of social media; while less practical in terms of States that face technological hurdles, social media may be an effective tool, particularly to disseminate information among younger entrepreneurs and family members;

(g) Developing courses for gender-specific trading or involving other disadvantaged groups could be developed; and

(h) Using educational techniques that may be particularly useful in the context.[38]

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[37] See, for example, efforts of the Democratic Republic of Congo in publicizing its OHADA "entreprenant" programme (www.ohada.com/actualite/2609/ohada-rdc-campagne-mediatique-de-sensibilisation-sur-l-entreprenant-communication-de-la-commission-nationale-ohada-de-rdc.html). A sample video may be viewed here: www.youtube.com/watch?v=lE1OIo1eNic.

[38] One such method may be "participatory learning and action", which has been described as an approach traditionally used with rural communities in the developing world. It combines

B. Make it desirable for MSMEs to enter the legally regulated economy

40. Another component of the communication package that should be conveyed to prospective business registrants is clear information on the incentives that a State provides to MSMEs to encourage them to register and participate in the legally regulated economy.

41. The effectiveness of the incentives offered by the State will vary according to the specific economic, business and regulatory context. As such, it is not possible to specify precisely which incentives should be offered to encourage businesses to operate in the legally regulated economy. However, States may wish to consider the following possible incentives, each of which, often in combination with others, has been found to be an effective means of encouraging MSMEs to enter the legally regulated economy. In addition, in planning for the creation of these incentives, States may need to ensure coordination with international organizations active in this area (including, for example, the World Bank Group, UNCTAD, UNIDO, the Asian Development Bank, or OHADA), business registration officials, local business incubators, the tax authority, and banks in order to maximize the impact of the incentives chosen.

42. The following is a non-exhaustive list of the incentives that States may consider offering to MSMEs in order to persuade them to operate their businesses in the legally regulated economy or to migrate them from the extralegal economy.[39] A State may consider programmes along the following lines:

(a) Simplification of the business registration process;

(b) Assistance in the business registration process;

(c) Free (or at least very low-cost) business registration;

(d) Receipt of an official certificate indicating the registered status and legal form of the business;

(e) Organized access to and support with banking services (bank accounts and chequing accounts);

(f) Promoting access to credit for registered businesses;

(g) Accounting training and services, and ensuring simplified accounting rules suitable for MSMEs;

(h) Assistance in the preparation of a business plan;

(i) Training (including managing inventory and finances);

(j) Providing credits for training costs;

(k) Protection against potential administrative abuse, possibly through access to mediation or other dispute resolution;

(l) Simpler and more equitable taxation (lower, simplified taxation rates), including tax mediation services and simplified tax forms;

(m) Business counselling services;

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participatory and visual methods with natural interviewing techniques and is intended to facilitate a process of collective analysis and learning. The approach can be used in identifying needs, planning, monitoring or evaluating projects and programmes, and offers the opportunity to go beyond mere consultation and promote the active participation of communities in the issues and interventions that shape their lives. See, for example, "What is Participatory Learning and Action (PLA): An Introduction", Sarah Thomas (http://idp-key-resources.org/documents/0000/d04267/000.pdf) or www.iied.org/participatory-learning-action.

[39] The Working Group may wish to note that each of these incentives, and any additional ones suggested for inclusion, could be described in a brief paragraph, if desired.

(n) Permitting a transition period to give new businesses time to comply fully with applicable laws;

(o) Providing a temporary "tax holiday" for small and microenterprises upon their initial registration;

(p) Providing lump sum monetary compensation or government subsidies and programmes[40] to foster MSME growth;

(q) Providing public communication and promotion of the registered business, as well as networking opportunities and access to experienced businesses, for example through free memberships in industry organizations;

(r) Tailoring specific public procurement programmes to encourage small and micro-businesses or those owned by disadvantaged groups to have access to contracts;

(s) Providing low-cost technological infrastructure;

(t) Promoting access to and support with obtaining health insurance; and

(u) The establishment of a business mentoring programme with experienced business owners to facilitate access to experience and information for MSMEs.

C. Make it easy for MSMEs to enter the legally regulated economy

43. In addition to a lack of information, one of the most often-cited reasons given by MSMEs for their reluctance to register their business is the cost and administrative burden of doing so. Two areas of reform that States may undertake to assuage these concerns are to simplify and streamline the procedures necessary to register a business, focussing on the needs of the user, and to provide for flexible and simplified business forms for MSMEs.

1. Simplified and streamlined business registration

44. One aspect of making it simple and desirable for an MSME to operate its business in the legally regulated economy is to take a user-centric approach and to make the procedures for business registration accessible, simple and clear. In order to facilitate the operation of MSMEs in the legally regulated economy, States may wish to take steps to rationalize and streamline their system of business registration. Improvements made by a State to its business registration system may be expected to assist not only MSMEs, but businesses of all sizes, including those already operating in the legally regulated economy. Importantly, care must also be taken to effectively communicate these changes and their advantages to MSMEs and potential entrepreneurs throughout the jurisdiction.

45. The draft legislative guide on key principles of a business registry (A/CN.9/WG.I/WP.106) explores in detail the steps that can be taken by a State to simplify, streamline and adopt good practices in its system of business registration.

2. Flexible and simplified business forms for MSMEs

46. Another aspect of creating an enabling legal environment and an attractive business registration programme for MSMEs is for the State to permit them simple access to flexible, legally recognized business forms. Many micro and small businesses are either sole proprietorships or family enterprises that do not possess a legal identity or a business form distinct from that of the owner. An entrepreneur should be permitted to easily and inexpensively register a business with a legally recognized form in that jurisdiction. States may wish to permit business registration of a range of different legal forms so as to provide entrepreneurs with sufficient flexibility to meet the needs of MSMEs, and to encourage their registration and foster their growth.

[40] For example, some States have programmes to encourage young nationals who have been educated abroad to return to their State and start businesses.

47. For some businesses, registering in the official business register as a simple sole proprietor may be sufficient for their purposes. However, some States and regional economic organizations have created a legal business form for individual entrepreneurs (defined as those whose business turnover is below a certain amount) which adds through simple business registration certain benefits to those otherwise available to the sole proprietor.[41] These benefits tend to include being subject to a simplified scheme for the calculation and payment of taxes and social security contributions, as well as fast, simplified and low (or no) cost registration requirements and formalities. In addition, States may also adopt a number of incentives available to such businesses which may include: assistance in opening a bank account and gaining access to banking services, access to mediation services (for example, in respect of taxation and legal services) and practical training and advisory services in key business areas (for example, in accounting, management and inventory, legal and tax obligations, financial education and awareness, business planning, and restructuring and growth strategies). Nonetheless, such schemes typically do not change the unlimited personal liability of a sole proprietor, whose personal and professional assets are all available to meet any business debt.

48. An important business right that should be offered to MSMEs is the opportunity for an enterprise to partition its business assets from the personal assets of its owner(s). The legal ability of an enterprise to partition its business assets from the personal assets of its owner(s) is an important building block for the encouragement of entrepreneurial activity since, even though a business may fail, the personal assets of the entrepreneur(s) will be protected.

49. Asset partitioning is seen as one of the defining features of a limited liability business entity, which is said to be among the most productivity enhancing legal institutions available. Offering entrepreneurs the opportunity to take on legal personality and limited liability through the adoption of a simplified business form is certainly a feature that States should consider in making policy decisions on legal forms to adopt in order to reduce the legal obstacles encountered by MSMEs. The key issues involved in adopting a legal regime for simplified business entities with these features, but adapted for MSMEs (including sole proprietors), is considered in detail in the draft legislative guide on an UNCITRAL limited liability organization (A/CN.9/WG.I/WP.99 and Add.1). However, it should be noted that the benefits of asset partitioning for MSMEs registering their businesses may also be available in a legal structure that stops short of full limited liability and legal personality, and is thus subject to fewer formal requirements.

50. One such model that has been adopted is that which permits an individual entrepreneur to officially allocate (and register with the business registry) a certain share of personal assets to the entrepreneur's professional activity. This approach permits the entrepreneur to segregate professional assets from personal assets so that, in the event of financial difficulty of the business, creditors will have access only to the professional assets of the entrepreneur.[42]

51. Another model that has been used in this regard is the establishment of a separate capital fund that has been established for a specific purpose. Such a fund may be established by individuals (and their spouses), into which specific assets can be placed that are identified as necessary for the family requirements of the individuals. Such assets are then protected from seizure in the case of business insolvency. A variation on this model may also be created by a corporation, which can establish a separate capital fund devoted to a specific purpose or which can agree that the earnings of an activity be dedicated to the repayment of loans obtained for the execution of certain specified activities. The establishment of such a fund is subject to certain

[41] See, for example, the "entrepreneur with limited liability" (EIRL) or the "auto-entrepreneur" in France (A/CN.9/WG.I/WP.94 and A/CN.9/WG.I/WP.87, paras. 22–23, and pp. 10 et seq., respectively), or the "entreprenant" in OHADA, Acte Uniforme Révisé Portant sur le Droi Commercial General, adopted 15 December 2011, entry into force 16 May 2011 (www.ohada.com/actes-uniformes/940/acte-uniforme-revise-portant-sur-le-droit-commercial-general.html).

[42] See A/CN.9/WG.I/WP.87, paras. 26–27.

requirements, including that its existence be made public by way of the business registry, and that it be open to opposition by existing creditors of the corporation. Once the fund is constituted, it is segregated from the other funds of the company, and may only be used to satisfy the claims of creditors arising as a result of the relevant activities. Other variations on the creation of a segregated fund may include the declaration of the fund to a specific purpose to the benefit of a natural or legal person, a public administrative body, or other entity, provided that the fund is established by public deed and is registered.[43]

52. An additional example of asset partitioning that stops short of providing legal personality and limited liability is the concept of "business network contracts". This legal tool can be used by a group of entrepreneurs (of various types and sizes, including sole proprietors, companies, public entities, and non-commercial and not-for-profit entities) who undertake a joint venture as agreed in the business network contract, which may be in respect of certain services or common activities within the scope of their business, or even with respect to the exchange of information. The goal of such an approach is to strengthen the individual businesses involved in the contract, as well as the network itself, at the national and international levels, so as to enable access to business opportunities not available to an individual enterprise, and thus to improve competitiveness. The contract must meet the formal requirements established by the State (for example, be duly executed in writing, indicate the objectives of the venture, its duration, the rights and obligations of participants, etc.), and be registered with the business registry. In addition, the contract must establish a capital fund to carry out the programme of the business network; this fund is then segregated from the individual assets of the founding entrepreneurs, and is available only to satisfy claims deriving from the activities performed within the scope of the network, and not for creditors of the individual entrepreneurs that created the business network.[44]

[43] See A/CN.9/WG.I/WP.87, paras. 2–7.
[44] See A/CN.9/WG.I/WP.87, paras. 8–17.

D. Report of the Working Group on MSMEs on the work of its thirtieth session (New York, 12–16 March 2018)

(A/CN.9/933)

[Original: English]

Contents

I. Introduction

1. At its forty-sixth session, in 2013, the Commission requested that a working group should commence work aimed at reducing the legal obstacles encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle.[1] At that same session, the Commission agreed that consideration of the issues pertaining to the creation of an enabling legal environment for MSMEs should begin with a focus on the legal questions surrounding the simplification of incorporation.[2]

2. At its twenty-second session (New York, 10 to 14 February 2014), Working Group I (MSMEs) commenced its work according to the mandate received from the Commission. The Working Group engaged in preliminary discussion in respect of a number of broad issues relating to the development of a legal text on simplified incorporation[3] as well as on what form that text might take,[4] and business registration was said to be of particular relevance in the future deliberations of the Working Group.[5]

3. At its forty-seventh session, in 2014, the Commission reaffirmed the mandate of Working Group I, as set out above in paragraph 1.[6]

4. At its twenty-third session (Vienna, 17 to 21 November 2014), Working Group I continued its work in accordance with the mandate received from the Commission. Following a discussion of the issues raised in working paper A/CN.9/WG.I/WP.85 in respect of best practices in business registration, the Working Group requested the Secretariat to prepare further materials based on parts IV and V of that working paper for discussion at a future session. In its discussion of the legal questions surrounding the simplification of incorporation, the Working Group considered the issues outlined in the framework set out in working paper A/CN.9/WG.I/WP.86, and agreed that it would resume its deliberations at its twenty-fourth session beginning with paragraph 34 of that document.

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[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.
[2] For a history of the evolution of this topic on the UNCITRAL agenda, see A/CN.9/WG.I/WP.97, paras. 5–20.
[3] A/CN.9/800, paras. 22–31, 39–46 and 51–64.
[4] Ibid., paras. 32–38.
[5] Ibid., paras. 47–50.
[6] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134.

5. At its twenty-fourth session (New York, 13 to 17 April 2015), the Working Group continued its discussion of the legal questions surrounding the simplification of incorporation. After initial consideration of the issues as set out in Working Paper A/CN.9/WG.I/WP.86, the Working Group decided that it should continue its work by considering the first six articles of the draft model law and commentary thereon contained in Working Paper A/CN.9/WG.I/WP.89, without prejudice to the final form of the legislative text, which had not yet been decided. Further to a proposal from several delegations, the Working Group agreed to continue its discussion of the issues included in A/CN.9/WG.I/WP.89, bearing in mind the general principles outlined in the proposal, including the "think small first" approach, and to prioritize those aspects of the draft text in A/CN.9/WG.I/WP.89 that were the most relevant for simplified business entities. The Working Group also agreed that it would discuss the alternative models introduced in A/CN.9/WG.I/WP.87 at a later stage.

6. At its forty-eighth session, in 2015, the Commission noted the progress made by the Working Group in the analysis of the legal issues surrounding the simplification of incorporation and to good practices in business registration, both of which aimed at reducing the legal obstacles encountered by MSMEs throughout their life cycle. After discussion, the Commission reaffirmed the mandate of the Working Group under the terms of reference established by the Commission at its forty-sixth session in 2013 and confirmed at its forty-seventh session in 2014.[7] In its discussion in respect of the future legislative activity, the Commission also agreed that document A/CN.9/WG.I/WP.83 should be included among the documents under consideration by Working Group I for the simplification of incorporation.[8]

7. At its twenty-fifth session (Vienna, 19 to 23 October 2015), the Working Group continued its preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, exploring the legal issues surrounding the simplification of incorporation and on good practices in business registration. In terms of the later, following presentation by the Secretariat of documents A/CN.9/WG.I/WP.93, Add.1 and Add.2 on key principles of business registration and subsequent consideration by the Working Group of A/CN.9/WG.I/WP.93, it was decided that a document along the lines of a concise legislative guide on key principles in business registration should be prepared, without prejudice to the final form that the materials might take. To that end, the Secretariat was requested to prepare a set of draft recommendations to be considered by the Working Group when it resumed its consideration of Working Papers A/CN.9/WG.I/WP.93, Add.1 and Add.2 at its next session.[9] In respect of the legal issues surrounding the simplification of incorporation, the Working Group resumed its consideration of the draft model law on a simplified business entity as contained in working paper A/CN.9/WG.I/WP.89, starting with Chapter VI on organization of the simplified business entity, and continuing on with Chapter VIII on dissolution and winding up, Chapter VII on restructuring, and draft article 35 on financial statements (contained in Chapter IX on miscellaneous matters).[10] The Working Group agreed to continue discussion of the draft text in Working Paper A/CN.9/WG.I/WP.89 at its twenty-sixth session, commencing with Chapter III on shares and capital, and continuing with Chapter V on shareholders' meetings.

8. At its twenty-sixth session (New York, 4 to 8 April 2016), Working Group I continued its consideration of the legal issues surrounding the simplification of incorporation and on key principles in business registration. In respect of the former, the Working Group resumed its deliberations on the basis of working paper A/CN.9/WG.I/WP.89. Following its discussion of the issues in Chapters III and V,[11] the Working Group decided that the text being prepared on a simplified business entity should be in the form of a legislative guide, and requested the Secretariat to prepare

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[7] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 220 and 225; *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134; and *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

[8] Ibid., *Seventieth session, Supplement No. 17* (A/70/17), para. 340.

[9] See A/CN.9/860, para. 73.

[10] Ibid., paras. 76 to 96.

[11] See A/CN.9/866, paras. 22 to 47.

for discussion at a future session a draft legislative guide that reflected its policy discussions to date (see A/CN.9/WG.I/WP.99 and Add.1).[12] In respect of key principles in business registration, the Working Group considered recommendations 1 to 10 of the draft commentary (A/CN.9/WG.I/WP.93, Add.1 and Add.2) and recommendations (A/CN.9/WG.I/WP.96 and Add.1) for a legislative guide, and requested the Secretariat to combine those two sets of documents into a single draft legislative guide for discussion at a future session.[13] In addition, the Working Group also considered the general architecture of its work on MSMEs, and agreed that its MSME work should be accompanied by an introductory document along the lines of A/CN.9/WG.I/WP.92, which would form a part of the final text and would provide an overarching framework for current and future work on MSMEs.[14] The Working Group also decided at its twenty-sixth session[15] that it would devote the deliberations of its twenty-seventh session to deliberations on a draft legislative guide on a simplified business entity, and its deliberations at its twenty-eighth session (New York, 1 to 9 May 2017) to a consideration of a draft legislative guide reflecting key principles and good practices in business registration.

9. At its forty-ninth session (New York, 27 June to 15 July 2016), the Commission commended the Working Group for its progress in the preparation of legal standards in respect of the legal issues surrounding the simplification of incorporation and to key principles in business registration, both of which aimed at reducing the legal obstacles faced by MSMEs throughout their life cycle. The Commission also noted the decision of the Working Group to prepare a legislative guide on each of those topics and States were encouraged to ensure that their delegations included experts on business registration so as to facilitate its work.[16]

10. At its twenty-seventh session (Vienna, 3 to 7 October 2016), the Working Group continued its deliberations. As decided at its twenty-sixth session,[17] the Working Group spent the entire twenty-seventh session considering a draft legislative guide on a simplified business entity, leaving consideration of the draft legislative guide on key principles of a business registry for the first week of its twenty-eighth session (New York, 1 to 9 May 2017). The Working Group considered the issues outlined in working papers A/CN.9/WG.I/WP.99 and Add.1 on an UNCITRAL limited liability organization (UNLLO), beginning with section A on general provisions (draft recommendations 1 to 6), section B on the formation of an UNLLO (draft recommendations 7 to 10), and section C on the organization of an UNLLO (draft recommendations 11 to 13). The Working Group also heard a short presentation of working paper A/CN.9/WG.I/WP.94 of the French legislative approach known as an "Entrepreneur with Limited Liability" (or EIRL), which represented a possible alternative legislative model applicable to micro and small businesses.

11. At its twenty-eighth session (New York, 1 to 9 May 2017), the Working Group considered both topics currently on its agenda. Those deliberations commenced with a review of the entire draft legislative guide on key principles of a business registry (A/CN.9/WG.I/WP.101), save for the introductory section and draft recommendation 9 (Core functions of a business registry) and its attendant commentary, to which the Working Group agreed to revert at a future session. With respect to its deliberations regarding the creation of a simplified business entity (A/CN.9/WG.I/WP.99 and Add.1), the Working Group continued the work begun at its twenty-seventh session, and considered the recommendations (and related commentary) of the draft legislative guide on an UNLLO in sections D, E and F.

12. At its fiftieth session (Vienna, 3 to 21 July 2017), the Commission commended the Working Group for the progress it had made in its two areas of work on the preparation of a draft legislative guide on an UNCITRAL limited liability

[12] Ibid., paras. 48 to 50.
[13] Ibid., paras. 51 to 85 and 90.
[14] Ibid., paras. 86 to 87.
[15] See A/CN.9/866, para. 90.
[16] *Official Records of the General Assembly, Seventy-first session, Supplement No. 17* (A/71/17), para. 224.
[17] A/CN.9/866, para. 90.

organization and a draft legislative guide on key principles of a business registry. In particular, the Commission welcomed the potential completion of the latter guide on business registration for possible adoption at the fifty-first session of the Commission (scheduled for 25 June to 13 July 2018).[18]

13. At its twenty-ninth session (Vienna, 16 to 20 October 2017), the Working Group continued its deliberations. As decided at its twenty-eighth session,[19] the Working Group spent the entire twenty-ninth session reviewing a draft legislative guide on key principles of a business registry (A/CN.9/WG.I/WP.106) save for the introductory section and part of the Annex (paras. 1 to 6 and 8 to 16 and recommendations 1 and 3/Annex) to which the Working Group agreed to revert at a future session.

II. Organization of the session

14. Working Group I, which was composed of all States Members of the Commission, held its thirtieth session in New York from 12 to 16 March 2018. The session was attended by representatives of the following States Members of the Working Group: Argentina, Brazil, Bulgaria, Burundi, Canada, China, Colombia, Czechia, El Salvador, France, Germany, Greece, Honduras, India, Indonesia, Israel, Italy, Japan, Kuwait, Mexico, Nigeria, Panama, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey and United States of America.

15. The session was attended by observers from the following States: Algeria, Croatia, Finland, Grenada, Iraq, Paraguay, and Saudi Arabia.

16. The session was also attended by observers from the following international organizations:

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

(b) *Intergovernmental organizations*: Commonwealth Secretariat; Cooperation Council for the Arab States of the Gulf;

(c) *Invited international non-governmental organizations*: American Bar Association (ABA); Conseils des Notariats de l' Union Europenne (CNUE); European Law Students Association (ELSA); International Bar Association (IBA); National Law Center for Inter-American Free Trade (NLCIFT); the Law Association for Asia and the Pacific (LAWASIA) and Union International du Notariat (UINL).

17. The Working Group elected the following officers:

Chair: Ms. Maria Chiara Malaguti (Italy)

Rapporteur: Mr. Mohamad Almutairi (Kuwait)

18. In addition to documents presented at its previous sessions, the Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.108);

(b) Note by the Secretariat on a draft legislative guide on key principles of a business registry (A/CN.9/WG.I/WP.109); and

(c) Note by the Secretariat on reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs) (A/CN.9/WG.I/WP.110).

19. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.

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[18] *Official Records of the General Assembly, Seventy-second session, Supplement No. 17* (A/72/17), paras. 230–235.

[19] A/CN.9/900, para. 169.

3. Adoption of the agenda.
4. Preparation of legal standards in respect of micro, small and medium-sized enterprises.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

20. The Working Group engaged in discussions in respect of the preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, in particular, on a draft legislative guide on key principles of a business registry on the basis of Secretariat documents A/CN.9/WG.I/WP.109 and the overarching document setting out the context for its work on MSMEs in A/CN.9/WG.I/WP.110. The deliberations and decisions of the Working Group on these topics are reflected below.

21. After discussion, the Working Group agreed to transmit the texts of the draft legislative guide on key principles of a business registry and the overarching document setting out the context for UNCITRAL's current and future work on MSMEs to the Commission for consideration and adoption at its fifty-first session (New York, 25 June to 13 July 2018). Those texts, as revised by the Secretariat to reflect the deliberations and decisions of the Working Group at its thirtieth session, are contained in documents A/CN.9/940 and A/CN.9/941 respectively.

IV. Preparation of legal standards in respect of micro, small and medium-sized enterprises

A. Draft legislative guide on key principles of a business registry

1. Presentation of A/CN.9/WG.I/WP.109 and introductory observations

22. The Working Group was reminded that the draft legislative guide in A/CN.9/WG.I/WP.109 on key principles of a business registry included changes in the text of A/CN.9/WG.I/WP.106 that the Working Group had agreed to at its twenty-ninth session in Vienna, 16 to 20 October 2017.

2. Introduction

Paragraphs 1 to 7

23. The Working Group reviewed the Introduction of the draft guide (paras. 1 to 28) after deliberating on A/CN.9/WG.I/WP.110 in order to ensure consistency between the two texts (see paras 102 to 113 below). As a matter of drafting, the Secretariat was requested to make any necessary adjustments to paragraphs 1 to 7 to eliminate redundancy with A/CN.9/WG.I/WP.110, and to remove paragraphs 4, 6, and 7, which summarized aspects of the *travaux préparatoires*. The Working Group further agreed that paragraph 3 could be made more consistent with the commentary to recommendation 20 (see paras. 64 and 65 below) and should include reference to States in which certain businesses are not required to register due to their size and legal form.

Purpose of the present guide: paragraphs 8 to 15

24. After discussion, the Working Group agreed to simplify paragraph 14 by eliminating all subparagraphs (i.e. (a) to (g)) and maintaining only the chapeau with the necessary editorial adjustments. The Secretariat was also requested to reflect the importance of a user-centric approach regarding the business registry and registration with other authorities in paragraph 12. With those changes, the Working Group supported the substance of paragraphs 8 to 15 as drafted.

Terminology: paragraph 16

25. With respect to the defined terms in paragraph 16, the Working Group agreed to revise the following (see also paras. 28, 47 and 73 below):

(a) Good quality and reliable: to add "good quality and" before "reliable" at the beginning of the second sentence;

(b) Registered information: to replace "information that will be made public" with "publicly available information";

(c) Unique identifier: to insert "or a non-business entity" after "a business"; and

(d) One-stop shop: to delete the term "simultaneous".

It was further suggested to delete the definition of MSMEs and insert in A/CN.9/WG.I/WP.109 a concept of MSMEs along the lines of section B "Defining MSMEs" in A/CN.9/WG.I/WP.110 (para. 12).

Legislative drafting considerations: paragraph 17

26. It was noted that paragraph 17 would need to be redrafted to comply with the definition of "law" that the Working Group agreed upon in paragraph 16.

The reform process: paragraphs 18 to 28

27. After discussion, the Working Group agreed with the substance of paragraphs 18 to 28 of the legislative guide as drafted.

3. Objectives of a Business Registry

Objectives of the business registry: paragraph 29 and recommendation 1

28. It was observed that the terms "business registry" and "business registration system" were used interchangeably in the text of the draft legislative guide, but it was felt that "business registration system" might be understood to encompass a broader environment of business registration, including, for example, registration with other public authorities. The Working Group agreed to provide greater clarity to recommendation 1 by replacing "a system of business registration" with "a business registry". It was also determined to review the definitions at a later stage and the Working Group requested the Secretariat to note when suggestions were made. It was suggested to add a definition of the term "business registration" due to the frequent use of such term throughout the draft legislative guide.

29. The Working Group agreed to insert into paragraph 29 language along the lines of "States should adopt a user-centric approach where the goal at all times should be simple low-cost registration and simple low cost procedures. States should make it possible for businesses to register simultaneously with all mandatory authorities, providing only one set of documents and only one payment through physical outlets or electronic windows".

Purposes of the business registry: paragraphs 30 to 32 and recommendation 2

30. It was felt that an inclusion of a reference to the section on core functions of business registries, paragraphs 57 to 65, would ensure that the concepts were not duplicated in the text in paragraphs 30 to 32. After discussion, it was agreed to leave the text of recommendation 2 as drafted, but to provide greater clarity in the commentary regarding the meaning of the phrase "providing to a business an identity" in recommendation 2(a).

31. A concern was raised that the phrase "enacting State" might be more suitable for a model law than for a legislative guide, but it was noted that other UNCITRAL legislative guides have used the same terminology.

32. The Working Group agreed to insert "provided that fees are low" after "all such businesses to register in the business registry" in paragraph 31. In terms of drafting,

proposals to eliminate the word "key" and to specify that registration "may" make businesses more visible were both supported by the Working Group.

Simple and predictable legislative framework permitting registration for all businesses: paragraphs 33 to 36 and recommendation 3

33. It was widely felt that any example of the type of discretion described in paragraph 33 would provide insufficient and potentially unclear guidance to enacting States. After discussion, the Working Group agreed to remove the example of discretion from paragraph 33 but to retain cross references to paragraphs 153 and 233.

34. There was consensus to remove the phrase "for all businesses" from the title and recommendation 3, and to change the word "rules" in recommendation 3(a) to "laws."

Key features of a business registration system: paragraphs 37 to 42 and recommendation 4

35. There was agreement in the Working Group to the following changes in the commentary to recommendation 4: (a) the language used in paragraphs 37 to 42 should be consistent with that of recommendation 4(d) (i.e. "good quality and reliable"); (b) in order to avoid redundancy, the definition of "good quality and reliable" should not be repeated in paragraph 38 and elsewhere in the draft text, since that phrase is a defined term in paragraph 16 of the draft guide. In the same way, definitions of other defined terms in the commentary should be deleted; (c) in the second sentence of paragraph 39, the phrase "the information that the entrepreneurs submit during the lifetime of the business" should be replaced with a sentence along the lines of "information that is submitted during the lifetime of the business; (d) in the last sentence of paragraph 39 the term "released" should be replaced with "disclosed"; and (e) in paragraph 41, the next to last sentence "However, … or at least daily" should be made consistent with paragraphs 189 and 215 of the draft guide and include reference to those instances in which staff may be required to enter in the business registry record information submitted electronically.

36. The Working Group further agreed to change the title of Section C and recommendation 4 to "key features of a business registry" and to replace "methods" in recommendation 4(b) with "procedures" or "process". With those changes, the Working Group agreed with the substance of recommendation 4 as drafted.

Responsible authority: paragraphs 44 to 46 and recommendation 5

37. The Working Group heard a proposal to further clarify the language in recommendation 5(a) as it was said that the term "authority" did not properly reflect those instances in which States would decide to outsource registry operations to a private company. There was wide support in the Working Group, however, for the view that the text of the commentary to recommendation 5 made sufficiently clear that the use of the term "authority" referred to both public agencies and private entities mandated by States to operate the registry. After discussion, the Working Group agreed to replace the term "authority" in recommendation 5(a) with "entity", leaving the title of the section and the recommendation unaltered.

4. Establishment and functions of the business registry

Appointment and accountability of the registrar: paragraphs 47 to 49 and recommendation 6

38. It was noted that paragraph 48 had been amended to indicate that States "may" permit the registrar to delegate its powers. In that context, the Working Group agreed to modify recommendation 6(b) to read "and if and to what extent those powers and duties may be delegated."

39. In terms of drafting, the Secretariat was requested to remove the definition of registrar from paragraph 48 and to rely on the definition in paragraph 16.

Transparency in the operation of the business registration system: paragraphs 50 and 51 and recommendation 7

40. The Working Group agreed with the substance of paragraphs 50 and 51 and recommendation 7 of the legislative guide as drafted.

Use of standard registration forms: paragraph 52 and recommendation 8

41. The Working Group agreed with recommendation 8 of the legislative guide as drafted. After discussion, the Working Group determined to add the phrase "or allowed" after the word "required" in the final sentence of paragraph 52 and to eliminate the remainder of the sentence after the phrase "for the creation of the business."

Capacity-building for registry staff: paragraphs 53 to 56 and recommendation 9

42. After discussion the Working Group agreed to the substance of paragraphs 53 to 56 and recommendation 9 as drafted.

Core functions of business registries: paragraphs 57 to 65 and recommendation 10

43. Regarding the issue of access to information collected by the registry, it was felt that the recommendation should be consistent with the terminology in recommendations 4 and 39. The Working Group therefore agreed on the following change to recommendation 10(b): "Providing access to publicly available registered information" and to include cross-references to recommendations 33 and 34 in paragraph 62 in the commentary. After discussion, the Working Group also agreed to substitute "providing information" for "publicizing any relevant information" in recommendation 10(g).

44. The Secretariat was requested to modify the commentary as necessary to reflect the amendments to the recommendations. While it was noted that subparagraph 58(b) included the concept of information currency through its use of the defined phrase "good quality and reliable," it was felt that more emphasis could be placed on keeping information as current as possible in the commentary to provide greater clarity to recommendation 10(e). It was also noted that paragraph 58 addressed more than core functions, so the Secretariat was requested to include language along the lines of "core functions and desired outcomes" in the chapeau.

45. It was agreed to change "several" to "many" in paragraph 63 in reference to States that have reformed their registration systems. While there was some support within the Working Group to include one-stop shops in recommendation 10, given that they were discussed in paragraph 63, others were of the view that one-stop shops were not a core function of the business registry. After discussion, it was determined to retain the discussion of one-stop shops in the commentary but not to add a reference to them in the recommendation itself.

46. It was noted that a recent survey found no jurisdictions where business registries were required to perform intellectual property verification of business names, and there was agreement within the Working Group to eliminate the last two sentences after the phrase "such as ensuring" in paragraph 60. It was also noted that business names were addressed in the preceding paragraph and the Secretariat was requested to contain the discussion of business names to paragraph 59 but to retain the discussion of control procedures within the operation of the registry in paragraph 60.

47. Noting that the phrase "business name" had been used throughout the draft legislative guide to encompass names of businesses that had not yet been registered, there was agreement within the Working Group to redefine "business name" in paragraph 16 to something along the lines of "a name registered on behalf of a business, or a name used or planned to be used by a business".

Storage of information and access to it throughout the registry: paragraphs 66 to 68 and recommendation 11

48. The Working Group agreed to replace the phrase "all information collected or stored anywhere in the system is capable of being processed or accessed", in the third sentence of paragraph 67, with text along the lines of "all information collected or stored anywhere in the system can be processed or accessed" for improved clarity of the language. With that change, the Working Group agreed with the substance of paragraphs 66 to 68.

49. The Working Group heard various proposals on editorial adjustments to the text of recommendation 11, but it decided to consider those proposals at a later stage of its deliberations (see para. 89 below).

5. Operation of the business registry

Operation of the business registry: paragraph 69; Electronic, paper-based or mixed registry: paragraphs 70 to 73; Features of an electronic registry: paragraphs 74 to 78; Phased approach to the implementation of an electronic registry: paragraphs 79 to 87; Other registration-related services supported by ICT solutions: paragraphs 88 to 91 and recommendation 12

50. After discussion, the Working Group agreed to consider any possible change to recommendation 12 at a later stage (see para. 90 below), but agreed to make the following changes to the commentary: (a) to edit the middle sentence of paragraph 71 to read: "The adoption of such systems enhances data integrity, information security, registration system transparency, and verification of business compliance registration requirements, which helps avoid unnecessary or redundant information storage"; (b) to delete "which result in a more streamlined process and user-friendly services," from the chapeau of paragraph 72; (c) to describe the word "handling" with "improved" in subparagraph 72(c); (d) to include in subparagraph 72(e) cross-references to paragraphs 189 and 215; (e) to include in paragraph 85 cross-references to paragraphs 153 and 233; (f) to substitute "implemented" for "considered" in paragraph 86; and (g) to delete "i.e., notations in the registry that a particular business is no longer registered" from paragraph 89.

51. In addition, there was discussion within the Working Group about the technological terminology used in paragraphs 80 and 83. It was agreed that the terms should be more general to account for digital and mobile access. After discussion, the Working Group agreed to substitute "digital access" for "internet penetration" in paragraph 80 and to modify the first sentence of paragraph 83 to language along the following lines: "Platforms that enable businesses to apply and pay for registration online as well as to file annual accounts and update registration details as operations change can be developed once the State's technological capacity allow for it."

Electronic documents and electronic authentication methods: paragraph 92 and recommendation 13

52. After discussion, the Working Group agreed to modify recommendation 13(b) to read: "Regulate such use pursuant to principles whereby electronic documents and signatures are functionally equivalent to their paper-based counterparts and cannot be denied legal validity or enforceability for the sole reason that they are in electronic form."

A one-stop shop for business registration and registration with other authorities: paragraphs 93 to 103 and recommendation 14

53. It was felt that the type of information needed by various public authorities could differ, and after discussion, the Working Group supported a proposal to delete "requiring the same information" from the text of recommendation 14(b).

54. It was noted that the definition of "one-stop shops" in paragraph 16 differed from the text in paragraph 94 and the Secretariat was requested to ensure consistency in the text, particularly with reference to integrated forms for registration and payment.

It was agreed to modify the second sentence of paragraph 94 to read something along the lines of "One-stop shops enable entrepreneurs to receive all of the information and forms they need in order to complete the necessary procedures to establish their business through single outlets rather than having to visit several different government authorities".

55. There was support within the Working Group to invert paragraphs 97 and 98 in order to highlight the less burdensome "one window" approach for entrepreneurs in paragraph 98 over the "one door" approach described in paragraph 97.

56. It was felt that the final sentence in paragraph 102 did not reflect the reality of one-stop shops in States where business registration would be found under the administrative oversight of the judiciary and the Working Group agreed to amend the beginning of the sentence to read "There are examples of adoption of a one-stop shop approach also in those States …".

57. In terms of drafting, proposals to change "public agencies" to "authorities" throughout the text and to change "database" to "platform" in paragraph 101 were supported by the Working Group. The Secretariat was also requested to redraft the last sentence of paragraph 103 to clarify that one-stop shops should not be expensive to maintain and should be self-sustainable.

58. It was further agreed to move the discussion of integration among public authorities in paragraph 68 to the commentary under recommendation 14, and to add to recommendation 14 a subsection (c), focusing on the exchange of information among the authorities (see para. 91 below). In this respect, it was noted that the term "interconnected" in recommendation 11 would need to be clarified (see para. 89).

Use of a unique identifier: paragraphs 104 to 111; Allocation of unique identifiers: paragraphs 112 and 113; Implementation of a unique identifier: paragraphs 114 to 117; Cross-border exchange of information among business registries: paragraphs 118 and 119 and recommendations 15, 16 and 17

59. A concern was raised that the notion of a unique identifier as the same business identification number used by all relevant authorities and not only by the business registry was not expressed with sufficient clarity in paragraphs 104 to 111 and the Secretariat was requested to eliminate any ambiguity in this part of the commentary.

60. With respect to paragraphs 107 and 110, it was noted that in certain States unique identifiers are allocated to non-business entities as well. The Working Group further agreed to change the term "must" into "may" in footnote 54 since changes in the legal form of the business do not require the allocation of a new identifier in all States.

61. With respect to recommendations 15 to 17, there was agreement in the Working Group to: (a) add text along the lines of "with a relationship with the enterprise being registered" between "authorities" and "sharing the information" in recommendation 16; and (b) add "or replaced by" after "linked to" in recommendation 17(b).

Sharing of protected data between public authorities: paragraph 120 and recommendation 18

62. There was support in the Working Group for a proposal to remove recommendations 18(b) and (c) and to adjust the rest of recommendation 18 along the following lines: "the sharing of protected data between public authorities pursuant to a unique identifier system should conform to the applicable law on the sharing of protected data between public authorities". In light of this change, the Working Group also requested the Secretariat to modify paragraph 120.

6. Registration of a business

Scope of examination by the registry: paragraphs 121 to 123; Accessibility of information of how to register: paragraphs 124 to 128 and recommendation 19

63. The Working Group agreed with the substance of paragraphs 121 to 128 and recommendation 19 as drafted.

Business permitted or required to register: paragraphs 129 to 132 and recommendation 20

64. The Working Group agreed to reverse the order of paragraphs 130 and 131, as it was considered more logical to first focus on instances of mandatory registration of businesses before instances of optional registration. In light of this change, the Secretariat was requested to reverse the order of recommendations 20(a) and (b).

65. A proposal that the phrase "and other entities" should be added in the first sentence of paragraph 130 (between "by the registry" and "including") received wide support from the Working Group. As a matter of drafting, the Secretariat was requested to further clarify in the final sentence of paragraph 130 that businesses that are not required to register, but that voluntarily do so, must fulfil whatever obligations have been established by the law for those types of businesses. Finally, the Working Group agreed that the commentary in paragraph 132 could include reference to States in which certain businesses are not required to register due to their size and legal form.

Minimum information required for registration: paragraphs 133 to 138 and recommendation 21

66. While recommendation 21 focused on minimum requirements, it was widely felt within the Working Group that greater clarity could be provided to States by removing the word "minimum" from the chapeau. The Secretariat was requested to clarify paragraph 133, which implied that public and private limited liability companies should be treated the same.

Language in which information is to be submitted: paragraphs 139 to 141 and recommendation 22

67. It was noted that paragraph 141 was descriptive of practices in a number of States but it was widely felt that the paragraph would benefit from an emphasis on the registration process being subject to the State's language laws, if any, and would also benefit from simplification and the elimination of the discussion of provinces and regions. It was also agreed to delete "or electronic records" from the last line of paragraph 139.

Notice of registration: paragraph 142 and recommendation 23

68. The Working Group supported a proposal to incorporate the final sentence of paragraph 142 into the text of recommendation 23.

Content of notice of registration: paragraph 143 and recommendation 24

69. The Working Group agreed to include "and time" after "date" in recommendation 24(b).

Period of effectiveness of registration: paragraphs 144 to 147 and recommendation 25

70. After discussion, the Working Group agreed with the substance of paragraphs 144 to 147 and recommendation 25 as drafted.

Time and effectiveness of registration: paragraphs 148 to 151 and recommendation 26

71. The Working Group agreed with the substance of paragraphs 148 to 151 and recommendation 26 as drafted.

Rejection of an application for registration: paragraphs 152 to 156 and recommendation 27

72. There was agreement within the Working Group to add the word "only" after the word "business" in recommendation 27(a). In that context, the Working Group agreed to delete recommendation 27(d) and the final sentence of paragraph 155.

Registration of branches: paragraphs 156 to 158 and recommendation 28

73. Concern was expressed that the definition of "branch" as an "entity" in paragraph 16 did not properly reflect the legal nature of branches since an "entity" could be understood to have an independent legal personality. The Working Group agreed that "entity" should be replaced with a term along the lines of "establishment" and requested the Secretariat to adjust the definition accordingly. In response to a comment that the second and third sentences of paragraph 156 seemed to overlap by referring to registration of national branches of foreign businesses, the Working Group agreed that the third sentence should be clarified to refer to the registration of national branches of national companies. The Working Group further supported the view that the last four sentences of paragraph 156 did not relate to the registration of branches but rather to the reason for having branches, a matter outside the scope of the draft guide, and it agreed to remove those sentences.

74. In respect to recommendation 28, it was further noted that both subparagraphs (a) and (c)(i) addressed the issue of when a branch should be registered and the Secretariat was requested to remove recommendation 28(c)(i).

7. Post-Registration

Paragraphs 159 and 160

75. The Working Group agreed with the substance of paragraphs 159 and 160 as drafted.

Information required after registration: paragraphs 161 and 162 and recommendation 29

76. The Working Group agreed to delete recommendation 29(b) as the filing of periodic returns would not be mandatory in every jurisdiction, and requested the Secretariat to make any necessary editorial adjustments to the remaining text of the recommendation. With that change, the Working Group agreed with the substance of paragraphs 161 and 162 and recommendation 29.

Maintaining a current registry: paragraphs 163 to 167 and recommendation 30; Making amendments to registered information: paragraphs 168 and 169 and recommendation 31

77. After discussion, the Working Group agreed with the substance of paragraphs 163 to 169 and recommendations 30 and 31 as drafted.

8. Accessibility and information-sharing

Access to business registry services: paragraphs 170 to 174 and recommendation 32

78. The Working Group heard a number of proposals to modify paragraphs 170 to 174 and recommendation 32 and agreed to consider them at a later stage (see paras. 92 to 95 below).

Public availability of information: paragraphs 175 to 182 and recommendation 33

79. The Working Group agreed to delete the phrase "that is relevant … status of that business" from paragraph 175 and left the Secretariat to make editorial changes if necessary. With those changes, the Working Group agreed with the substance of paragraphs 175 to 182 and recommendation 33 as drafted.

Where information is not made public: paragraphs 183 and 184 and recommendation 34

80. A request was made to clarify the rights and responsibilities of the registrar in recommendation 34, which could be understood to provide discretion to the registrar. The Working Group heard a proposal to eliminate recommendation 34(a) and another

proposal to modify 34(a) by adding "which type of information cannot be publicly disclosed" after "protected data and" and eliminating the latter portion of 34(a). After discussion, the Secretariat was requested to redraft the recommendation based on the deliberations of the Working Group.

Hours of operation: paragraphs 185 to 187 and recommendation 35

81. While the Working Group supported the substance of paragraphs 185 to 187 and recommendation 35 as drafted, it was noted that the text of Part VI contained ambiguities in its use of the terms "business registry services" and "services of the business registry." In that context, the Working Group agreed to relocate recommendation 35 and its commentary to the beginning of Part VI to provide greater clarity to the text. The Secretariat was requested to check that Part for consistency in use of terminology regarding the registrar, the registry, registry services, and information services (see also para. 95 below).

Direct electronic access to submit registration, to request amendments and to search the registry: paragraphs 188 to 191 and recommendations 36 and 37

82. The Working Group agreed to eliminate the phrase "are permitted without requiring" and subsequent text from recommendations 36 and 37 and to replace it with "may be done remotely through electronic means." With those amendments, the Working Group agreed with the substance of paragraphs 188 to 191 and recommendations 36 and 37 as drafted.

Facilitating access to information: paragraphs 192 to 197 and recommendation 38

83. In paragraph 194, after the phrase "less accessible are" the Working Group agreed to include "limiting search criteria to unique business identifiers (as opposed to also allowing searches by business names)" and requested the Secretariat to make editorial changes if necessary. With that change, the Working Group agreed with the substance of paragraphs 192 to 197 and recommendation 38 as drafted.

Cross-border access to publicly available registered information: paragraphs 198 and 199 and recommendation 39

84. The Working Group agreed with the substance of paragraphs 198 and 199 and recommendation 39 as drafted.

9. Fees

Paragraphs 200 and 201

Fees charged for business registry services: paragraphs 202 to 204 and recommendation 40; Fees charged for information: paragraph 205 and recommendation 41; Publication of fee amounts and methods of payment: paragraph 206 and recommendation 42; Electronic payments: paragraph 207 and recommendation 43

85. The Working Group agreed with the substance of paragraphs 200 to 207 and recommendations 40 to 43 as drafted.

10. Liability and sanctions

Paragraphs 208 and 209

Liability for misleading, false or deceptive information: paragraphs 210 and 211 and recommendation 44; Sanctions: paragraphs 212 and 213 and recommendation 45; Liability of the business registry: paragraphs 214 to 219 and recommendation 46

86. The Secretariat was requested to move paragraph 211 to the commentary under recommendation 45, which dealt with sanctions. In terms of drafting, the Secretariat was requested to review the final sentence of paragraph 216 in an effort to make it more similar to the previous version of the draft legislative guide (see para. 212 of

A/CN.9/WG.I/WP.106). With those changes, the Working Group agreed with the substance of paragraphs 208 and 209 and recommendations 44 and 45.

87. With respect to the liability of the business registry, a suggestion was made to clarify that the issue of liability would not necessarily be addressed by the laws governing the business registry. The Working Group did not take up the proposal and agreed with the substance of paragraphs 214 to 219 and recommendation 46 as drafted.

11. Operation of a business registry (*ctd.*)

Recommendations 11: Storage of and access to information contained in the registry; 12: Electronic, paper-based or mixed registry; and 14(c): A one-stop shop for business registration and registration with other authorities

88. The Working Group resumed consideration of the drafting of recommendations 11, 12 and 14(c) (see paras. 49, 50 and 58 above).

89. There was agreement in the Working Group that the opening phrase of recommendation 11 be redrafted along the following lines: "the law should establish that the business registry offices and repositories are interconnected…" and the Secretariat was requested to make editorial adjustments to the remaining text as needed. After further discussion, the Working Group agreed upon the following language to slightly adjust the text of the recommendation: "the law should establish that business registry offices are interconnected in regard to storage of and access to information received from registrants and registered businesses or entered by registry staff".

90. The Working Group agreed to leave recommendation 12 as drafted, but that drafting proposals could be considered at the fifty-first session of UNCITRAL (New York, 25 June to 13 July 2018).

91. With respect to recommendation 14(c) (see para. 58 above), there was support in the Working Group for a proposal along the following lines: [such an interface] "should provide for connectivity of all authorities with which a business is required to register and provide for the sharing of information on the business among the authorities as well as the use of a single, integrated application form for registration and payment to those authorities and a unique identifier."

12. Accessibility and information-sharing (*ctd.*)

Access to business registry services: paragraphs 170 to 174 and recommendation 32

92. In resuming its discussion of paragraphs 170 to 174 and recommendation 32 (see para. 78 above), the Working Group heard a proposal to insert a new recommendation into the section on "Access to business registry services" in order to promote equality of rights for women to register and start a business. It was pointed out that studies show that there is a disparity in access to business registration based on legal discrimination against women. Therefore the guide should include a recommendation on equal access to business registration for women. Because of the importance of women's entrepreneurship for economic development, it was said that such a recommendation would address instances in which legal disparities prevented businesses owned by women from realizing their full potential and resulted in those businesses operating in the informal economy. While there was wide support in the Working Group for the principles underpinning that proposal, concerns were raised that an exclusive focus on discrimination against women would create an imbalanced approach in the draft guide, since it would seem to suggest that discrimination based on grounds other than sex did not hinder the economic development of a State and the legal empowerment of other vulnerable groups. Moreover, it was stated that including such a recommendation in the legislative guide must be done with language and an approach consistent with those used in other Conventions and texts of the United Nations that provided for the promotion of human rights. It was also pointed out that the proposed recommendation was consistent with non-discrimination commitments of States under international human rights instruments, such as the Universal

Declaration of Human Rights, as well as the obligations of States parties to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to eliminate discrimination against women. Finally, a concern was raised that the location of the proposal referred only to access of women to business registration, without consideration of the guide as a whole.

93. After discussion, the Working Group agreed that recommendation 32 be redrafted to refer to the text used in the opening sentence of paragraph 170 ("the law should…political view"). In addition, a new recommendation 33 should be inserted to read something along the lines of: "the law should ensure that women have equality in enforceable legal rights for registering and starting a business and avoid requirements for registering a business that treat applicants less favourably based on their gender". During discussions leading to the adoption of recommendations 32 and 33, a concern was raised that these recommendations only apply to the prohibition of discrimination against registrants and not against all of the users of the registry services.

94. The Working Group also agreed that commentary be drafted consistent with the proposed recommendation 33 and include a separate section B entitled "women's equality of rights". It was further suggested that the commentary should include appropriate reference to the United Nations Sustainable Development Goal 5 which calls on States "to end all forms of discrimination against all women and girls everywhere".

95. Finally, in response to reiterated concerns expressed about possible ambiguity arising from the use of the phrase "access to business registry services", the Secretariat was again requested to review the text for improved clarity of the language (see also para. 81 above).

13. Deregistration

Deregistration: paragraphs 220 to 224 and recommendations 47 and 48

96. After discussion, the Working Group agreed with the substance of paragraphs 220 to 224 and recommendations 47 and 48 of the legislative guide as drafted.

Process of deregistration: paragraphs 225 to 227 and recommendation 49; Reinstatement of registration: paragraph 228 and recommendation 50

97. The Working Group agreed with the substance of paragraphs 225 to 228 and recommendations 49 and 50 of the legislative guide as drafted.

14. Preservation of records

Preservation of records: paragraphs 229 to 232 and recommendation 51; Alteration or deletion of information: paragraphs 233 and 234 and recommendation 52; Protection against loss of or damage to the business registry record: paragraphs 235 and 236 and recommendation 53; Safeguard from accidental destruction: paragraph 237 and recommendation 54

98. The Working Group agreed to change "entered" to "submitted" in paragraph 234 and otherwise agreed with the substance of paragraphs 229 to 237 and recommendations 51 to 54 as drafted.

15. Annex: The underlying legislative framework

99. Differing views were expressed about the merits of eliminating the Annex, of retaining the Annex, and of integrating the Annex into the main text. It was felt that portions of the Annex could be incorporated into the introduction, but a concern was raised about providing recommendations in the introductory section of a legislative guide. After discussion, the Working Group agreed to relocate the content of the Annex as a whole into a new chapter, Part XI.

100. It was noted that the Secretariat would need to ensure that the terms in Part XI were consistent with the rest of the text and the definitions in paragraph 16, and that

some editorial adjustments would need to be made to eliminate repetition and to avoid inconsistencies, particularly in paragraphs 10 and 13. It was noted that section E of the Annex duplicated the title of section E of Part III, Operation of the business registry, in the draft legislative guide and would need to be amended by the Secretariat.

101. The Secretariat was further requested to delete the final sentences of paragraphs 1, 11 and 13, and to eliminate repetition of the term "simpler" in paragraph 7.

B. Reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs)

1. Presentation of A/CN.9/WG.I/WP.110 and introductory comments

102. The Working Group was reminded that at its twenty-sixth session (New York, 4 to 8 April 2016), it had considered document A/CN.9/WG.I/WP.92 (a previous version of A/CN.9/WG.I/WP.110) which had been prepared by the Secretariat to provide the overall context for work prepared by the UNCITRAL in respect of MSMEs. While the Working Group did not have sufficient time to consider A/CN.9/WG.I/WP.92 in detail, there was broad support for the proposal that a document along those lines could accompany its MSME work as an introduction to the final text and that it could provide an overarching framework for UNCITRAL's current and future work on MSMEs.

103. The Working Group was reminded that most references to data, statistics, and specific jurisdictions would be removed from the text of A/CN.9/WG.I/WP.110, but there was some support for a suggestion to retain general statistics on MSMEs in the global economy.

104. It was felt that the title of the document did not accurately reflect the contents therein, and suggestions were made to change the title to something along the lines of "Adopting an enabling legal environment for the operation of MSMEs" rather than emphasizing "reducing the legal obstacles." The Secretariat was requested to make this change based on the deliberations of the Working Group.

2. Micro, small and medium-sized enterprises (MSMEs): paragraphs 3 to 6

105. It was widely felt that the standards developed by the Working Group would be beneficial to all economies, regardless of their size and stage of development, and the Secretariat was requested to include a statement to that effect in the text of the document. It was noted that paragraph 4 referenced the Sustainable Development Goals, and could be expanded to reference UNCITRAL's work.

106. A suggestion was made to reorder the sequence of the discussion of MSMEs, but it was generally felt that a discussion of the importance of MSMEs in the global economy should precede their definition and descriptive nature, and that the section on creating a sound business environment for all business should follow.

3. The importance of MSMEs in the global economy: paragraphs 7 to 11; Defining MSMEs: paragraph 12; the nature of MSMEs: paragraphs 13 to 16

107. Some delegations were of the view that several of the characteristics of MSMEs described in paragraph 16 only applied to microbusinesses. Others were of the view that some of the characteristics would apply to larger businesses as well, depending on the jurisdiction. The Working Group agreed to change the chapeau to read "… despite their disparate nature (especially in terms of size), certain possible characteristics of MSMEs may be broadly shared, such as:".

4. Creating sound business environments for all businesses: paragraphs 17 to 20

108. It was noted that the document described certain legal obstacles faced by MSMEs, such as bureaucracy and cost, but that taxes were another obstacle. While it was noted that paragraph 42 discusses tax in its programme for States to consider to

make it more desirable for MSMEs to enter the legal economy, the Secretariat was requested to make reference to taxes in the commentary under section D.

5. The extralegal economy: paragraphs 21 to 30

109. It was noted that the document used the words "legally regulated economy/ extralegal". The Working Group agreed to change those words to "formal/informal" in all its materials to make the term more consistent with how other organizations refer to businesses that operate outside of the legal environment.

110. There was some discussion about whether to remove references to taxation and social security authorities from paragraph 23, but the Working Group agreed to the substance of paragraphs 21 to 30 as drafted.

6. Ensuring that operation in the legally regulated economy is simple and desirable for MSMEs

Paragraph 31

Explaining the meaning of operating in the legally regulated economy: paragraphs 32 to 39

111. The Working Group accepted several proposals for minor changes: (a) to include a reference to labour laws in paragraph 34; (b) to soften language in paragraph 36 such as "primary" and "dramatically" in subparagraph 36(a) and "proving" in 36(d); (c) to clarify "legal forms" in subparagraphs 36(d) and (f); (d) to add reference in 36(f) to facilitating access to investment and venture capital; and (e) to remove reference to "Chamber of Commerce" in 36(h).

7. Making it desirable for MSMEs to operate in the legally regulated economy: paragraphs 40 to 42; Making it easy for MSMEs to operate in the legally regulated economy: paragraphs 43 to 52

112. A concern was raised that paragraph 49 did not accurately reflect the models of business forms that could provide limited liability protection and the segregation of assets without the creation of a separate legal personality. The Working Group agreed to modify the final sentence of paragraph 49 to read: "… stops short of legal personality, while being subject to fewer formal requirements." In that context, the Working Group also agreed to eliminate the reference to "limited liability" from paragraph 52.

113. The Working Group considered changing the order of paragraphs 49 to 52, the possibility of including paragraphs 51 and 52 in document A/CN.9/WG.I/WP.109, and inserting a discussion of other examples of flexible and simple business forms. After discussion, it was agreed to retain the order of the paragraphs as they appeared but the Secretariat was requested to create a new paragraph on simplified business incorporation regimes in a balanced manner that described various options.

V. Other matters

114. The Working Group recalled that its thirty-first session was tentatively scheduled to be held in Vienna from 8 to 12 October 2018. The Working Group confirmed that at that session it would resume its consideration of the draft legislative guide on an UNCITRAL Limited Liability Organization (while currently found in A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1, revised versions of those working papers will be prepared for the thirty-first session).

E. Note by the Secretariat on a draft legislative guide on key principles of a business registry

(A/CN.9/WG.I/WP.109)

[Original: English]

Contents

Introduction

1. The present legislative guide has been prepared on the understanding that, for the reasons described in document A/CN.9/WG.I/WP.110 (formerly A/CN.9/WG.I/WP.107), it is in the interests of States and of micro, small and medium-sized enterprises (MSMEs) that such businesses operate in the legally regulated economy. This guide is also intended to reflect the idea that entrepreneurs that have not yet commenced a business may be persuaded to do so in the legally regulated economy if the requirements for formally starting their business are not considered overly burdensome, and if the advantages for doing so outweigh their interest in operating in the extralegal economy.

2. This legislative guide recognizes that in several States, MSMEs, especially micro and small businesses, may not be required to register with the business registry in order to operate in the legally regulated economy, but they may be required to register with other public authorities such as taxation and social security authorities. The operation of a business in the legally regulated economy refers to a business that has complied with all mandatory registration and other requirements of the jurisdiction in which it is doing business.

3. Depending on the jurisdiction in which the business is operating and the legal form of the business, registration with the business registry may be one of the mandatory registration requirements for doing business in that jurisdiction. However, this guide recommends that even States that do not require mandatory business registration should consider permitting, but not necessarily requiring, businesses of all sizes and legal forms to register in the business registry. This permissive approach

could significantly enhance the advantages for businesses operating in the legally regulated economy as set in paragraph 36 of document A/CN.9/WG.I/WP.110.[1]

4. As the Working Group may recall, it agreed[2] at its twenty-fifth session that document A/CN.9/WG.I/WP.110, should be prepared as an introductory document that, once adopted, was intended to form a part of the final text and provide an overarching framework for current and future work by UNCTRAL to assist MSMEs in overcoming the legal barriers faced by them during their life cycle. Underpinning that contextual framework would be a series of legal pillars, which would include both legislative guides currently under preparation by the Working Group – the present guide on key principles of a business registry and the other guide on an UNCITRAL limited liability organization[3] – as well as any other materials adopted by UNCITRAL in respect of MSMEs. In summary, A/CN.9/WG.I/WP.110 currently outlines the following themes as key to UNCITRAL's approach to its MSME work:

(a) The importance of MSMEs in the global economy;

(b) Each State should decide what constitutes a micro, small or medium-sized business in its own economic context, the common factor being that the smallest and most vulnerable businesses require assistance;

(c) Although MSMEs are incredibly disparate in their size, goals, the commercial sector in which they operate and their general nature, they usually face a number of common obstacles;

(d) Improving the business environment assists businesses of all sizes, not only MSMEs;

(e) Participation by MSMEs in the legally regulated economy can assist them in successfully negotiating the obstacles they face;

(f) States should make it simple and desirable for MSMEs to participate in the legally regulated economy by:

(i) Explaining what it means and by setting out the advantages for entrepreneurs, as well as by ensuring appropriate communication of and education on those advantages and opportunities;

(ii) Making it desirable for MSMEs to conduct their activities in the legally regulated economy, for example, by offering them incentives for doing so; and

(iii) Making it easy for MSMEs to operate in the legally regulated economy by enacting laws that:

a. Facilitate creation and operation of legally recognized simple and flexible legal business forms that meet the needs of MSMEs;[4] and

b. Ensure that business registration and any mandatory registration with public authorities is accessible, simple and streamlined.

5. In order to encourage entrepreneurs to operate their business in the legally regulated economy – particularly when business registration is a requirement for them to do so – States may wish to take steps to rationalize and streamline their system of business registration. Faster and simpler procedures to register a business could be expected to assist in business formation of all sizes and types of businesses, not only MSMEs. For these reasons, simplification and streamlining of business registration has become one of the most pursued reforms by States in all regions and at all levels

[1] At its twenty-ninth session, the Working Group requested the Secretariat to clarify what form of registration by a business is required to operate in the "legally regulated economy" as opposed to the "extralegal economy" (para. 22, A/CN.9/928). That clarification has been made to the relevant paragraphs of this guide and of document A/CN.9/WG.I/WP.110.

[2] As agreed by the Working Group (para. 87, A/CN.9/866) and approved by the Commission (*Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17) para. 222).

[3] See A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1.

[4] See A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1.

of development. This trend has generated several good practices, whose features are shared among the best performing economies. In order to assist States wishing to reform their business registration procedures so as to take into consideration the particular needs of MSMEs, or simply to adopt additional good practices to streamline existing procedures, this guide sets out key principles and good practices in respect of business registration, and how to achieve the necessary reforms.

6. Further to discussion in the Working Group and decisions made at its twenty-fifth (October 2015) and twenty-sixth sessions (April 2016),[5] the Secretariat prepared a consolidated draft legislative guide (A/CN.9/WG.I/WP.101), which addressed legal, technological, administrative and operational issues involved in the creation and implementation of a business registration system. The draft combined into a single text the draft commentary (A/CN.9/WG.I/WP.93, Add.1 and Add.2) and recommendations (A/CN.9/WG.I/WP.96 and Add.1) considered by the Working Group at its twenty-fifth and twenty-sixth sessions.

7. At its twenty-eighth session (May 2017), the Working Group reviewed that consolidated text (A/CN.9/WG.I/WP.101) save for the introductory section and draft recommendation 9 ("Core functions of a business registry")[6] and its attendant commentary to which the Working Group agreed[7] to revert at a future session. The changes to the text arising from the deliberations of the Working Group at that session were included in a revised draft of the legislative guide (A/CN.9/WG.I/WP.106) which was considered by the Working Group at its twenty-ninth session (October 2017) save for the introductory section and part of the Annex (paras. 1 to 6 and 8 to 16 and recs. 1 and 3/Annex). The current revision of the legislative guide includes changes arising from the deliberations of the Working Group at that session; guidance to the revisions made is reflected in footnotes throughout the text. As in A/CN.9/WG.I/WP.106, the Secretariat has also made editorial adjustments necessary to facilitate the cohesion and consistency of the text.

A. Purpose of the present guide

8. Business registries are systems established by law that receive, store and make accessible to the public certain information on new and existing businesses that are operating in the jurisdiction of the registry, both when those businesses are established and throughout the course of their lifespan. This process not only enables such businesses to comply with their obligations under the domestic law applicable to them, but it empowers them to participate fully in the legally regulated economy when registration is required for that purpose, and otherwise enables them to benefit from legal, financial and policy support services that are more readily available to registered businesses. Moreover, when information is appropriately maintained and shared by the registry, it allows the public to access business information, thus facilitating the search for potential business partners, clients or sources of finance and reducing risk when entering into business partnerships. In performing its functions, the registry can thus play a key role in the economic development of a State. In addition, since businesses, including MSMEs, are increasingly expanding their activities beyond national borders, registries efficiently performing their functions can play an important role in a cross-border context by facilitating access to business information of interested users from foreign jurisdictions (see also paras. 198 and 199 below), which greatly reduces the risks of transacting and contracting.

9. Business registration systems vary greatly across States and regions, but a common thread to all is that the obligation to register can apply to businesses of all sizes depending on the legal requirements applicable to them under domestic law. Approaches to business registration reforms are most often "neutral" in that they aim at improving the functioning of the registries without differentiating between

[5] See para. 73, A/CN.9/860 and para. 51, A/CN.9/866.
[6] Recommendation 9 of A/CN.9/WG.I/WP.106 is recommendation 10 in this draft of the legislative guide.
[7] See para. 46, A/CN.9/900 and para. 82, A/CN.9/860.

large-scale business activities and much smaller business entities. Evidence suggests, however, that when business registries are structured and function in accordance with certain features, they are likely to facilitate the registration of MSMEs, as well as operating more efficiently for businesses of all sizes. These features are reflected as recommendations in this legislative guide.

10. This legislative guide draws on the lessons learned through the wave of reforms of business registration systems implemented since 2000 by States in various geographic regions.[8] Through this approach, the guide intends to facilitate not only efficient domestic business registration systems, but also cooperation among registries in different national jurisdictions, with a view to facilitating cross-border access to registries by all interested users. Promoting the cross-border dimension of business registration contributes to foster transparency and legal certainty in the economy and significantly reduces the cost of businesses operating beyond their national borders (see also paras. 198 and 199 and rec. 39 below).

11. The present guide supports the view that transitioning to an electronic or mixed (i.e. electronic and paper-based) registration system greatly contributes to promoting the registration of MSMEs. The guide recognizes that adoption of modern technology has not progressed equally among or within States, and it recommends that any reform towards an electronic business registration system should be tailored to the State's technological and socioeconomic capacity. This may include phasing in implementation, particularly if the technology that is adopted requires a complete reengineering of registration processes (see paras. 79 to 83 below). It should be noted that reference to electronic or online registration is not intended to recommend the use of any particular technology, but rather describes the performance of the business registry's functions through electronically operated devices. In keeping with that approach, this guide has been drafted with the aim of accommodating the use of existing information and communications technology (ICT) as well as any emerging technology, such as distributed ledger technology, that States may consider appropriate when reforming their registration systems.[9]

12. Other features that encourage the registration of MSMEs include providing registration and post-registration services at no cost or at low cost, and collecting and maintaining good quality and reliable information on registered businesses. Importantly, establishing a one-stop shop for business registration and registration with other public authorities, such as taxation and social security authorities, greatly facilitates such registration, particularly in the case of MSMEs. In this regard, it should be noted that the terms "business registry" and "one-stop shop" (i.e. a single interface for business registration) as used in this draft guide are not intended to be interchangeable. When these materials refer to the "business registry", it means the system for receiving, storing and making accessible to the public certain information about business entities. When the term "one-stop shop" is used, it refers to a single entry point, physical or electronic, that a business can use to achieve not only its registration with the business registry, but that acts as a single entry point to all other regulatory functions in the State that relate to starting and operating a business, including, at a minimum, registering for tax purposes and for social security services. This guide supports the view that one-stop shops are a key means to improve institutional interoperability among relevant public authorities and that States should use one-stop shops to establish integrated registration procedures for the establishment of a business (see paras. 100 and 101 and rec. 14 below).[10]

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[8] In keeping with a decision of the Working Group at its twenty-ninth session to avoid using terms such as "developing" or "developed" States, the Secretariat has made those adjustments in the text (paras. 48 and 55, A/CN.9/928).

[9] The Secretariat has included a reference to "distributed ledger technology" and other emerging technologies further to a request of the Working Group (see also para. 69 below) (para. 47, A/CN.9/928).

[10] The Secretariat has added the final sentence of this paragraph further to the decision of the Working Group at its twenty-ninth session that additional reference to the concept of "interoperability" should be included (para. 52, A/CN.9/928).

13. These materials have benefited from various tools prepared by international organizations that have supported such reform processes in numerous regions around the world. Data made available through the activity of international networks of business registries that, among other activities, survey and compare the practices of their affiliates in various States around the world have also been referenced. The main sources used in the preparation of this draft legislative guide include:

- How Many Stops in a One-Stop Shop? (Investment Climate, World Bank Group, 2009)
- Outsourcing of business registration activities, lessons from experience (Investment Climate Advisory Services, World Bank Group, 2010)
- Innovative Solutions for Business Entry Reforms: A Global Analysis (Investment Climate, World Bank Group, 2012)
- Reforming Business Registration: A Toolkit for the Practitioners (Investment Climate, World Bank Group, 2013)
- The annual International Business Registers Report (prepared previously by ECRF, and currently by ASORLAC, CRF, ECRF and IACA)
- The Business Facilitation Programme website (developed by UNCTAD)[11]
- Guide to the International Business Registers Surveys 2016 (available at http://www.ecrforum.org)
- […]

[*The Working Group may wish to note that reference to these specific resources will be changed in the final text to reference to the international organizations that prepared them*]

14. This legislative guide is addressed to States interested in the reform or improvement of their business registration system, and to all stakeholders in the State that are interested in or actively involved in the design and implementation of business registries, as well as to those that may be affected by or interested in the establishment and operation of a business registry. These may include:

(a) Policymakers;

(b) Registry system designers, including technical staff charged with the preparation of design specifications and with the fulfilment of the hardware and software requirements for the registry;

(c) Registry administrators and staff;

(d) Registry users, including business persons, consumers, and creditors, as well as the general public and all others with an interest in the appropriate functioning of the business registry;

(e) Credit agencies and other entities that will provide credit to a business;

(f) The general legal community, including academics, judges, arbitrators and practising lawyers; and

(g) All those involved in company law reform and the provision of technical assistance in the simplification of business registration, such as international organizations, bilateral donors, multilateral development banks and non-governmental organizations active in the field of business registration.

15. The present guide uses neutral legal terminology so that its recommendations can be adapted easily to the diverse legal traditions and drafting styles of different States. This draft legislative guide also takes a flexible approach, which will allow its recommendations to be implemented in accordance with local drafting conventions and legislative policies regarding which rules must be incorporated in principal

[11] UNCTAD is the United Nations Conference on Trade and Development. See http://businessfacilitation.org/index.html.

legislation and which may be left to subordinate regulation or to ministerial or other administrative rules.

B. Terminology

16. The meaning and use of certain expressions that appear frequently in this draft legislative guide is explained in this paragraph. It is to be noted that whenever terms such as annual accounts, periodic returns, documents, forms (such as search forms, registration forms or other forms to request registry services), notices, notifications and written materials are used, reference is intended to include both their electronic and paper versions unless otherwise indicated in the text. Frequently used expressions include the following:

- *Annual accounts*: The term "annual accounts" means financial information on the business' activities prepared at the end of a financial year of the business (cf. "periodic returns").
- *Branch*: The term "branch" means an entity carrying on business in a new location either within the jurisdiction in which it was formed or in another domestic or cross-border jurisdiction. The branch is not a subsidiary and does not have a separate legal personality from the original or main business.
- *Business name*: The term "business name" means a name registered on behalf of a business.
- *Business registry* or *Business registration system*: The term "business registry" or "business registration system" means a State's system for receiving, storing and making accessible to the public certain information about businesses, as distinct from mandatory registration by the business with other public authorities (e.g. taxation and social security authorities).
- *Deregistration*: The term "deregistration" means indicating in the registry that a business is no longer registered.
- *Electronic signature*: The term "electronic signature" means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message.[12]
- *Good quality and reliable*: A business registration system and the information it contains is of "good quality and reliable" when the registered information is kept as current and accurate as possible and the system may be considered positively in terms of performance and security. The term "reliable" does not refer to whether the information is legally binding on the registry, the registrant, the registered business, or third parties.[13]
- *ICT*: The term "ICT" means information and communications technology.
- *Information products*: The term "information products" means information that is processed or published by the business registry (in electronic or paper form) to convey data requested by users.
- *Information services*: The term "information services" means the system established by the business registry through which it supplies information products to users.[14]

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[12] See UNCITRAL Model Law on Electronic Signatures (2001), article 2.

[13] At its twenty-ninth session, the Working Group agreed to replace the definition of "reliable" with that of "good quality and reliable", which was said to be more consistent with the agreed revision of recommendation 4(d) (recommendation 3(d) in A/CN.9/WG.I/WP.106), and to delete the phrase "is not a legal standard" from the definition (para. 32, A/CN.9/928).

[14] The Secretariat has included the definition of "information products" and "information services" further to a comment of the Working Group at its twenty-ninth session that such terms could be defined in the section on "Terminology" (para. 90, A/CN.9/928).

- *Law*: The term "law" means the applicable law in the enacting State and is intended to include both the specific rules adopted to establish the business registry (whether such rules are found in legislation or in administrative regulations or guidelines; see also para. 1 in the Annex) and the broader body of domestic law that may be relevant to issues related to the business registry, but are found outside of the specific rules establishing the business registry.

- *Legally regulated economy*: The term "legally regulated economy" means economic activity that takes place in a State within the context of the legal and regulatory regime that the State has established to govern such activity. The legally regulated economy does not include commercial activity that takes place outside of that context (sometimes referred to as the "extralegal economy"), nor does it include illicit trade in goods or services.

- *Micro, small and medium-sized enterprises (MSMEs)*: The term "MSMEs" means micro, small and medium-sized enterprises as they are defined according to the criteria established by the State undertaking the business registration reforms.

- *One-stop shop*: The term "one-stop shop" means a physical office, a single interface on an electronic platform or an organization that carries out more than one function relating to the registration of a business with at least the business registry, as well as taxation and social security authorities necessary for the business to operate in the legally regulated economy. A one-stop shop should ensure the interoperability of all public authorities with which a business is required to register, and allow for the simultaneous sharing of information on the business among those authorities, as well as the use of a single integrated application form for registration with, and payment to, those authorities.[15]

- *Periodic returns*: The term "periodic returns" means a statement provided annually or at other prescribed intervals which gives essential information about a business' composition, activities, and financial status, and which, subject to applicable law, registered businesses may be required to file with an appropriate authority (cf. "annual accounts").

- *Protected data*: The term "protected data" means all information that must be kept confidential pursuant to the applicable law of the enacting State.

- *Registered business*: The term "registered business" means a business that, further to filing an application for registration, has been officially registered in the business registry.

- *Registered information*: The term "registered information" means information regarding the business that has been submitted to the registry, including protected data and information that will be made public.

- *Registrant*: The term "registrant" means the natural or legal person that submits the prescribed application form and any additional documents to a business registry.

- *Registrar*: The term "registrar" means the natural or legal person appointed pursuant to domestic law to supervise and administer the operation of the business registry.[16]

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[15] At its twenty-ninth session, the Working Group agreed to standardize the phrase describing the main relevant public authorities in business registration throughout the legislative guide and to make reference to an integrated application form with those authorities in the definition of "one-stop shop" (para. 54, A/CN.9/928).

[16] The Secretariat has adjusted the definition of "registrar" to ensure improved consistency with paragraph 48 (para. 45 of A/CN.9/WG.I/WP.106) of this guide.

- *Unique identifier*[17]: The term "unique identifier" means a set of characters (numeric or alphanumeric) that is allocated only once to a business and that is used consistently by the public authorities of a State.

C. Legislative drafting considerations

17. States implementing the principles contained in this legislative guide should consider whether to include them in a law, in a subordinate regulation, in administrative guidelines or in more than one of these texts, depending on their legislative drafting conventions. This guide does not distinguish between these legislative mechanisms and uses "law" to denote both the rules adopted by the enacting State to establish the business registry and those provisions of domestic legislation in the broader sense that are somehow relevant to and touch upon issues related to business registration.

D. The reform process

18. Streamlining business registration to meet the key objective of simplifying the registration process and making it time and cost efficient, as well as user friendly (both for registrants and users searching the registry), usually requires undertaking reforms that address the enacting State's legal and institutional framework. It may also be necessary to reform the business processes that support the registration system. Sometimes reforms are needed in all of these areas. The approach taken in these reforms may vary considerably among States as the design and features of a registration system are influenced by the State's level of development, priorities and laws. There are, however, several common issues that States should consider and several similar recommended steps for reform regardless of jurisdictional differences that may exist. These issues are examined below.

1. The reform catalysts

19. Business registration reform is a multifaceted reform process that addresses various aspects of the State apparatus; its implementation requires the participation of a broad range of stakeholders and a thorough understanding of the State's legal and economic conditions, as well as of the practical needs of registry personnel and the intended users of the registry. To be successful, the reform must be driven by the need to improve private sector development and, for this reason, it is advisable that the reform be part of a larger private sector development or public sector modernization programme. It is thus essential to gain an understanding of the importance of business registration in relation to other business environment challenges and of its relationship to other potential reforms. This analysis will require, as crucial preliminary steps, ensuring that domestic circumstances are amenable to a business registration reform programme, that incentives for such a reform exist and that there is support for such initiatives in the government and in the private sector prior to embarking on any reform effort.

(a) Relevance of a reform advocate

20. Support or even leadership from the highest levels of the State's government is of key importance for the success of the reform process. The engagement of relevant government ministries and political leadership in the reform effort facilitate the achievement of consensus on the steps required. This can be particularly important to facilitate access to financial resources, to make and implement decisions, or when it is necessary to move business registry functions from one branch of government to another or to outsource them.

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[17] Further to a suggestion made by the Working Group at its twenty-ninth session, that the use of the terms "unique business identifier" and "unique identifier" should be made consistent, the Secretariat has made the necessary revisions (para. 58, A/CN.9/928).

(b) The steering committee

21. In order to oversee the day-to-day progress of the reform and to manage difficulties as they may arise, it is advisable that a steering committee be established to assist the State representative or body leading the reform. In addition to experts with technological, legal and administrative expertise, this committee should be composed of representatives of the public and private sector and should include a wide range of stakeholders, including those who can represent the perspectives of intended users. It may not always be necessary to create such a committee, since it may be possible to use existing mechanisms; in any event, a proliferation of committees is to be avoided, as their overall impact will be weakened.

22. The steering committee should have clearly defined functions and accountability; it is advisable that its initial setup be small and that it should grow progressively as momentum and stakeholder support increase. Although linked to the high-level government body spearheading and advocating for the reform, the committee should operate transparently and independently from the executive branch. In certain jurisdictions, regulatory reform bodies have later been transformed into more permanent institutions that drive ongoing work on regulatory governance and regulatory impact analysis.

23. The steering committee must nurture the reform process and consider how to address concerns raised in respect of it. Concerns could include those arising from bureaucratic inertia, or fears that registry employees may lose their jobs if their ICT skills are weak or if technology replaces human capital. Thus, it is likely to be important for the body overseeing the reform to be able to consider diverse interests and fully inform potential beneficiaries and political supporters.

(c) The project team

24. In collaboration with the steering committee, it is advisable that a project team be assigned the task of designing a reform programme tailored to an enacting State's circumstances and providing technical expertise to implement the reforms. A successful reform will require a team of international and local specialists, with expertise and experience in business registration reform, in legal and institutional reform, and in a variety of technology matters (for example, software design, hardware, database and web specialists).

(d) Awareness-raising strategies

25. States embarking on a reform process should consider appropriate communication strategies aimed at familiarizing businesses and other potential registry users with the operation of the registry and of the legal and economic significance of business registration. This effort should include informing businesses of the benefits of registration with the business registry and mandatory registration with other public authorities (e.g. taxation and social security), and of participation in the legally regulated economy (e.g. visibility to the public, the market and improved access to the banking system). Awareness should also be increased of the incentives that the State may offer businesses to operate in the legally regulated economy, including (see para. 27 below) the opportunity to participate in public procurement; legal validation of the business; access to flexible legal business forms and asset partitioning; the possibility of protecting the business' unique name and other intangible assets; opportunities for the business to grow and to have access to a specialized labour force and access to government assistance programmes. The awareness-raising strategy should also ensure that clear information is readily accessible on compliance with the law, fulfilment of the obligations taken on by registering (e.g. the payment of taxes) and potential penalties for non-compliance.[18]

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[18] For a more detailed presentation of the advantages of operating in the legally regulated economy, and the incentives that can be offered to businesses that do so, see paragraphs 36 and 40 to 42 of A/CN.9/WG.I/WP.110. For more information on awareness-raising and compliance, see

26. Effective communication may also be expected to encourage the development of new businesses and to encourage existing businesses to comply with mandatory registrations, as well as to provide signals to potential investors about the enacting State's efforts to improve the business environment. Awareness-raising strategies should commence early in the reform process and should be maintained throughout it, including after the enactment of the legal infrastructure and implementation of the new business registration system. In coordination with the steering committee, the project team should determine which cost-effective media can best be used: these can include private-public dialogues, press conferences, seminars and workshops, television and radio programmes, newspapers, advertisements, and the preparation of detailed instructions on submitting registration information and obtaining information from the business registry. In order to raise MSME awareness of the reforms to the business registration system, it may be advisable to consider communication strategies tailored specifically to that audience.[19]

(e) Incentives for businesses to register

27. In addition to an efficient awareness-raising campaign, States should consider adding incentives for MSMEs and other businesses to comply with mandatory registration with public authorities through the provision of ancillary services for businesses that are in compliance. The types of incentives will vary according to the specific economic, business and regulatory context, and may include: promoting access to credit for registered businesses; offering accountancy training and services as well as assistance in the preparation of a business plan; providing credits for training costs; establishing lower and simplified taxation rates and tax mediation services; providing business counselling services; providing monetary compensation, government subsidies or programmes to foster MSME growth and providing low-cost technological infrastructure.[20]

2. Phased reform process

28. The duration of a reform process can vary considerably, depending on the types of reforms implemented and on other circumstances relevant to the particular economy. While the most comprehensive approach may entail a complete reform of the business registry and the law establishing it, this may not be realistic in all cases and enacting States may wish to consider a phased implementation of their reform. In States with a large number of unregistered businesses, a reform process that adopts a "think small" approach at the outset might be more effective than a reform with a broader focus, which could be introduced at a later stage. For example, if the main objective is initially to promote the registration of MSMEs, simple solutions addressing their needs at the local level may be more successful than introducing sophisticated automated systems that require high-level technological infrastructure, and changes in the legal and institutional framework, and that may be more appropriate to larger businesses or businesses operating in the international market. Even when the reform is carried out in jurisdictions with more advanced business registration systems, it may be advisable to "start small" and pilot the reforms at a local level (for example, in a district or the capital) before extending them throughout the State. Success in a pilot stage can have a strong demonstration effect, and is likely to build support for continued reform.

I. Objectives of a business registry

29. The focus of the present legislative guide is primarily the business registry of a State and the adoption of best practices in order to optimise the operation of the business registration system for its users so that it is simple, efficient and cost-effective. However, in most States, in order for a business to participate in the

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paragraphs 125 (para. 124 of A/CN.9/WG.I/WP.106), 212 and 213 (paras. 207 to 209 of A/CN.9/WG.I/WP.106) of this draft guide.

[19] See paragraphs 37 to 39 of A/CN.9/WG.I/WP.110.

[20] For a more comprehensive list of incentives, see paras. 40 to 42 of A/CN.9/WG.I/WP.110.

legally regulated economy, it must usually register not only with the business registry but also with various additional public authorities (see also para. 63 below). In addition to the business registry, these authorities often include taxation and social security authorities. States wishing to facilitate the entry of businesses into the legally regulated economy should thus assess the multiple public authorities with which a business must register and consider ways to reduce the burden on businesses by streamlining those requirements. As examined in greater detail in this legislative guide (see paras. 93 to 103 and rec. 14 below), a best practice to accomplish that goal would be for a State to establish a one-stop shop for business registration and for registration, at a minimum, with taxation and social security authorities, subject to the legal and institutional organization of the enacting State.

Recommendation 1: Objectives of the business registry[21]

The law should ensure the establishment of a system of business registration that facilitates the operation of businesses in the legally regulated economy as part of the system of all registrations that may be required of a business and may include registration with business registry, taxation and social security authorities, as well as with other authorities.

A. Purposes of the business registry

30. The opening provisions of the law that establishes the business registry should set out explicitly the purpose of a system for the registration of businesses.

31. The law of the enacting State should establish which businesses are required to register with the business registry. Currently, many States require only businesses of a certain legal form to register, often focusing on those that have limited liability status. Requiring such businesses to register puts third parties dealing with them on notice of their limited liability status, as well as providing additional information in respect of the business. However, since business registration may be viewed as a key conduit through which businesses of all sizes and legal forms interact with the State and operate in the legally regulated economy, States may wish to permit (but not necessarily to require) all such businesses to register in the business registry. Through registration, a business becomes more visible not only in the marketplace, but also to States, who may then be able to more easily identify MSMEs in need of support, and design appropriate programmes for those purposes (see the discussion in paras. 40 to 42 of A/CN.9/WG.I/WP.110). Permitting voluntary registration of a range of different legal forms of business may encourage the registration of MSMEs, assisting them in their growth in addition to facilitating their operation in the legally regulated economy (see also para. 3 above, para. 131 and rec. 20 below and A/CN.9/WG.I/WP.110).[22]

32. The following overarching principles should govern an effective system of business registration: (a) enabling businesses of all sizes and legal forms to be visible in the marketplace and to operate effectively in the legally regulated economy; and (b) enabling MSMEs to increase their business opportunities and to improve the profitability of their businesses.

Recommendation 2: Purposes of the business registry

The law should provide that the business registry is established for the purposes of:

(a) Providing to a business an identity that is recognized by the enacting State; and

[21] At its twenty-ninth session, the Working Group agreed on the insertion of an additional recommendation after paragraph 29 (para. 26 of A/CN.9/WG.I/WP.106) (para. 24, A/CN.9/928).

[22] As agreed by the Working Group at its twenty-ninth session, the Secretariat has added a reference to recommendation 20 (recommendation 19 in A/CN.9/WG.I/WP.106) in paragraph 31 (para. 28 of A/CN.9/WG.I/WP.106). In respect of the comments of the Working Group that any necessary clarification should be made to indicate that it was for each State to determine which businesses were required to register, the opening sentence of paragraph 31 and the reference to voluntary registration in the second and third sentences provide information on this aspect (para. 25, A/CN.9/928).

(b) Receiving, storing and making information in respect of registered businesses accessible to the public.[23]

B. Simple and predictable system of laws permitting registration for all businesses

33. States should set the foundations of their business registry by way of law. In order to foster a transparent and reliable business registration system, with clear accountability of the registrar (see also paras. 47 and 49 below), that law should be simple and straightforward. Care should be taken to limit or avoid any unnecessary use of discretionary power, and to provide for appropriate safeguards against its arbitrary use. However, some discretion should be permitted to the registrar in order to ensure the smooth functioning of the system. For example, subject to the requirements of the law and prior notice to the registrant, the registrar may be allowed to correct errors in the registered information (see also paras. 153 and 233 below).

34. The applicable law in each State should determine which business forms are required to register, and which additional conditions those businesses may have to fulfil as part of that requirement. Business registration may not be required for all businesses, but it may facilitate the effective participation of all businesses, including MSMEs, in the legally regulated economy (see paras. 129 to 132 below and rec. 20). States should thus consider enabling[24] businesses of all sizes and legal forms to register in an appropriate business registry, or create a single business registry that is tailored to accommodate registration by a range of businesses of different sizes and different legal forms.

35. The law governing registration with the business registry and other public authorities (including taxation and social security authorities) should also provide for simplified registration and post-registration procedures in order to promote registration of MSMEs. The goal should be for States to establish procedures with only the minimum necessary requirements for MSMEs and other businesses to register in order to operate in the legally regulated economy. Of course, businesses with more complex legal forms would be subject to additional information requirements under the law of the enacting State as a consequence of their particular legal form or type of business.

36. Further, regardless of the approach chosen to maintain updated information in the business registry, it would be advisable to make updating the records of MSMEs as simple as possible. This could involve a number of different approaches examined in greater detail below, such as extending the period of time for such businesses to declare a change; harmonizing the information needed when the same information is repeatedly required; or exempting MSMEs from certain obligations in specific cases (see also paras. 163 to 167 and rec. 30 below).

Recommendation 3: Simple and predictable system of laws permitting registration for all businesses

The law should:

(a) Adopt a simple structure for rules governing the business registry and avoid the unnecessary use of exceptions or granting of discretionary power; and

[23] At its twenty-ninth session, the Working Group agreed to: (a) end recommendation 2(a) (recommendation 1(a) in A/CN.9/WG.I/WP.106) after the term “enacting State”; and (b) to make recommendation 2(b) compatible with the definition of “business registry or business registration system” in paragraph 16 of the legislative guide (para. 13 of A/CN.9/WG.I/WP.106) (para. 26, A/CN.9/928).

[24] The Secretariat has added a reference to recommendation 20 (recommendation 19 in A/CN.9/WG.I/WP.106) in paragraph 34 (para. 31 of A/CN.9/WG.I/WP.106) as agreed by the Working Group at its twenty-ninth session (para. 28, A/CN.9/928).

(b) Ensure that micro, small and medium-sized enterprises (MSMEs) that are required or permitted to register are subject to the minimum procedures necessary pursuant to the law.[25]

C. Key features of a business registration system

37. To be effective in registering businesses of all sizes, a business registration system should ensure that, to the extent possible, the registration process is simple, time and cost efficient, user-friendly and publicly accessible. Moreover, care should be taken to ensure that the publicly available registered information on businesses is easily searchable and retrievable, and that the process through which the registered information is collected and maintained as well as the registry system are kept as current, reliable and secure as possible.

38. The reliability of the business registration system and the information contained in the registry is a recurring theme in the present guide. In keeping with the definition of "good quality and reliable" in paragraph 16 above, the reliability of the system refers to a system that may be considered positively in terms of performance and security and in which registered information is kept as current and accurate as possible. "Good quality and reliable" does not refer to the method that a State uses to ensure that reliability, and this legislative guide leaves it to each enacting State to determine how best to ensure the reliability of its business registration system and the information it contains in light of its own context and legal tradition. Reliability in this guide does not refer to whether or not the information in the business registry is legally binding on the registry, the registrant, the registered business or on third parties, nor to whether the enacting State uses a declaratory approach or an approval approach in respect of its business registration system. However, the extent to which information in the registry is legally binding and whether the State adopts a declaratory system or an approval system (see paras. 121 to 123 below) are aspects that should be made clear by the enacting State in its business registry law and on the business registry itself.

39. Regardless of which registration system is adopted, maintaining high quality, current and reliable information is imperative for the business registry in order to make the information useful for the registry users and to establish confidence in business registry services. This applies not only to the information provided when applying to register a business, but also to the information that the entrepreneur submits during the lifetime of the business. It is thus important that the information meets certain requirements in the way it is submitted to the registry and then made available to the public (see, for example, paras. 40 and 41 below).[26] For these reasons, States should devise provisions that allow the registry to operate according to principles of transparency and efficiency in the way information is collected, maintained and released.

40. The registry can implement certain procedures in order to ensure that the information maintained in the registry is of good quality and reliable. Those procedures, which will be further discussed below, can be grouped into two broad categories. One group comprises those measures aimed at protecting the identity and integrity of a business through the prevention of corporate identity theft or the adoption of identity verification methods for those who provide information to the business registry. A wide range of measures can be implemented in this regard, such

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[25] At its twenty-ninth session, the Working Group requested the Secretariat to: (a) delete recommendation 3(b) (recommendation 2(b) in A/CN.9/WG.I/WP.106); (b) make the necessary adjustments to the title of the recommendation; (c) adjust the text of recommendation 3(c) to clarify that business registration was not mandatory for MSMEs; and (d) adjust the final phrase of recommendation 3(c) along the lines of "subject to the minimum procedures as required by law" (paras. 29 and 30, A/CN.9/928).

[26] The Secretariat has included a cross reference to paragraphs 40 and 41 (paras. 37 and 38 of A/CN.9/WG.I/WP.106) in response to concerns expressed by the Working Group at its twenty-ninth session about the lack of clarity of the penultimate sentence of paragraph 39 (para. 36 of A/CN.9/WG.I/WP.106) (para. 32, A/CN.9/928).

as the use of monitoring systems or establishing access through the use of passwords to prevent corporate identity theft; or the use of electronic signatures and electronic certificates to verify the identity of those who submit information to the registry. Business registries usually adopt more than one type of measure.

41. Another group of measures that registries can implement to ensure the good quality and reliability of the registered information pertains to the way information is collected and maintained in the registry and the frequency with which it is updated (see paras. 159 to 167 and recs. 29 and 30 below). Ensuring that the registry record is regularly updated is of key importance. In electronic registry systems, the software will usually provide for automated periodic updating as amendments are submitted by businesses. However, when registries use paper-based or mixed systems, the registrar must ensure that updates to the registry record are entered as soon as practicable, and if possible, in real time or at least once daily. To underpin these measures, it is important for States to establish effective enforcement mechanisms upon which registries can rely when a business fails to provide accurate and complete information (see paras. 208 to 213 and recs. 44 and 45 below).

42. Moreover, in order to enhance the quality and reliability of the information deposited in the registry, enacting States should preserve the integrity and security of the registry record itself. Steps to achieve those goals include: (a) requiring the registry to request and maintain the identity of the registrant; (b) obligating the registry to notify promptly the business about the registration and any changes made to the registered information; and (c) eliminating any discretion on the part of the registrar to modify information that has been submitted to the registry.[27]

Recommendation 4: Key features of a business registration system

The law should ensure that the business registration system contains the following key features:

(a) Registration is publicly accessible, simple, user-friendly and time- and cost-efficient;

(b) The registration methods are suited to the needs of MSMEs;

(c) The publicly available registered information on businesses is easily searchable and retrievable; and

(d) The registry system and the registered information are of good quality and reliable, and are maintained that way through periodic updates and system verification.[28]

II. Establishment and functions of the business registry

43. Several different approaches may be taken in establishing an effective business registration system, but there is broad agreement on certain key objectives of such systems. Regardless of differences in the way business registries may operate, efficient business registries have a similar structure and perform similar functions when carrying out the registration of a new business or in recording the changes that may occur in respect of an existing business.

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[27] At its twenty-ninth session, the Working Group requested the Secretariat to replace the phrase “to deny access to registry services” in subparagraph 42(c) (subpara. 39(c) of A/CN.9/WG.I/WP.106) (after “registry staff to”) with text along the lines of “to modify information that has been submitted to the registry” (para. 34, A/CN.9/928).

[28] At its twenty-ninth session, the Working Group requested the Secretariat: (a) to ensure consistency between the terms “system”, “process” and “information” in paragraph 37 (para. 34 of A/CN.9/WG.I/WP.106) and recommendation 4 (recommendation 3 in A/CN.9/WG.I/WP.106); (b) to clarify in recommendation 4(d) that the registry system and the registered information are of good quality and reliable when they are secure and kept current with periodic updates; and (c) to adjust the terminology of recommendation 4(d), since certain terms might not be used interchangeably in relation to systems and information. The Secretariat has implemented those changes (paras. 31 and 32, A/CN.9/928).

A. Responsible authority

44. In establishing or reforming a business registry, enacting States will have to decide how the business registry will be organized and operated. Different approaches can be taken regarding its form, the most common of which is based on oversight by the government. In such States, a government department or agency, staffed by civil servants, and usually established under the authority of a particular government department or ministry, operates the registration system. Another type of organization of a business registry is one that is subject to administrative oversight by the judiciary. In such contexts, the registration body might be a court or a judicial registry whose function, usually specified in the applicable commercial code, is concerned with verifying the business requisites for registration but does not require prior judicial approval of a business seeking to register.

45. States may also decide to outsource some or all of the registry operations through a contractual or other legal arrangement that may involve public-private partnerships or the private sector. When registration is outsourced to the private sector, it remains a function of the government, but the day-to-day operation of the system is entrusted to privately owned companies. In one jurisdiction, for example, such an outsourcing was accomplished by way of appointing a private company, in accordance with the law, as the assistant registrar with full authority to run the registration function. However, operating the registry through public-private partnerships or private sector companies does not yet appear to be as common as the operation of the registry by a government agency.[29] States may also decide to form entities with a separate legal personality, such as chambers of commerce, with the object of managing and developing the business registry, or to establish by law registries as autonomous or quasi-autonomous agencies, which can have their own business accounts and operate in accordance with the applicable regulations governing public authorities. In one State, for example, the business registry is a separate legal person that acts under the supervision of the Ministry of Justice, while in another State the registry is an administratively separate executive agency of a government department, but does not have separate legal status. In deciding which form of organization to adopt, States will have to consider their specific domestic circumstances, evaluate the challenges and trade-offs of the various forms of organization and then determine which one best meets the State's priorities and can be achieved within the limits of its human, technological and financial resources.

46. While the day-to-day operation of the registry may be delegated to a private sector firm, the enacting State should always retain the liability for ensuring that the registry is operated in accordance with the applicable law. For the purposes of establishing public trust in the business registry and preventing the unauthorized commercialization or fraudulent use of information in the registry record, the enacting State should retain its competence over the registry record. Furthermore, the State should also ensure that, regardless of the daily operation or the structure of the business registry, the State retains the right to control the access to and use of the data and information in the registry.

Recommendation 5: Responsible authority

The law should provide that:

(a) The business registry should be operated by the State or by an authority appointed by that State; and

(b) The State retains its competence over the business registry.

[29] Arrangements involving contracting with the private sector to provide business registration services require careful consideration of several legal and policy issues, such as the responsibilities of the government and the private provider, the form of the arrangements, the allocation of risk, and dispute resolution.

B. Appointment and accountability of the registrar

47. The law of the State should set out the procedure to appoint and dismiss the registrar, as well as the duties of the registrar, and the authority empowered to supervise the registrar in the performance of those duties.

48. "Registrar" is a defined term and refers to a natural or legal person appointed to supervise and administer the business registry (see para. 16 above). In keeping with the practice of some States, it should also be noted that the appointment of a registrar is intended to include all methods by which a registrar can be selected, including through election. Further, States may permit the registrar to delegate its powers to persons appointed to assist the registrar in the performance of its duties.[30]

49. In addition, the laws of the enacting State should clearly set out the functions of the registrar in order to ensure the registrar's accountability in the operation of the registry and the minimization of any potential for abuse of authority. In this regard, the applicable law of the enacting State should establish principles for the liability of the registrar and the registry staff to ensure their appropriate conduct in administering the business registry (the potential liability of the registrar and the registry staff are addressed in paras. 214 to 219 and rec. 46 below).

Recommendation 6: Appointment and accountability of the registrar

The law should:

(a) Provide that [*the person or entity authorized by the enacting State or by the law of the enacting State*] has the authority to appoint and dismiss the registrar and to monitor the registrar's performance; and

(b) Determine the registrar's powers and duties and the extent to which those powers and duties may be delegated.

C. Transparency in the operation of the business registration system

50. Laws that foster the transparent and reliable operation of the system for business registration have a number of features. They should allow registration to occur as a simplified process[31] with a limited number of steps, and they should limit interaction with registry authorities, as well as provide short and specified turn-around times, be inexpensive, result in registration of a long-term or unlimited duration, apply throughout the jurisdiction and make registration easily accessible for registrants.

51. Registries should also establish "service standards" that would define the services to which users are entitled and may expect to receive, while at the same time providing the registry with performance goals that the registry should aim to achieve. Such service standards could include, for example, rules on the correction of errors (see paras. 33 above, and 153 and 233 below), rules governing the maximum length of time for which a registry may be unavailable (such as for electronic servicing) and providing advance notice of any expected down time. Service standards contribute to ensuring further transparency and accountability in the administration of the registry, as such standards provide benchmarks to monitor the quality of the services provided and the performance of the registry staff.

Recommendation 7: Transparency in the operation of the business registration system

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[30] At its twenty-ninth session, the Working Group agreed that the term "should" in the final sentence of paragraph 48 (para. 45 of A/CN.9/WG.I/WP.106) should be changed to "may", and that the commentary should be adjusted to note that the "appointment" of a registrar was intended to include all methods by which a registrar was selected, including by way of election (para. 36, A/CN.9/928).

[31] At its twenty-ninth session, the Working Group requested the Secretariat to include the concept of simplification of the registration process in paragraph 50 (para. 47 of A/CN.9/WG.I/WP.106) (para. 37, A/CN.9/928).

The law should ensure that the rules, procedures and service standards that are developed for the operation of the business registration system are made public to ensure transparency of the registration procedures.[32]

D. Use of standard registration forms

52. Another approach that is often used to promote transparency and reliability in the operation of the business registry is the use of simple standard registration forms paired with clear guidance to the registrant on how to complete them. Such forms can easily be completed by businesses without the need to seek the assistance of an intermediary, thus reducing the cost and de facto contributing to the promotion of business registration among MSMEs. These forms also help prevent errors in entering the data by business registry staff, thus speeding up the overall process. In some jurisdictions, the adoption of standardized registration forms has been instrumental in streamlining the registration requirements and disposing of unnecessary documents. Moreover, in jurisdictions with enhanced interoperability between the public authorities involved in the establishment of a business (e.g. the business registry, taxation and social security authorities), the adoption of a standardized registration form that consolidates in one form all of the information required of a business by such authorities has reduced duplication of information requests and has enabled the streamlining of registration procedures with multiple authorities. It should be noted that the use of standard registration forms should not preclude a business from submitting to the registrar additional materials and documents required by applicable law for the creation of the business, or in the exercise of the freedom of contract in establishing the business, such as agreements in respect of the internal operation of the business or additional information in respect of its financial state.[33]

Recommendation 8: Use of standard registration forms

The law should provide that simple[34] standard registration forms are introduced to enable the registration of a business and the registrar should ensure that guidance is available to registrants on how to complete those forms.

E. Capacity-building for registry staff

53. Once a reform of the business registration system has been initiated, developing the capacity of the personnel entrusted with business registration functions is an important aspect of the process. Poor service often affects the efficiency of the system and can result in errors or necessitate multiple visits to the registry by users. Capacity development of registry staff could not only focus on enhancing their performance and improving their knowledge of the new registration processes, ICT solutions and client orientation, but staff could also be trained in new ways of improving business registration.

54. Different approaches to capacity-building can be followed, from the more traditional training methods based on lectures and classroom activities, to more innovative ways that can be driven by the introduction of new business registration systems. In some jurisdictions, team-building activities and role-playing have been

[32] At its twenty-ninth session, the Working Group agreed to: (a) change the phrase “rules or criteria” to “rules, procedures and service standards”; and (b) include the phrase “developed for the operation of the business registration system” (para. 38, A/CN.9/928). Moreover, it was agreed that all recommendations in the draft guide should commence with: “The law should” (para. 89, A/CN.9/928).

[33] At its twenty-ninth session, the Working Group agreed to incorporate the text of footnote 58 in A/CN.9/WG.I/WP.106 and to include a reference to Part VII (para. 39, A/CN.9/928). The Secretariat has not included a reference to Part VII in the commentary, since it may not be consistent with the text of paragraph 52 (para. 49 of A/CN.9/WG.I/WP.106), as recommendation 40 and its commentary refer to the approach States should take when establishing fees for business registry services.

[34] At its twenty-ninth session, the Working Group agreed to insert the word “simple” before “standard registration forms” (para. 39, A/CN.9/928).

used with some success, since reforms often break barriers between various government departments and require the improvement of the flow of information among them, as well as an understanding of different aspects of the procedures with which specific registry staff may not be familiar. In other cases, States have also opted for developing action plans with annual targets in order to meet standards of performance consistent with global best practices and trends, and they have linked promotions and bonuses for staff to the achievement of the action plan's goals. In other cases, States have decided to introduce new corporate values in order to enhance the public service system, including business registration. Although the relevant governmental authority will usually take the lead in organizing capacity development programmes for the registry staff, the expertise of local legal and business communities could also be enlisted to assist.

55. Peer-to-peer learning and the establishment of national and international networks are also effective approaches to build capacity to operate the registry. These tools enable registry staff to visit other jurisdictions and States with efficient and effective business registration systems. In order to maximize the impact of such visits, it is important that they occur in jurisdictions familiar to the jurisdiction undergoing the reform. This approach has been followed with success in several jurisdictions engaging in business registration reform. International forums and networks also provide platforms for sharing knowledge and exchanging ideas for implementing business registration reform among registry personnel from around the world.

56. In order to facilitate business registration, it may be equally important to build capacity on the part of intermediaries in States where the services of those professionals are required to register a business (see paras. 121 and 122 below).

Recommendation 9: Capacity-building for registry staff

The law should ensure that appropriate programmes are established to develop and strengthen the knowledge and skills of the registry staff on business registration procedures, service standards and the operation of electronic registries, as well as the ability of registry staff to deliver requested services.

F. Core functions of business registries

57. There is no standard approach in establishing a business registry or in streamlining an existing one: models of organization and levels of complexity can vary greatly depending on a State's level of development, its priorities and its legislation. However, regardless of the structure and organization of the registry, certain core functions can be said to be common to all registries.

58. Subject to the enacting State's legal and institutional organization, core functions in addition to those listed below may be added to the business registry. But, in keeping with the overarching principles governing an effective business registration system (see para. 32 above), the core functions of business registries are, at a minimum, to:

(a) Register a business when it fulfils the necessary conditions established by the law of the enacting State, which may include conferring legal existence on the business and recording that status;

(b) Publish and make accessible good quality and reliable information on the business to be registered so as to facilitate trade and interactions between business partners, the public and the State, including when such interactions take place in a cross-border context;

(c) Assign a unique identifier to the business to facilitate information exchange between the business and the State;

(d) Share information on the registered business among public authorities to promote and facilitate coordination among such authorities;

(e) Protect the integrity of the registry record to protect the identity and integrity of the businesses that are registered;

(f) Publicize information concerning the establishment of a business, including any associated obligations and responsibilities of the registered business, as well as the legal effects of information maintained in the business registry; and

(g) Provide assistance to the business in searching and reserving a business name when required by the law so that the business can establish its commercial identity.[35]

59. In a standard registration process, the entry point for entrepreneurs to the business registry may be the support provided to them in choosing a unique name for the new business that they wish to establish. When registering, a business is usually required to have a name that must be sufficiently distinguishable from other business names within that jurisdiction so that the business will be recognized and identifiable under that name. Enacting States are likely to establish their own criteria for determining how to decide whether a business name is sufficiently distinguishable from other business names, and in any event, the assignment of a unique identifier will assist in ensuring the unique identity of the business within and across jurisdictions (see also paras. 104 to 111 below). Business registries usually assist entrepreneurs at this stage with a procedure that can be optional or mandatory, or they may provide business name searches as an information service. Registries may also offer a name reservation service prior to registering a new business, so that no other business can use that name. Such a name reservation service may be provided either as a separate procedure (again, which can be optional or mandatory), or as a service integrated into the overall business registration procedure.

60. Business registries also provide forms and various types of guidance to entrepreneurs preparing the application and other necessary documents for registration. Once the application is submitted, the registry performs a series of checks and control procedures to ensure that all the necessary information and documents are included in the application. In particular, a registry verifies the chosen business name as well as any requirements for registration that have been established in the State's applicable law, such as the legal capacity of the entrepreneur to operate the business. Some legal traditions may require the registry to perform simple control procedures (such as establishing that the name of the business is sufficiently unique), which means that if all of the basic administrative requirements are met, the registry must accept the information as filed and record it. Other legal traditions may require more thorough verification of the information filed, such as ensuring that the business name does not violate any intellectual property requirement or that the rights of businesses with similar names are not infringed before the registry can allocate a business name (in those regimes where the registry is mandated to do so). All such information is archived by the registry, either before or after the registration process is complete.

61. Payment of a registration fee (if any, see paras. 200 to 204 and rec. 40 below) must usually be made before the registration is complete. Once a business registration is complete, the registry issues a certificate that confirms the registration and contains information about the business. Since much of the registered information should be disclosed to interested parties, registries make their public components available through various means, including through publication on a website, or in publications such as the National Gazette or newspapers. Where the infrastructure permits, registries may offer, as an additional non-mandatory service, subscriptions to announcements of specific types of new registrations.

62. In accordance with the applicable law of the enacting State, registered information that is made available to the public can include specific information on the business structure, such as who is authorized to sign on behalf of the business or

[35] At its twenty-ninth session, the Working Group requested the Secretariat to modify paragraph 58 (para. 55 of A/CN.9/WG.I/WP.106) in line with the revised text of recommendation 10 (recommendation 9 in in A/CN.9/WG.I/WP.106) (paras. 41 and 45, A/CN.9/928).

who serves as the business's legal representative. Basic information about the business, such as the name of the business, its telephone number, email and postal addresses (in addition to the addresses at which the businesses deemed to receive correspondence) can also be made public, but the publication of such details may be subject to the agreement of the business. When business registries collect disaggregated information submitted on a voluntary basis on the registrant or the persons associated with the business according to gender or other indicators that could raise privacy issues (e.g. association with an ethnic or language group), the law should establish whether and subject to which conditions that information can be made available to the public (see para. 192 below).[36] In some States, public access to certain information in the business registry is provided free of charge (in respect of fees for information, see para. 205 and rec. 41 below).

63. A new business must usually register with several government agencies, such as taxation and social security authorities, which often require the same information as that gathered by the business registry. In certain States, the business registry provides to entrepreneurs information on the necessary requirements of other public authorities and refers them to the relevant agencies. In States with more developed registration systems, businesses may be assigned a registration number that also functions as a unique identifier across public authorities (see paras. 104 to 111 below), which can then be used in all of the interactions that the business has with government agencies, other businesses and banks. This greatly simplifies the establishment of a business since it allows the business registry to exchange more easily information with the other public institutions involved in the process. In several States that have reformed their registration systems, business registries function as one-stop shops to support registration with other authorities. The services operated by such outlets may include providing any necessary licensing, or they may simply provide information on the procedures to obtain such licences and refer the entrepreneur to the relevant agency. As noted above (see para. 12 above), this legislative guide takes the view that establishing such one-stop shops for registration with at least the business registry, taxation and social security authorities, and enhancement of the integration of the registration procedures of all such authorities is the best approach for States wishing to optimise their business registration system (see paras. 93 to 103 and rec. 14 below).

64. One important aspect that States should take into account when establishing a business registration system is whether the registry should also be required to record certain procedures that affect the status of the business, for example bankruptcy, merger, winding-up, or liquidation. The approach to such changes in status appears to vary from State to State. For example, in some States, registries are often also entrusted with the registration of bankruptcy cases, while in other States, they tend not to perform this function. In certain jurisdictions, registries are also given the task of registering mergers as well as the winding-up and liquidation of businesses. In any event, business registries naturally also record the end of the life span of any business that has permanently ceased to do business by deregistering it (see paras. 220 to 227 and recs. 47, 48 and 49 below).

65. The opening provisions of the law governing business registration may include a list of the various functions of the registry, with cross references to the relevant provisions of the law in which those functions are addressed in detail. The advantage of this approach is clarity and transparency as to the nature and scope of the issues that are dealt with in detail later in the law. The possible disadvantage is that the list may not be comprehensive or may be read as placing unintended limitations on the detailed provisions of the law to which cross reference is made. Accordingly, implementation of this approach requires special care to avoid any omissions or inconsistencies as well as to allow for the registry's interoperability with other public

[36] At its twenty-ninth session, the Working Group agreed to revise paragraph 62 (para. 59 of A/CN.9/WG.I/WP.106) by reorganizing the order in which information was presented, and including additional information that business registry could make accessible to the public (para. 41(c), A/CN.9/928). Moreover, the Secretariat has added reference to the collection of disaggregated data to the legislative guide as appropriate as agreed by the Working Group (para. 33, A/CN.9/928).

authorities in the jurisdiction, and for access to the information maintained in the registry.

Recommendation 10: Core functions of business registries

The law should establish the core functions of the business registry, including:

(a) Registering the business when the business fulfils the necessary conditions established by the law;

(b) Providing access to the public of relevant information collected by the business registry;

(c) Assigning a unique identifier to the registered business;

(d) Sharing information among the requisite public authorities;

(e) Keeping the information in the business registry as current as possible;

(f) Protecting the integrity of the information in the registry record;

(g) Publicizing any relevant information on the establishment of the business, including the obligations and responsibilities of the business and the legal effects of the information publicly available on the business registry; and

(h) Assisting businesses in searching and reserving a business name when required by the law.[37]

G. Storage of information and access to it throughout the registry

66. When organizing the storage of the information contained in the business registry, States should be guided by the goals of efficiency, transparency and accessibility. Regardless of how a State decides to store and ensure the availability of the information throughout its registry system, its goal should be to achieve consistency in the identification and classification of registered businesses, as well as the efficient, non-duplicative collection of information on those businesses.

67. To achieve these goals, it is important that all business registration offices, sub-offices and repositories of registry information in a State be interconnected regardless of their physical location. In order to function efficiently, such interconnection should be established through an electronic interface linking all such outlets and allowing for their technical interoperability (see para. 77(c) below). Through these means, all information collected or stored anywhere in the system is capable of being processed or accessed in a timely fashion regardless of how (whether in electronic or paper format) or where it is collected, stored by or submitted to the registry. Ensuring the electronic interconnection of the entire business registry system would permit all information contained in it to be stored and made accessible in digital format and would permit the sharing of such information, possibly in real time, throughout the entire registry system, providing it simultaneously to multiple access points without regard to their geographic location (including business registry sub-offices, terminals, or using online technology). Further, access to the entirety of the information stored in the business registry should allow for its integration with other public authorities to permit information exchange with those authorities as well (see para. 77 (c) below).[38] This approach will strengthen the institutional interoperability among such public authorities in order not only to simplify the process of registration with the business registry, but also to streamline all registrations that may be required of a business at its establishment (see rec. 1 above).

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[37] At its twenty-ninth session, the Working Group agreed on a new text for recommendation 10 (recommendation 9 in A/CN.9/WG.I/WP.106) (para. 45, A/CN.9/928).

[38] Further to comments made by the Working Group at its twenty-ninth session that the intention of paragraphs 66 to 68 (paras. 63 to 65 of A/CN.9/WG.I/WP.106) was to ensure that information was stored and shared throughout the registry system through full interconnectivity and multiple access points, the Secretariat has made the necessary adjustments to paragraphs 64 and 65 (para. 46, A/CN.9/928).

68. Where such an interconnected business registry is set up, it may be necessary to streamline technical standards and specifications so that the information collected and shared is of similar quality and of a standardised nature. This will include: establishing appropriate procedures to handle the exchange of information and communication of errors between the various collection points for and repositories of the information, regardless of their location within the State; providing minimum information technology security standards to ensure, at least, secure channels for data exchange (for example, the use of "https" protocols); and ensuring the integrity of data while it is being exchanged.

Recommendation 11: Storage of information and access to it throughout the registry

The law should establish an interconnected registry system that would process, store and provide access to information received from registrants and registered businesses or entered by registry staff.[39]

III. Operation of the business registry

69. As noted above, business registration can be implemented through many different organizational tools that vary according to jurisdiction. States embarking on a reform process to simplify registration will have to identify the most appropriate and efficient solutions to deliver the service, given the prevailing domestic conditions. Regardless of the approach chosen by the State, aspects such as the general legal and institutional framework affecting business registration, the legal foundation and accountability of the entities mandated to operate the system and the budget needed by such entities should be carefully taken into account. Reform efforts rely to a different extent on a core set of tools, including: the use of technology; the establishment of a one-stop shop; and ensuring interconnectivity between the different authorities involved in the registration process (with the possible adoption of a unique identifier). States should also ensure that their reform efforts do not inadvertently exclude the adoption of emerging technologies that might further improve the operation of the business registry (e.g. the use of distributed ledger technology).[40]

A. Electronic, paper-based or mixed registry[41]

70. An important aspect to consider when reforming a business registration system is the form in which the application for registration should be filed and the form in which information contained in the registry should be stored. Paper-based registration requires sending documents (usually completed in handwritten form) by mail or delivering them by hand to the registry for manual processing. Hand delivery and manual processing are not unusual in many jurisdictions due to the lack of an advanced technological infrastructure. In such States, entrepreneurs may have to visit personally registration offices that are usually located in municipal areas that may not be easily reachable for many MSME entrepreneurs, particularly for those in rural areas. In addition, any copies of the documents required must usually be provided on

[39] At its twenty-ninth session, the Working Group requested the Secretariat to replace the phrase "process and store all information" (between the terms "would" and "receive") to "process, store and provide access to information" to better reflect the focus of the recommendation on information storing and sharing (para. 46, A/CN.9/928).

[40] In keeping with the decision of the Working Group at its twenty-ninth session that reference to emerging technology should be included in the commentary, the Secretariat has added the final sentence (para. 47, A/CN.9/928) (see also para. 11 above).

[41] At its twenty-ninth session, the Working Group requested the Secretariat to ensure that all references to "paper-based" and "electronic" registry systems listed electronic systems first. The Secretariat has implemented that change throughout the guide save for the order of paragraphs 70 and 71 of this section (paras. 67 and 68 of A/CN.9/WG.I/WP.106), since the current drafting of these two paragraphs allows to better focus on the advantages of an electronic business registration system (para. 48, A/CN.9/928).

paper. Paper-based registry systems can facilitate in-person communication between the registrant and the registry, and thus may offer an opportunity to clarify aspects of the requirements for registration. However, the labour-intensive nature of this procedure normally results in a time-consuming and expensive process (for example, it may require more than one visit to the business registry), both for the registry and for users, and it can easily lead to data entry errors. Furthermore, paper-based registry systems require considerable storage space as the documents with the registered information may have to be stored as hard copies (although some States using a mixed system may also scan documents and then destroy the paper versions after the expiry of a minimum legal period for their preservation; in this regard, see paras. 229 to 232 and rec. 51 below). Finally, registration requests transmitted by paper or fax also give rise to delays, since registrants must wait until registry staff manually carry out the business registration and certify it.

71. In comparison, online registration systems allow for improved efficiency of the registry and for more user-friendly services. This approach requires, at a minimum, that the information provided by the registrant be stored in electronic form in a computer database; the most advanced electronic registration systems, however, permit the direct electronic submission of business registration applications and relevant information (as well as searches of the registry) over the Internet or via direct networking systems as an alternative to paper-based submissions. The adoption of such systems enhances data integrity, information security, registration system transparency, and verification of business compliance, as well as permitting the avoidance of unnecessary or redundant information storage. Furthermore, when electronic submission of applications is allowed, business registries can produce standard forms that are easier to understand and therefore easier to complete correctly. Although the use of ICT solutions can carry with them risks of software errors, electronic systems do more to reduce those risks by providing automated error checks and other appropriate solutions. Such technology is also instrumental in the development of integrated registration systems and the implementation of unique identification numbers.

72. In addition to these features, which result in a more streamlined process and user-friendly services, electronic business registration and access to the business registry also offer the following advantages:

(a) Improved access for smaller businesses that operate at a distance from the registry offices;

(b) A very significant reduction in the time and cost required of the entrepreneur to perform the various registration steps, and consequently in the time and cost required before successful registration of a business, as well as in the day-to-day cost of operating the registry;

(c) The handling of increasing demands for company information from other government authorities;

(d) A reduction in the opportunity for fraudulent or improper conduct on the part of registry staff;

(e) A reduction in the potential liability of the registry to users who otherwise might suffer loss due to the failure of registry staff to enter accurately registration information;

(f) User access to registration and information services outside of normal business hours; and

(g) Possible revenue opportunities for the registry from other businesses and financial institutions that seek company information as potential trading counterparties and borrowers.[42]

[42] At its twenty-ninth session, the Working Group requested the Secretariat to delete the phrase “to inform their risk analysis of” in subparagraph 72(g) (subpara. 69(g) of A/CN.9/WG.I/WP.106) and to adjust the remaining text as necessary (para. 48, A/CN.9/928).

73. Introducing electronic registration processes, however, often requires an in-depth re-engineering of the way in which the service is delivered, which may involve several core aspects of the State's governance systems in addition to its level of technological infrastructure, including: financial capability, organization and human resources capacity, legislative framework (e.g. commercial code and company law) and institutional setting. Therefore, States launching a reform process aiming at the automation of the business registry would be advised to carry out a careful assessment of the legal, institutional and procedural dimensions (such as legislation authorizing electronic signatures or information security laws, or establishing complex e-government platforms or other ICT infrastructure) in order to identify those areas where reforms are needed and to adopt those technology solutions that are most appropriate to their current needs and capabilities. In several States, only information about registering a business is currently available online, and a functioning electronic registry has not yet been implemented. Making information electronically available is certainly less expensive and less difficult to achieve than is the establishment of an electronic registry, and it does not require any legislative reform or specialized technology. While the adoption of a mixed registration system that combines electronic processing and paper-based manual submission and processing might thus be an appropriate interim solution, it does involve higher maintenance costs, and the ultimate goal of a State should remain the progressive development of fully electronic registration systems (see paras. 79 to 87 and rec. 12 below).

B. Features of an electronic registry

74. When the business registry record is computerized, the hardware and software specifications should be robust and should employ features that minimize the risk of data corruption, technical error and security breaches. Even in a paper-based registry, measures should be taken to ensure the security and integrity of the registry record, but this is more efficiently and easily accomplished if the registry record is electronic. (Regardless of its method of operation, it is important for the registry to have risk-mitigation measures in place: see paras. 235 and 236 and rec. 53 below.) In addition to database control programs, software must also be developed to manage such aspects as user communications, user accounts, payment of any required fees, financial accounting, computer-to-computer communication, internal workflow and the gathering of statistical data. Software applications enabling data collection would also assist the registry in making evidence-based decisions which would facilitate efficient administration of the system (for example, the collection of data on more frequent requests by registry users would enable evidence-based decisions on how best to allocate registry resources).[43] When the State's technological infrastructure is not sufficiently advanced to allow the features mentioned above to be implemented, it is nevertheless important that the software put in place be flexible enough to accommodate additional and more sophisticated features as they become more feasible in the future.

75. Implementing an online business registration system will require defining the technical standards of the online system, carefully evaluating the hardware and software needs of the business registry to make those standards operational in the context of the national technological infrastructure, and deciding whether it is feasible to develop the necessary hardware and software in-house or whether it must be purchased from private suppliers. In making that determination, it will be key to investigate whether a ready-made product is available that can easily be adapted to the needs of the State. If different suppliers are used for the hardware and the

[43] For example, "application programming interfaces" (APIs) may be adopted. APIs have a wide variety of possible uses, such as enabling the submission of applications to the registry through simplified procedures, for example by pre-filling certain fields by default, or allowing users, and equipping systems with the proper software to connect directly to the registry and retrieve information automatically.

software, it is important that the software developer or provider is aware of the specifications of the hardware to be supplied, and vice versa.

76. Following more recent technological advances, one option States may want to consider is whether to rely on traditional software or to move to more sophisticated applications such as cloud computing, which is an Internet-based system that allows the delivery of different services (such as storing and processing of data) to an organization's computers through the Internet. The use of cloud computing allows for a considerable reduction in the resources needed to operate an electronic registration system, since the registry does not have to maintain its own technological infrastructure. However, data and information security can represent an issue when introducing such a system and it would be advisable for States to conduct a careful risk analysis before establishing a system exclusively based on cloud applications.

77. Additional aspects that States should consider when adopting an online registry include:

(a) Scalability: the ICT infrastructure should be capable of handling an increasing volume of users over time, as well as traffic peaks that may occasionally arise;

(b) Flexibility: the ICT infrastructure of the registry should be easily adaptable to new user and system requirements, and the migration of data from one technology to another may require data-cleansing aspects;

(c) Interoperability: the registry should be designed to allow (even at a later stage) integration with other automated systems, such as other governmental authorities operating in the jurisdiction and online or mobile payment portals;

(d) Costs: the ICT infrastructure should be financially sustainable both in terms of initial and operating costs; and

(e) Intellectual property rights: in order to avoid risks deriving from adverse circumstances that might affect an owner of intellectual property rights in the technology used (for example, if the owner ceases to operate or is prohibited from doing business with the government), the State should always either be granted ownership of the system or an unrestricted licence to the source code.

78. In terms of the cost of the ICT infrastructure, the level of security needed by an electronic registration system and its cost must be carefully addressed. In particular, it is important to align the risk attached to a specific interaction (between the registry and the business or the registry and other public authorities) with the costs and administration required to make that interaction secure. Low security may deter parties from using electronic services (unless it is mandatory), but costly high security measures could have the same effect.

C. Phased approach to the implementation of an electronic registry

79. The methods used to establish the online system should be consistent with the reforms required as they can determine the success or the failure of the initiative. Moving directly to a full online solution before re-engineering registry business processes would be a mistake in many cases, as the solutions designed would not be able to capture the technology's full benefits. Moreover, subject to the level of development of the implementing State, factors such as the existence and quality of the infrastructure and literacy rates (including computer literacy) of the intended users should be carefully considered before the adoption of an online system. Several States, for example, must deal with a non-existent or weak ICT infrastructure, lack of dependable electricity supplies and Internet connectivity, and a low literacy rate, which may have a disproportionate effect on women and businesses in rural areas. In these instances, technical and capacity-building assistance programmes coordinated by international organizations might be necessary in order to progress towards the goal of a fully automated electronic registry.

80. In locations where Internet penetration is not extensive, a phased approach may be an appropriate way forward. Automation would start with the use of simple databases and workflow applications for basic operations, such as name searches or the sharing of information with other government authorities, and then would progress to more sophisticated web-based systems that would enable customers to conduct business with the registry entirely online. These web-based systems could be quite convenient for smaller businesses operating at a distance from the registry, provided that those entrepreneurs were able to access the system. The final phase of the approach would be to accommodate ICT interoperability between those authorities involved in business registration.

81. The simplest approach for States beginning their activity in this area would be to develop a content-rich website that consolidates registration information, provides downloadable forms, and enables users to submit feedback. This simple resource would allow users to obtain information and forms in one place and would make registries more efficient by enabling users to submit email inquiries before going to registry offices with the completed forms. Since this solution does not require a stable Internet connection, it may appeal to States with limited Internet access.

82. If only limited Internet bandwidth is available, then automating front-counter and back-office operations prior to moving online would be a suitable approach. If the registry has sub-offices outside its main location (for example, in rural areas), it would be important to establish a dedicated Internet connection with them. This approach would still require entrepreneurs to visit the registry, but at least it would establish a foundation on which the registry could later develop a more sophisticated web platform. A key factor even at this basic stage would be for the system to be able to digitize historical records and capture key information in the registry, such as the names of members or owners and directors of the business.

83. Once the State's technological capacity and Internet penetration allows for digital commerce, then platforms that enable businesses to apply and pay for registration online as well as to file annual accounts and update registration details as operations change can be developed. With regard to online payment of a registration fee, it should be noted that ICT-supported solutions would depend on a State's available modes of payment and on the regulatory framework that establishes the modes of payment that a public authority can accept. When the jurisdiction has enacted laws that allow for online payment, the most efficient option is to combine the filing of the electronic application and the fee payment into one step. Error checks should be included in ICT systems that incorporate this facility, so that applications are not submitted before payments are completed and registry officials can see payment information along with the application. When fee payment is required before registration of the business, this constitutes a separate procedural step and the use of ICT solutions in order to be user-friendly would require streamlining the procedures for filing the application and for payment (see also para. 77(c) above). In some States, the use of mobile payment systems might permit easier and more effective methods of payment for registration and other related fees. In such cases, the same considerations involved in establishing online payments (e.g. enacting appropriate laws, as well as designing efficient options to combine mobile payments and the filing of registration documents) should be applied in order to develop efficient solutions appropriate to the use of mobile technology.

84. As noted above (see para. 73) when introducing electronic registration systems, States should adopt legislation that facilitates the implementation of these electronic solutions, although the obligation to use such solutions should be considered only when the various stakeholders concerned with the registration process (including the registrant, government authorities, and other relevant authorities) are prepared to comply. Furthermore, when developing such laws, States should take into account that while certain legal requirements can be checked electronically, the most complex aspects of the process may need to be addressed by a registry official.

85. Enacting States should also be aware that establishing an electronic registration system requires a well-designed legal and regulatory framework that promotes

simplicity and flexibility and avoids, to the greatest extent possible, discretionary power and the making of exceptions (see para. 33 above). For example, provisions requiring the interpretation of the content of documents and the collection of various pieces of information are difficult to adapt to electronic processing; the same applies to granting authority to the registrar to establish fees for the services of the registry and establishing a complex structure of rules and exceptions.

86. When a State has developed the ICT infrastructure necessary to achieve full business registry automation, the integration of other online registration processes for taxation, social security and other purposes could be considered. Even if no integration with registrations required by other public authorities is built into the system, it would nevertheless be advisable that States implement data interchange capabilities so that the relevant business information could be shared across government authorities (see para. 77(c) above). A final improvement would be the development of mechanisms for disseminating value-added business information products to interested parties; such products could substantially contribute to the financial sustainability of the registry (see paras. 192 to 193 and 197 below).

87. One issue that would likely arise when the online registry is able to offer full-fledged electronic services would be whether to abolish any paper-based submission of information or to maintain both online and paper-based registration. In many jurisdictions, registries choose to have mixed solutions with a combination of electronic and paper documents or electronic and manual processing during case handling. This approach may result in considerable cost for registries, since the two systems require different tools and procedures. Moreover, if this option is chosen, it is important to establish rules to determine the time of registration as between electronic and paper-based submissions. Finally, paper applications must be processed in any case, so that the information included in a paper document can be transformed into data that can be processed electronically; this can be done by scanning the paper-based application for registration (possibly using optical character recognition technology so as to make the scanned document electronically searchable). However, in order to ensure that the record made by scanning correctly represents the paper application, the registry will likely have to employ staff to check that record, thus adding a step that increases costs and reduces the benefits of using an online system.

D. Other registration-related services supported by ICT solutions

88. Automation should enable the registry to perform other functions in addition to the processing of applications. Where States require user-friendly electronic filing and repopulated forms,[44] for example, it can assist businesses in the mandatory filing of periodic returns and annual accounts. Electronic filing and automated checks also help reduce processing time by the registry.

89. Electronically supported registration could also assist the registry in deregistration procedures, i.e. notations in the registry that a particular business is no longer registered (see paras. 225 to 227 and rec. 49 below). Such procedures usually require an official announcement that a business will be deregistered. The use of ICT can provide for the automation of such announcements, from initiating the process to producing a standard notice, thus helping registries to ensure that businesses are not deregistered before any time limit has elapsed and to reduce processing time. In order to be fully effective, however, adoption of an electronic registration system needs to be supported by streamlined procedures that enable the deregistration of businesses in a simplified and quick way.

[44] Repopulated forms allow selected fields to be automatically filled based on information previously provided by the registrant or maintained in their user account. When changes in the registrant's information occur, the registrant is not required to fill out the entire form again, but only to enter the relevant changes. Information included in the repopulated form is stored and may be made accessible to and exchangeable with other relevant authorities.

90. Further, ICT solutions could be applied to assist in the filing of financial information in machine-readable format (such as extensible Business Reporting Language, or XBRL). For example, a platform could be provided to assist in the conversion of paper-based financial statements to XBRL format. Machine-readable financial data facilitates the aggregation and analysis of financial information, which could be of significant value to users of the registry.

91. Solutions using ICT could also support follow-up and enforcement procedures of business registries when businesses fail to comply with registration requirements. In one jurisdiction, for example, the back-office system of the registry monitors the records of businesses and detects whether certain circumstances suggest that the business is not in compliance with statutory requirements. An automatic notice to the business is then produced in order for it to remedy the situation. Should the business fail to do so within the statutory deadline, the ICT solution starts a new procedure to forward the case to the district court, which may make a decision on the compulsory liquidation of the business. Upon issuing an order for compulsory liquidation, the court notifies the registry, which then deregisters the business.

Recommendation 12: Electronic, paper-based or mixed registry

The law should provide that the optimal medium to operate an efficient business registry is electronic. Should full adoption of electronic services not yet be possible, such an approach should nonetheless be implemented to as great an extent as permitted by the current technological infrastructure of the enacting State, as well as its institutional framework and laws, and expanded as that infrastructure improves.

E. Electronic documents and electronic authentication methods

92. As noted above (see, for example, paras. 73 and 83), an efficient electronic business registry system should allow users to submit and receive documents in electronic format, to sign electronically when transmitting information or requests to the registry and to pay online for business registry services (see also para. 207 below and rec. 43). Therefore, as a preliminary step, appropriate domestic law should be in place to regulate all such matters (see also paras. 84 and 85 above).[45] States that enact legal regimes on electronic communications and electronic signatures may wish to consider the legislative texts prepared by UNCITRAL to govern electronic transactions.[46] Such texts establish the principles of technological neutrality and functional equivalence (see also paras. 12 to 15 in the Annex) that are needed to ensure equal treatment between electronic and paper-based communications; they also deal extensively with provisions covering the issues of legal validity of electronic documents and signatures,[47] authentication, and the time and place of dispatch and receipt of electronic messages. Because of the way these texts, and other UNCITRAL legislative texts, are negotiated and adopted, they offer solutions appropriate to

[45] At its twenty-ninth session, the Working Group agreed to include a cross reference to recommendation 43 (recommendation 42 in A/CN.9/WG.I/WP.106) and to include reference to the main features of an electronic business registry (i.e. electronic payments, electronic signatures and electronic documents) (para. 49, A/CN.9/928).

[46] Such texts include: the UNCITRAL Model Law on Electronic Commerce (1996); the UNCITRAL Model Law on Electronic Signatures (2001) and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005). For further information, see http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce.html.

[47] Further to changes made in recommendation 13 (recommendation 12 in A/CN.9/WG.I/WP.106), the Secretariat has added a new sentence at the end of this footnote (footnote 86 in A/CN.9/WG.I/WP.106) which would now read: "The principle of 'technological neutrality' means that the provisions of the law are 'neutral' and do not depend on or presuppose the use of particular types of technology and can be applied to generation, transmission or storage of all types of information. The principle of 'functional equivalence' establishes the criteria under which electronic communications and electronic signatures may be considered equivalent to paper-based communications and hand-written signatures. According to the principle of 'legal validity' communications and signatures cannot be denied legal effect, validity or enforceability on the sole ground that they are in electronic form."

different legal traditions and to States at different stages of economic development. Furthermore, domestic legislation based on the UNCITRAL texts on electronic commerce will greatly facilitate cross-border recognition of electronic documents and signatures.

Recommendation 13: Electronic documents and electronic authentication methods[48]

The law should:

(a) Permit and encourage the use of electronic documents as well as of electronic signatures and other equivalent identification methods; and

(b) Regulate such use pursuant to principles established by law that electronic documents and signatures cannot be denied legal validity or enforceability, and that they are functionally equivalent to their paper-based counterparts.

F. A one-stop shop for business registration and registration with other authorities

93. As discussed above (beginning in para. 2), before a business may operate in the legally regulated economy, it is often required to register with several different government authorities in addition to the business registry. These additional authorities often require the same information that has already been gathered by the business registry. Entrepreneurs must often personally visit each authority and fill out multiple forms. Taxation, social security, justice and employment authorities are usually involved in this process; other administrative offices and institutions, specific to each jurisdiction, may also be involved. This often results in multiple procedures governed by different laws, duplication of information and lack of ownership or full control of the process by the authorities involved. Moreover, the entire process can require weeks, if not months.

94. The establishment of one-stop shops has thus become one of the most popular reforms to streamline business registration in recent years. One-stop shops are single outlets where entrepreneurs receive all of the information and forms they need in order to complete the necessary procedures to establish their business rather than having to visit several different government authorities.

95. Beyond this general description, the scope of one-stop shops can vary according to the services offered. Some one-stop shops only provide business registration services, which may still be an improvement if the registration process previously involved a number of separate visits to the relevant authorities; others carry out other functions related to the establishment of a business. A common additional function is registration with taxation authorities, although there are also examples of one-stop shops dealing with registration for social security and statistical purposes and with obtaining the required licences from municipal and other authorities. In some cases, one-stop shops assist entrepreneurs not only with business licences and permits but also with investment, privatization procedures, official diaries and journals, intellectual property and import-export registries, tourism-related issues and State-owned property management, and may provide access to utilities and banking services.[49]

96. The functions of one-stop shops can be carried out through physical offices or an electronic platform. Physical premises, when in rural areas, are particularly appropriate for businesses with limited access to municipal centres; so, too, are mobile offices, particularly in places that are too remote for States to have physical premises. In addition to physical premises, online business registration can be offered

[48] At its twenty-ninth session, the Working Group requested the Secretariat to redraft recommendation 13 (recommendation 12 in A/CN.9/WG.I/WP.106) by retaining subparagraph 13(a), combining elements of subparagraphs 13(b)(i) and 13(b)(iv) and deleting the remaining text (para. 51, A/CN.9/928).

[49] Further to a decision of the Working Group at its twenty-ninth session, the Secretariat has modified paragraph 95 as requested (para. 53, A/CN.9/928).

as an option available for registering a business. Online one-stop shops take advantage of solutions supported by ICT, which allow for the rapid completion of several formalities due to the use of dedicated software. Such online portals may provide a fully interconnected system or may still entail separate registration in respect of some requirements, for example, for taxation services.

97. When establishing one-stop shops, in particular those performing functions in addition to business registration, States can choose among different approaches. In the "one door" approach, representatives of different government authorities involved in registration are brought together in one physical place, but the registrant must deal separately with each representative (for example, the business registry official dealing with the approval of the business name, the clerks checking the documents, and the taxation official), although the different authorities liaise among themselves. As may be apparent, this solution is relatively uncomplicated and would normally not require any change in law or ministerial responsibilities, but it would involve establishing effective cooperation between the different government ministries. One issue States should consider when opting for this approach would be how much authority the representatives of each government authority should have; for example, should they have the discretion to process the registration forms on site or would they simply be acting on behalf of their agencies and be required to take the documents to their home agencies for further processing? Similarly, it is also important to consider clarifying the lines of accountability of the various representatives from the different agencies to the administrator of the one-stop shop.

98. Another form of one-stop shop is the so-called "one window" or "one table" version, which offers a higher level of integration of the different public agencies involved in the establishment of a business. In this case, the one-stop shop combines the process for obtaining business and other registrations with public authorities, such as for taxation and social security, with other arrangements, like publishing the registration in a National Gazette or newspapers, when required. All relevant documents are submitted to the one-stop shop administrator who is authorized, and properly trained, to accept them on behalf of the various government authorities involved. Documents are then dispatched, electronically or by hand or courier, to the competent authority for processing. This type of one-stop shop requires detailed coordination between the different government authorities, which must modify their procedures to ensure an effective flow of information. A memorandum of understanding between the key agencies involved may be needed in order to establish the terms in respect of the sharing of business information. In some cases, taking such an approach may also require a change in legislation.

99. A third approach, which is less common, is based upon the establishment of a separate entity to coordinate the business registration function and to deal with other requirements that entrepreneurs must meet, such as making tax declarations, obtaining the requisite licences, and registering with social security authorities. Pursuant to this model, the entrepreneur would apply to the coordinating entity after having registered with the business registry in order to fulfil the various additional aspects of the procedures necessary prior to commencing business operations. Although this approach results in adding a step, it could be useful in some States since it avoids having to restructure the bodies with the main liability for business registration. On the other hand, the adoption of such a structure could involve an increase in the cost of the administrative functions and may only reduce time frames to the extent that it allows the various functions to take place successively or enables participants in the one-stop shop to network with the other agencies to speed up their operations. From the user's perspective, however, the advantage of being able to deal with a single organization remains.

100. Regardless of the approach chosen in the implementation of a one-stop shop, it is important to emphasize that such an arrangement does not require the establishment of a single government authority with authority over all of the other agencies related to the one-stop shop. Instead, it involves designating which government authority has authority over the single integrated interface, while all of the government authorities participating in the one-stop shop retain their functional autonomy. In order to

enhance the benefits deriving from the establishment of a one-stop shop, it would be desirable that States facilitate improved technical and institutional interoperability among the public authorities participating in the one-stop shop, including through the adoption of a unique identifier for each business (see paras. 104 to 117 and rec. 15 below) and a single form for registration with, and payment of fees to each authority. In recent years, for example, several jurisdictions have adopted integrated online registration systems in which an application submitted for business registration includes all of the information required by business registry, taxation, social security and possibly other authorities. Once completed, the information in the integrated application is transmitted by the business registry to all relevant authorities.[50] Information and any necessary approvals from the other authorities are then communicated back to the registry, which immediately forwards the information and approvals to the business. While this is beneficial for all businesses, regardless of their size, it is particularly valuable for MSMEs, which may not have the resources necessary to cope with the compliance requirements of multiple government authorities in order to establish their business.

101. In States with developed ICT infrastructures, the functions of the agencies concerned with registration may be fully integrated through the use of a common database which is operated by one of the agencies involved and provides simultaneous registration for various purposes, i.e. business registration, taxation, and social security, etc. In some jurisdictions, a public agency (such as the tax administration) is responsible for the registration of businesses, or ad hoc entities have been set up to perform simultaneous registration with all public authorities. In other jurisdictions, advanced interoperability among the different public authorities involved in the registration process has resulted in a consolidated electronic registration form that can be repopulated[51] with information from the different agencies concerned. In jurisdictions where this approach has been developed, agencies perform regular file transfers to update the database as well as their own records; they have direct access to the common database and use the same back-office systems to update it; and the information registered is regularly verified by trusted staff of the agencies. Such strong coordination among the relevant public authorities is often based on regulatory provisions that allocate roles and responsibilities among the various agencies involved. Moreover, in certain jurisdictions such integrated delivery and governance of the registration process with the relevant public authorities takes the form of an electronic platform that allows other public authorities involved in the establishment of a business to connect to the platform and share information on the business.[52]

102. One issue that States should consider when establishing a one-stop shop is its location. It is usually advisable for the one-stop shop to be directly connected to the business registry office, either because it is hosted there or because the registry is part of the one-stop shop. The organization responsible for the one-stop shop could thus be the same as that which oversees the business registration process. This approach should take into account whether such organizations are equipped to administer the one-stop shop. Examples from various jurisdictions indicate that where authorities such as executive agencies are responsible for business registration, they possess the skills to perform one-stop shop functions as well. The same can be said of chambers of commerce, government commissions, and regulatory authorities. There are very few examples of adoption of a one-stop shop approach in those States where business registration is under the administrative oversight of the judiciary.

103. Although one-stop shops do not necessarily require changes to domestic legislation, it is important that the operation of such mechanisms be legally valid, which may involve adapting existing law to the new structure and method of

[50] Further to the decision of the Working Group at its twenty-ninth session, the Secretariat has adjusted paragraph 100 (para. 102 of A/CN.9/WG.I/WP.106) to include reference to an integrated application form for registration with the main relevant public authorities with which a business may have to register at its establishment (para. 56, A/CN.9/928).

[51] For details on repopulated forms, see footnote 44, supra.

[52] The Secretariat has made the necessary adjustments to this paragraph in light of the request made by the Working Group at its twenty-ninth session to ensure that the concept of “interoperability” was sufficiently included in the commentary (para. 52, A/CN.9/928).

proceeding. For example, effective functioning of the one-stop shop may require provisions governing the collection of information by public authorities as well as the exchange of information among such authorities. The extent of the changes required will thus vary according to the different needs of the State and the structure of its system of registration with public authorities mandatorily involved in the establishment of a business. For example, in several States, enhanced interoperability between the business registry, taxation and social security authorities through the one-stop shop may have to take into consideration that while registration with taxation and social security authorities is usually mandatory, registration with the business registry may be on a voluntary basis. In addition, one-stop shops should be given a sufficient budget (since they can be quite expensive to establish and maintain), they should be staffed with well-trained personnel, and they should have their performance regularly monitored by the supervising authority in accordance with user feedback.

Recommendation 14: A one-stop shop for business registration and registration with other authorities

The law should establish a one-stop shop for business registration and registration with other public authorities, including designating which public authority should oversee the functioning of the single interface. Such an interface:

(a) May consist of an electronic platform or physical offices; and

(b) Should integrate the services of as many public authorities requiring the same information as possible, including, but not limited to, business registry, taxation and social security authorities.[53]

G. Use of unique identifiers

104. In those jurisdictions where the government authorities with which businesses are required to register operate in isolation from each other, it is not unusual for this procedure to result in duplication of systems, processes and efforts. This approach is not only expensive but may cause errors. Moreover, if each authority assigns a registration number to the business when it registers with that authority, and the use and uniqueness of that number is restricted to the authority assigning it, information exchange among the authorities requires each authority to map the different identification numbers applied by the other authorities. When ICT solutions are used, they can facilitate such mapping, but even they cannot exclude the possibility that different entities will have the same identifier, thus reducing the benefits (in terms of cost and usefulness) obtained from the use of such tools.

105. States wishing to foster advanced integration among different authorities, in order to minimize duplication of procedures and facilitate exchange of information among relevant public authorities, may wish to consider that in recent years, tools have been developed to facilitate inter-agency cooperation. For example, one international organization has developed an online system that allows for the interoperability of the various public authorities involved in business registration with minimal or no change at all in the internal processes of the participating authorities nor in their computer systems.

106. Some States have introduced a more sophisticated approach, which considerably improves information exchange throughout the life cycle of a business. This approach, which is based on enhanced technical and institutional interoperability of the authorities involved (such as the ability of different ITC infrastructures to exchange and interpret data; or semantic interoperability – see para. 117 below), requires the use of a single unique business identification number or unique identifier, which ties information to a given business and allows for information in respect of it

[53] At its twenty-ninth session, the Working Group agreed to replace the phrase “but at a minimum should include” in recommendation 14(b) (recommendation 13(b) in A/CN.9/WG.I/WP.106) with “including, but not limited to” (para. 54, A/CN.9/928).

to be shared among business registry, taxation and social security authorities as well as other public authorities and possibly private agencies.

107. A unique identifier is structured as a set of characters (numeric or alphanumeric) which distinguish registered entities from each other. When designing a unique identifier, it may be advisable to build some flexibility in the structure of the identifier (for example, by allowing the addition of new characters to the identifier at a later stage) so that the identifier can be easily adaptable to new system requirements in a national or international context, or both. The unique identifier is allocated only once (usually upon establishment) to a single business and does not change during the existence of that business,[54] nor after its deregistration. The same unique identifier is used for that business by all public authorities (and possibly private agencies), which permits information about that particular registered entity to be shared.

108. The experience of States that have adopted unique identifiers has demonstrated the usefulness of such tools. As noted above, they permit all government authorities to identify easily new and existing businesses, and to verify information in respect of them. In addition, the use of unique identifiers improves the quality of the information contained in the business registry, and in the records of the other interconnected authorities, since the identifiers ensure that information is linked to the correct entity even if its identifying attributes (for example name, address, and type of business) change. Moreover, unique identifiers prevent the situation where, intentionally or unintentionally, businesses are assigned the same identification; this can be especially significant where financial benefits are granted to legal entities or where liability to third parties is concerned. Unique identifiers have been found to produce benefits for businesses as well, in that they considerably simplify business administration procedures: entrepreneurs do not have to manage different identifiers from different authorities, nor are they required to provide the same or similar information to different authorities. Introducing unique identifiers can also contribute to improving the visibility of businesses, in particular of MSMEs, with possible partners as well as with potential sources of finance, since it would assist in creating a safe and dependable connection between a business and all of the information that relates to it. This access to relevant information could facilitate the establishment of business relationships, including in the cross-border context.

109. One issue a State may have to consider when introducing unique identifiers is that of individual businesses that do not possess a separate legal status from their owners. In such cases, taxation, social security or other authorities may often prefer to rely on the identifier for the individual, who may be a natural person, rather than on the business identifier. However, States may also opt to assign a separate identifier to a sole proprietor in a business capacity and in a personal capacity.

110. Situations may arise in which different agencies in the same jurisdiction allocate identifiers to businesses based on the particular legal form of the business. States should thus consider adopting a verification system to avoid multiple unique identifiers being allocated to the same business by different public authorities. If the identifier is assigned through a single jurisdictional database the risk of several identifiers being allocated to one business or of several businesses receiving the same identifier is considerably reduced.

111. The effective use of unique identifiers is enhanced by the complete adoption of electronic solutions that do not require manual intervention. However, electronic solutions are not a mandatory prerequisite to introducing unique identifiers, as they can also be effective in a paper-based environment. When unique identifiers are connected to an online registration system, it is important that the solution adopted fits the existing technology infrastructure.

(a) Allocation of unique identifiers

[54] While the unique identifier does not change throughout the lifetime of a business, if the business changes its legal form, a new unique identifier must be allocated.

112. The use of unique identifiers requires sustained cooperation and coordination among the authorities involved, and a clear definition of their roles and responsibilities, as well as trust and collaboration between the public and business sectors. Since the introduction of a unique identifier does not of itself prevent government authorities from asking a business for information that has already been collected by other authorities, States should ensure that any reform process in this respect start with a clear and common understanding of the reform objectives among all the stakeholders involved. Moreover, States should ensure that a strong political commitment to the reform is in place. Potential partners ideally include the business registry, taxation and social security authorities, at a minimum, and if possible, the statistics office, the pension fund, and any other relevant authorities. If agreement among these stakeholders is elusive, at least the business registry, taxation and social security authorities should be involved. Information on the identifiers in use by the other authorities and within the business sector is also a prerequisite for reform, as is a comprehensive assessment to identify the needs of all stakeholders.

113. In order to permit the introduction of a unique identifier, the law should include provisions on a number of issues including:

(a) Identification of the authority charged with allocating the unique identifier;

(b) Allocation of the unique identifier before or immediately after registration with the authorities involved in the establishment of a business;

(c) Listing the information that will be related to the identifier, including at least the name, address and type of business;

(d) The legal mandate of the public authorities to use the unique identifier and related information, as well as any restrictions on requesting information from businesses;

(e) Access to registered information by public authorities and the private sector;

(f) Communication of business registration and amendments among the public authorities involved; and

(g) Communication of deregistration of businesses that cease to operate.

(b) Implementation of a unique identifier

114. Adoption of a unique identifier normally requires a centralized database linking the business to all relevant government authorities whose information and communication systems must be interoperable. This requirement can be a major obstacle to implementation if the technological infrastructure of the State is not sufficiently advanced.

115. States can introduce the unique identifier in one of two ways. In the first approach, business registration is the first step and includes the allocation of a unique identifier, which is made available (together with the identifying information) to the other authorities involved in the registration process (for example, taxation and social security authorities), and which is re-used by those authorities. In the second approach, the allocation of a unique identifier represents the beginning of the process. The unique identifier and all relevant information are then made available to the government authorities involved in business registration, including the business registry, and is then re-used by all authorities. Either of these two approaches can be followed by the authority entrusted with allocating unique identifiers, regardless of whether the authority is the business registry, a facility shared by public authorities or the taxation authority. The enacting State should determine the format of the unique identifier and which authority would have the authority to assign it. It is important to note that in some States, the use of a unique identifier may be restricted: in some

jurisdictions, certain government authorities still allocate their own identification number[55] although the business is assigned a unique identifier.

116. Introducing a unique identifier usually requires adaptation both by public authorities in processing and filing information and by businesses in communicating with public authorities or other businesses. A unique identifier requires the conversion of existing identifiers, which can be accomplished in various ways. Taxation identifiers are often used as a starting point in designing a new identifier, since the records of the taxation authorities cover most types of businesses and are often the most current. Examples also exist in which, rather than introducing a completely new number, the taxation number itself is retained as the unique business number. New identification numbers can also be created using other techniques according to a State's registration procedures. In such a situation, it is important that each business, once assigned a new number, verify the related identifying information, such as its name, address, and type of activity.

117. The interoperability of the ICT systems of different agencies could be a major obstacle when implementing unique identifiers. The ability of different information technology infrastructures to exchange and interpret data, however, is only one aspect of interoperability that States should consider. Another issue is that of semantic interoperability, which can also pose a serious threat to a successful exchange of information among the authorities involved as well as between relevant authorities and users in the private sector. For this reason, it is important to ensure that the precise meaning of the information exchanged is understood and preserved throughout the process and that semantic descriptions are available to all of the stakeholders involved. Measures to ensure interoperability would thus require State action on a dual level: agreement on common definitions and terminology on the one hand, and the development of appropriate technology standards and formats on the other. This approach should be based on a mutual understanding of the legal foundation, responsibilities and procedures among all those involved in the process.

(c) Cross-border exchange of information among business registries

118. States are increasingly aware of the importance of improving the cross-border exchange of data and information between registries,[56] and sustained progress in respect of ICT development now allows this aspect to be addressed. Introducing unique identifiers that enable different public authorities to exchange information about a business could thus be relevant not only at the national level, but also in an international context. Unique identifiers can allow more efficient cross-border cooperation among business registries located in different States, as well as between business registries and public authorities in different States. Implementation of cross-border exchange of data and information can result in more dependable information for consumers and existing or potential business partners, including small businesses that provide cross-border services, as well as for potential sources of finance for the business (see paras. 198 and 199 and rec. 39 below).

119. Accordingly, States implementing reforms to streamline their business registration system may wish to consider adopting solutions that will, in future, facilitate such information exchanges between registries from different jurisdictions and to consult with States that have already implemented approaches that allow for such interoperability.[57] One such reform could include developing a system of

[55] In certain cases, authorities may keep their own numbering system in addition to using the unique identifier because of "legacy data", i.e. an obsolete format of identifying a business that cannot be converted into unique identifiers. In order to access such information, the registry must maintain the old identification number for internal purposes. In dealing with the public, however, the government authority should use for all purposes the unique identifier assigned to the business.

[56] For example, there are some regional examples of cross-border information-sharing on businesses between States, but these are cases where the information-sharing was a component of a broader project involving significant economic integration of the relevant States.

[57] Some States with more integrated economies have developed an application that allows users to carry out simultaneous searches of the registries in both States by using their smartphones or mobile devices.

business prefixes that would make the legal form of the business immediately recognizable across international and other borders.

Recommendation 15: Use of unique identifiers

The law should provide that a unique identifier should be allocated to each registered business and should:

(a) Be structured as a set of numeric or alphanumeric characters;

(b) Be unique to the business to which it has been allocated; and

(c) Remain unchanged and not be reallocated following any deregistration of the business.

Recommendation 16: Allocation of unique identifiers

The law should specify that the allocation of a unique identifier should be carried out either by the business registry upon registration of the business, or before registration by the designated authority. In either case, the unique identifier should then be made available to all other public authorities sharing the information associated with that identifier, and should be used in all official communication in respect of that business.

Recommendation 17: Implementation of a unique identifier

The law should ensure that, when adopting a system for the use of a unique identifier:

(a) There is interoperability between the technological infrastructure of the business registry and of the other public authorities sharing the information associated with the identifier; and

(b) That existing identifiers are linked to the unique identifier.

H. Sharing of protected data between public authorities

120. Although the adoption of a system of unique identifiers facilitates information sharing between public agencies,[58] it is important that sensitive data and privacy be protected. For this reason, when a State introduces interoperability among different authorities, it should address how public authorities may share protected data relating to individuals and businesses so that there is no infringement of the rights of data owners. States should thus ensure that all information sharing among public authorities occurs in accordance with the applicable law, which should establish the conditions under which such sharing is permitted. Moreover, the law should clearly identify which public authorities are involved, the information shared and the purpose for sharing, and establish that the owners of the data should be informed of the purposes for which their protected data may be shared among public authorities. Information-sharing should be based on the principle that only the minimum information necessary to achieve the public authority's purpose may be shared and that appropriate measures are in place to protect the rights to privacy of the business. When devising appropriate law or policy on the sharing of protected data between public authorities, it is important for States to consider the interoperability of those public authorities.

Recommendation 18: Sharing of protected data between public authorities

The law should establish that rules for the sharing of protected data between public authorities pursuant to a unique identifier system:

(a) Conform to the applicable law on the sharing of protected data between public authorities;

(b) Enable a public authority to access protected data only in order to carry out their statutory functions; and

(c) Enable a public authority to access protected data only in relation to those businesses with respect to which it has statutory authority.

IV. Registration of a business

A. Scope of examination by the registry

121. The method through which a business is registered varies from State to State, ranging from those that tend to regulate less and rely on the law that governs business behaviour, to States that opt for ex ante screening of a business before it may be registered (see also para. 60 above). In this regard, a State aiming at reforming the registration system must first decide which approach it will take to determine the scope of the examination that will have to be carried out by the registry. The State may thus choose to have a system where the registry only records information submitted to it by the registrant or a system where the registry is required to perform legal verifications and decide whether the business meets the criteria to register.[59]

122. States opting for ex ante verification of legal requirements and authorization before businesses can register (referred to as an "approval system") often have registration systems under the oversight of the judiciary in which intermediaries such

[58] At its twenty-ninth session, the Working Group requested the Secretariat to add the phrase "between public agencies" (para. 58, A/CN.9/928).

[59] At its twenty-ninth session, the Working Group agreed: (a) to replace the term "legal framework" in the opening sentence of paragraph 121 (para. 120 of A/CN.9/WG.I/WP.106) and elsewhere in the draft legislative guide with the defined term "law" (para. 13 of A/CN.9/WG.I/WP.106); and (b) to replace the phrase "only records facts" in the final sentence of paragraph 121 with "only records information submitted to the registry by the registrant" (para. 61, A/CN.9/928).

as notaries and lawyers perform a key role.[60] Other States structure their business registration as a declaratory system, in which no ex ante approval is required before the establishment of a business and where registration is an administrative process. In such declaratory systems, registration is under the oversight of a government department or authority, which can choose whether to operate the business registration system itself or to adopt other arrangements. There are also States that do not fall neatly within either category and in which there is a certain variation in the level and type of verification carried out as well as in the level of judiciary oversight.

123. Both the approval and the declaratory system have their advantages. Approval systems intend to protect third parties by preventing errors or omissions prior to registration. Courts and intermediaries exercise a formal review and, when appropriate, a substantive review of the prerequisites for the registration of a business. On the other hand, declaratory systems are said to reduce the inappropriate exercise of discretion; furthermore, they may reduce costs for registrants by negating the need to hire an intermediary and appear to have lower operational costs. Some systems have been said to merge advantages of both the declaratory system and the approval system by combining ex ante verification of the requirements for establishing a business with a reduced role for the courts and other intermediaries, thus simplifying procedures and shortening processing times.[61]

B. Accessibility of information on how to register

124. In order for the business registry to facilitate trade and interactions between business partners, the public and the State, easy access to business registry services should be provided both to businesses that want to register and to interested users who want to search the information on the business registry.

125. For businesses wanting or required to register, many microbusinesses may not be aware of the process of registration nor of its costs: they often overestimate time and cost, even after the registration process has been simplified. Easily retrievable information on the registration process should be made available (e.g. a list of the steps needed to achieve the registration; the necessary contacts; the data and documents required; the results to be expected; how long the process will take; methods of lodging complaints; and possible legal recourse), including on the advantages offered by a one-stop shop (where available) (see also paras. 93 to 103 and rec. 14 above) as well as on the relevant fees. This approach can reduce compliance costs, and make the outcome of the application more predictable, thus encouraging entrepreneurs to register. Restricted access to such information, on the other hand, might require meetings with registry officials in order to be apprised of the registration requirements or the involvement of intermediaries to facilitate the registration process.

126. In jurisdictions with developed ICT infrastructures, information on the registration process and documentation requirements should be available on the registry website or the website of the government authority overseeing the process. Moreover, the possibility of establishing direct contact with registry personnel through a dedicated email account of the registry, electronic contact forms or client service telephone numbers should also be provided. As discussed below (see para. 141), States should consider whether the information included on the website should be offered in a foreign language in addition to official and local languages. States with more than one official language should make the information available in all such languages.

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[60] At its twenty-ninth session, the Working Group agreed to replace the phrase “court-based registration systems” in the first sentence and throughout the text with an appropriate term such as “verification-based systems” or “systems under the oversight of the judiciary” (para. 62, A/CN.9/928).

[61] At its twenty-ninth session, the Working Group agreed to replace the text of paragraph 123 (para. 122 of A/CN.9/WG.I/WP.106) with text proposed at that session (para. 64, A/CN.9/928).

127. A lack of advanced technology, however, should not prevent access to information that could be ensured through other means, such as through the posting of communication notes at the premises of the relevant agency or dissemination through public notices. In some jurisdictions, for example, it is required to have large signs in front of business registry offices advising of their processes, time requirements and fees. In any event, information for businesses to register should be made available at no cost.

128. It is equally important that potential registry users are given clear information on the logistics of registration and on the public availability of information on the business registry. This may be achieved, for example, through the dissemination of guidelines and tutorials (ideally in both printed and electronic form) and through the availability of in-person information and training sessions. In some States, for example, prospective users of the system are referred to classroom-based or eLearning opportunities available through local educational institutions or professional associations.

Recommendation 19: Accessibility of information on how to register

The law should provide that the registrar should ensure that information on the business registration process and any applicable fees is widely publicized, readily retrievable, and available free of charge.

C. Businesses permitted or required to register

129. One of the key objectives of business registration is to permit businesses of all sizes and legal form to improve their visibility in the marketplace and to the public. This objective is of particular importance in assisting MSMEs to participate effectively in the economy and to take advantage of State programmes available to assist them. States should enable businesses of all sizes and legal form to register in an appropriate business registry, or create a single business registry that is tailored to accommodate registration by a range of different sizes and different legal forms of business.

130. Enabling the registration of businesses that would not otherwise be required to register with the business registry (but may be subject to mandatory registration with other public authorities, such as taxation and social security)[62] allows such businesses to benefit from a number of services offered by the State and by the registry, including the protection of a business or a trade name, facilitating access to credit, accessing additional opportunities for growth, improving visibility to the public and to markets and, subject to the legal form chosen for the business which may require it to be registered, the separation of personal assets from assets devoted to business or limiting the liability of the owner of the business. Businesses that voluntarily register with the business registry must, however, fulfil the same registration obligations (e.g. timely filing of periodic returns, updating of registered information, accuracy of information submitted) as those businesses that are required to register and will be subject to the same penalties for non-compliance.

131. States must also define which businesses are required to register under the applicable law. Laws requiring the registration of businesses vary greatly from State to State, but one common aspect is that they all require registration of a particular legal form of business. The nature of the legal forms of business that are required to register in a given jurisdiction is, of course, determined by the applicable law. In some legal traditions, it is common to require registration of all businesses, including sole proprietorships, professionals, and government bodies; in other legal traditions, only corporations and similar entities (with legal personality and limited liability) are required to register. This latter approach can exclude businesses like partnerships and

[62] In keeping with the views of the Working Group at its twenty-ninth session that the concepts of registration with the business registry and of operation of a business in the legal economy are not necessarily synonymous, the Secretariat has added the phrase “with the … security)” to paragraph 130 (para. 129 of A/CN.9/WG.I/WP.106) (para. 22, A/CN.9/928).

sole proprietorships from mandatory registration. However, variations on these regimes also exist, and some jurisdictions permit voluntary registration for businesses that would not otherwise be required to register, such as sole traders and professional associations.

132. Even when business registration is voluntary, it may still prove burdensome for MSMEs and outweigh the benefits the business could gain as a registered business, thus discouraging registration. Some jurisdictions have carried out reforms to simplify the registration process by decreasing its cost (see paras. 202 to 204 and rec. 40 below) and by removing administrative obstacles. In any event, States should encourage micro and small businesses to register by adopting policies especially tailored to the needs of such businesses in order to convey to them the advantages of registration, including specific incentives available for MSMEs (see paras. 40 to 42 in document A/CN.9/WG.I/WP.110). [63]

Recommendation 20: Businesses permitted or required to register

The law should specify:

(a) That businesses of all sizes and legal forms are permitted to register; [64] and

(b) Which legal forms of businesses are required to register.

D. Minimum information required for registration

133. Businesses must meet certain information requirements in order to be registered; those requirements are determined by the State based on its laws and economic framework. The information required usually varies depending on the legal form of business being registered – for example, sole proprietorships and simplified business entities may be required to submit relatively simple details (if at all) in respect of their business, while businesses such as public and private limited liability companies will be required to provide more complex and detailed information. Although the requirements for registration of each legal form of business will vary according to the applicable law, there are, however, some requirements that can be said to be common for many businesses in most States, both during the initial registration process and throughout the lifecycle of the business.

134. General requirements for the registration of all legal forms of business are likely to include information in respect of the business and its registrant(s), such as:

(a) The name of the business;

(b) The address at which the business can be deemed to receive correspondence (such an address can be a "service address" and need not be the residential address of the registrants or the managers of the business);

(c) The name(s) and contact details of the registrant(s);

(d) The identity of the person or persons who are authorized to sign on behalf of the business or who serve as the business's legal representative(s); and

(e) The legal form of the business that is being registered and its unique identifier, if such an identifier has already been assigned (see paras. 112 and 113 above). [65]

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[63] At its twenty-ninth session, the Working Group requested the Secretariat to emphasize that transaction costs and administrative requirements should not create obstacles for businesses that want to register (para. 66, A/CN.9/928).

[64] At its twenty-ninth session, the Working Group agreed to modify recommendation 20(a) (recommendation 19(a) in A/CN.9/WG.I/WP.106) to read: "that businesses of all sizes and legal forms are permitted to register; and" (para. 67, A/CN.9/928).

[65] The Secretariat has adjusted the text in keeping with suggestions made by the Working Group at its twenty-ninth session (para. 68, A/CN.9/928).

135. Other information that may be required for registration, depending on the jurisdiction of the registry and the legal form of the business being registered, can include:

(a) The names and addresses of the persons associated with the business, which may include managers, directors and officers of the business;

(b) The rules governing the organization or management of the business; and

(c) Information relating to the capitalization of the business.[66]

136. Business registries may request information on the gender identification, ethnicity or language group of the registrant and other persons associated with the business, but the provision of such information should not be a requirement for registration. It should be noted, however, that while such information can be statistically important, particularly in light of State programmes that may exist to support under-represented groups, its collection could raise privacy issues. Such information should thus be requested only on a voluntary basis, should be treated as protected data and made available, if at all, only on a statistical basis.[67]

137. Depending on the legal form of the business being registered, other details may be required in order to finalize the registration process. In some jurisdictions, proof of the share capital, information on the type of commercial activities engaged in by the business, and agreements in respect of non-cash property constitute information that may also be required in respect of certain legal forms of business. In addition, in several jurisdictions, registration of shareholder details and any changes therein may be required; in a few cases, registration of shareholder details is carried out by a different authority. States should, however, be mindful that requesting a prospective business to submit complex and extensive information may result in making registration more difficult and expensive and thus may discourage MSMEs from registering.

138. It should also be noted that in some jurisdictions, registration of the identity of the business owner(s) is considered a key requirement; other jurisdictions now make it a practice to register beneficial ownership details and changes in those details, although the business registry is not always the authority entrusted with this task.[68] Transparency in the beneficial ownership of businesses can help prevent the misuse of corporate vehicles, including MSMEs, for illicit purposes.[69]

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[66] As suggested by the Working Group at its twenty-ninth session, the Secretariat has removed redundancies in the commentary to recommendation 21 (recommendation 20 in A/CN.9/WG.I/WP.106) (para. 68, A/CN.9/928).

[67] Further to agreement by the Working Group at its twenty-ninth session on the importance of gathering disaggregated information in respect of the persons associated with the business, the Secretariat has drafted this paragraph (para. 69, A/CN.9/928).

[68] A "beneficial owner" is the natural person(s) who ultimately owns or controls a legal person or arrangement even when the ownership or control is exercised through a chain of ownership or by means of control other than direct control. These vehicles may include not only corporations, trusts, foundations, and limited partnerships, but also simplified business forms, and may involve the creation of a chain of cross-border company law vehicles created in order to conceal their ownership. See also paragraphs 47 to 55, A/CN.9/825.

[69] It should be noted that the Financial Action Task Force (FATF) Recommendation 24 in respect of transparency and beneficial ownership of legal persons encourages States to conduct comprehensive risk assessments of legal persons and to ensure that all companies are registered in a publicly available company registry. The basic information required is: (a) the company name; (b) proof of incorporation; (c) legal form and status; (d) the address of the registered office; (e) its basic regulating powers; and (f) a list of directors. In addition, companies are required to keep a record of their shareholders or members. (See International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, Part E on Transparency and Beneficial Ownership of Legal Persons and Arrangements, Recommendation 24 (www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf).)

Recommendation 21: Minimum information required for registration

The law should establish the minimum information and supporting documents required for the registration of a business, including at least:

(a) The name of the business;

(b) The address at which the business can be deemed to receive correspondence or, in cases where the business does not have a standard form address, the precise description of the geographical location of the business;

(c) The identity of the registrant(s);

(d) The identity of the person or persons who are authorized to sign on behalf of the business or who serve as the business's legal representative(s); and

(e) The legal form of the business being registered and its unique identifier, if such an identifier has already been assigned.

E. Language in which information is to be submitted

139. When requiring the submission of information for business registration, one important issue for the State to consider is the language in which the required information must be submitted. Language can be a barrier and can cause delays in registration if documents need to be translated into the language of the registry. On the other hand, a business can be registered only if the content of the information is legible to the registry staff. For this reason, it is not common for jurisdictions to allow documents or electronic records to be submitted in a non-official language. States, however, may consider whether such documents can be accepted. There are some States that allow all or some of the information relating to the business registration to be submitted in a non-official language. Should States opt for this approach, they may wish to require that the documents or electronic records must be accompanied by a sworn translation into the registry's national language(s) or any other form of authenticating the documents or electronic records that is used in the State.

140. Another issue is whether the documents submitted to the business registry include information, such as names and addresses, that uses a set of characters different from the characters used in the language of the registry. In such a situation, the State should provide guidance on how the characters are to be adjusted or transliterated to conform to the language of the registry.

141. A number of States have more than one official language. In these States, registration systems are usually designed to accommodate registration in all official languages. To ensure that information on businesses operating in the State is available to all registrants and searchers, different approaches can be adopted. States may require parties to make their registration in all official languages; or they may permit filing in one language only, but then require the registry to prepare and register duplicate copies in all official languages. Both these approaches, however, may be costly and invite error. A more efficient method to deal with multiple official languages, any one of which may be used to register, would be to allow registrants to carry out registration in only one of those official languages. Such a language could be that of the province or the region where the registry office or the registry sub-office is located and where the registrant has its place of business. This approach would also take into account the financial constraints of MSMEs and additional circumstances, such as possible literacy issues, when entrepreneurs may not be equally fluent in all official languages spoken in a State. When such an approach is chosen, however, States should ensure that the registration and public information relating to the registry are available in all official languages of the registry. Whichever approach is taken, States will have to consider ways to address this matter so as to ensure that the registration and any subsequent change can be carried out in a cost effective way for both the registrant and the registry and, at the same time, ensure that information can be understood by the registry's users.

Recommendation 22: Language in which information is to be submitted

The law should provide that the information and documents submitted to the business registry must be expressed in the language or languages specified, and in the character set as determined and publicized by the business registry.

F. Notice of registration

142. The enacting State should establish that the business registry must notify the registrant whether or not the registration of the business was effective as soon as practicable, and, in any event, without undue delay. Obligating the registry to inform promptly the registrant of the registration helps to ensure the integrity and security of the registry record. In States where online registration is used, the registrant should receive an online notification of the registration of the business immediately after all of the requirements for the registration of that business have been successfully fulfilled.

Recommendation 23: Notice of registration

The law should establish that the business registry should notify the registrant whether or not the registration of its business is effective as soon as practicable, and, in any event, without undue delay.

G. Content of notice of registration

143. The notice of registration should include the minimum information in respect of the registered business necessary to provide conclusive evidence that all requirements for registration have been complied with and that the business is duly registered according to the law of the enacting State.

Recommendation 24: Content of notice of registration

The law should provide that the notice of registration may be in the form of a certificate, notice or card, and that it should contain at least the following information:

(a) The unique identifier of the business;

(b) The date of its registration;

(c) The name of the business;

(d) The legal form of the business; and

(e) The law under which the business has been registered.

H. Period of effectiveness of registration

144. States may adopt one of two approaches to determine the period of effectiveness of the registration of a business. In some States, the registration of the business is subject to a maximum period of duration established by law. It follows that unless the registration is renewed, the registration of the business will expire on the date stated in the notice of registration or upon the termination of the business.[70] This approach imposes a burden on the registered business, which could be particularly problematic for MSMEs, as they often operate with minimal staff and limited knowledge of the applicable rules. Further, if additional information is required and not furnished by the business, renewal of its registration could also be refused.

[70] It should be noted that the general law of the enacting State for calculating time periods would apply to the calculation of the period of effectiveness, unless specific legal provisions applicable to registration provides otherwise. For example, if the general law of the enacting State provides that, if the applicable period is expressed in whole years from the day of registration, the year runs from the beginning of that day.

145. Under the second approach, no maximum period of validity is established for the registered business and the registration is effective until the business ceases to operate and is deregistered. This approach simplifies the intake process and both encourages registration and reduces its burden on all businesses. However, States that opt for this approach should ensure the adoption of appropriate methods (e.g. sending regular prompts to businesses, establishing advertising campaigns as reminders, or, as a last resort, enforcement procedures) to encourage businesses to keep their registered information current (see paras. 163 to 167 and rec. 30 below).

146. In some cases, both approaches have been adopted: a maximum period of registration, subject to renewal, may apply to registered businesses that are of a legal form that does not have legal personality, while an unlimited period of registration may apply to businesses that have legal personality. This duality of approach reflects the fact that the consequences of the expiry of registration of a business that possesses legal personality are likely to be more serious and may affect the very existence of the business and the limited liability protection afforded its owners.

147. Although some jurisdictions require registered businesses to renew their registration periodically, the practice of establishing registration without a maximum period of validity is a more desirable approach as it meets the needs of businesses for simplified and fast procedures, while relieving them, in particular MSMEs, of a potential burden.

Recommendation 25: Period of effectiveness of registration

The law should establish that the registration is valid until the business is deregistered.

I. Time and effectiveness of registration

148. In the interests of transparency and predictability of a business registration system, States should determine the moment at which the registration of a business or any later change made to the registered information is effective. States usually determine that a business registration or any subsequent change made to it is effective either at the time of the entry of that information into the registry record or when the application for registration (or a change to that information) is received by the registry. Whichever approach is chosen, the most important factor is that the State makes it clear at which moment the registration or change is effective. In addition, the effective time of registration of the business or any later change to the registered information should be indicated in the registry record relating to the relevant business.

149. In some jurisdictions, businesses may also apply for the protection of certain rights in the period prior to registration. For example, the provisional registration of the trade name of the business to be registered may protect that name from being used by any other entity until the registration of the business is effective. In such cases, States should be equally clear to establish the moment at which such pre-registration rights are effective and the period of their effectiveness.[71]

150. If the registry is designed to enable users to submit or amend registered information electronically without the intervention of registry staff and to use online payment methods for the registration, the registry software should ensure that the information becomes effective immediately or nearly immediately after it is transmitted. As a result, any delay between the time of the electronic transmission of the information and the effective time of registration of the business will be eliminated.

151. In registry systems in which the registry staff must enter the information into the registry record (whether it is received electronically or in paper form), there will inevitably be some delay between the time when the information is received in the

[71] At its twenty-ninth session, the Working Group agreed to move the substance of footnote 162 of A/CN.9/WG.I/WP.106 into the commentary (para. 74, A/CN.9/928).

registry office and the time when the information is entered into the registry record. In these cases, the law should provide that the registry must enter the information received into the registry record as soon as practicable and possibly set a deadline by which that entry should be completed. In a mixed registry system which allows information to be submitted in both electronic and paper form, registrants who elect to use the paper form should be alerted that this method may result in some delay in the time of effectiveness of the registration. Finally, a business registry usually processes applications for registration in the order in which they have been received, although some jurisdictions may permit expedited processing of applications, subject to the payment of an additional fee.[72]

Recommendation 26: Time and effectiveness of registration

The law should:

(a) Require the business registry to record the date and time that applications for registration are received and to process them in that order as soon as practicable and, in any event, without undue delay;

(b) Establish clearly the moment at which the registration of the business is effective; and

(c) Specify that the registration of the business must be entered into the business registry as soon as practicable thereafter, and in any event without undue delay.

J. Rejection of an application for registration

1. Rejection due to errors in the application for registration

152. A series of checks and control procedures are required to ensure that the necessary information is provided in order to register the business, however, the extent of such controls varies according to the jurisdiction. In those legal regimes where the registry performs simple control procedures, if all of the basic legal and administrative requirements established by applicable law are met, the registrar must accept the information as filed, record it, and register the business. When the legal regime requires a more thorough verification of the information filed, registries may have to check whether mandatory provisions of the law are met by the content of the application and information submitted, or by any amendments thereto. Whichever approach is chosen, States should define in their law which requirements the information to be submitted to the registry must meet. In certain jurisdictions, the registrar is given the authority to impose requirements as to the form, authentication and manner of delivery of information to be submitted to the registry. When an MSME is seeking to register, such requirements should be kept to a minimum in order to facilitate the registration process for MSMEs. This will reduce administrative hurdles and help in promoting business registration among such businesses.

153. Registration of MSMEs may also be facilitated if the registrar is granted the power to accept and register documents that do not fully comply with the requirements for the form of the submission, and to rectify clerical errors, including its own incidental errors, in order to bring the entry in the business registry into conformity with the documents submitted by the registrant. This will avoid imposing the potentially costly and time-consuming burden of requiring the registrant to resubmit its application for registration. Entrusting the registrar with these responsibilities may be particularly important if registrants do not have direct access to electronic submission of documents and where such submission, or the entry of data, requires the intervention of the registry staff. In States where it is possible for registrants to submit applications for registration directly online, the electronic

[72] The Secretariat has added a sentence at the end of the paragraph further to a request of the Working Group at its twenty-ninth session that the commentary should include a reference to States that permitted the processing of expedited registration subject to the payment of an additional fee (para. 74, A/CN.9/928).

registration system usually provides automated scrutiny of the data entered in the application. When the registrar is granted the authority to correct its own errors as well as any incidental errors that may appear in the information submitted in support of the registration of the business, the law of the enacting State should strictly determine under which conditions those responsibilities may be discharged (see also para. 233 and 234 and rec. 52 below). Clear rules in this regard will ensure the integrity and security of the registry record and minimize any risk of abuse from or corruption by the registry staff (see also paras. 214 to 219 and rec. 46 below). The law of the enacting State should thus establish that the registry may only exercise its discretion to correct errors upon having provided prior notification of the intended corrections to the registrant and having received the consent of the registrant in return, although this approach could create a delay in the registration of the business while the registrar seeks such consent. When the information provided by the business is not sufficient to comply with the requirements for registration, the registrar should be granted the authority to request from the business additional information in order to finalize the registration process. The law of the enacting State should specify an appropriate length of time within which the registrar should make such a request.

154. The rejection of an application for registration is likely to be processed differently depending on whether the registration system is electronic, paper-based, or mixed. In a registry system that allows registrants to submit applications and relevant information directly to the registry electronically, the system should be designed, when permitted by the State's technological infrastructure, so as to automatically require correction of the application if it is submitted with an error, and to automatically reject the submission of incomplete or illegible applications, displaying the reasons for the rejection on the registrant's screen. In cases where the application for registration of a business is submitted in paper form and the reason for its rejection is that the application was incomplete or illegible, there might be some delay between the time of receipt of the application by the registry and the time of communication of its rejection, and the reasons therefor, to the registrant. In mixed registry systems which allow applications to be submitted using both paper and electronic means, the design of the electronic medium should include the technical specifications that allow for automatic requests for correction or automatic rejection of an application. Moreover, registrants who elect to use the paper form when such a choice is possible should be alerted that this method may result in some delay between the time of receipt of the application by the registry and the time of communication of any rejection, and the reasons therefor.

2. Rejection of an application for failure to meet the requirements prescribed by law

155. States should provide that registries may reject the registration of a business if its application does not meet the requirements prescribed by the applicable law of the State.[73] This approach is implemented in several jurisdictions regardless of their legal tradition. In order to prevent any arbitrary use of such power, however, the registrar must provide, in writing, a notice of the rejection of an application for registration and the reasons for which it was rejected, and the registrant must be allowed time to appeal against that decision as well as to resubmit its application. Moreover, it should be noted that the authority of the registrar to reject an application should be limited to situations where the application for registration does not meet the conditions for registration as required by law. The registrar should not have the authority over the substantive grounds for the establishment of a particular legal form of business; such matters should be governed by the law of the enacting State.[74]

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[73] Instances in which the registry improperly accepts an application and registers a business that does not meet the requirements prescribed by law should be governed by the provisions establishing liability of the business registry, if any (see paras. 214 to 219 below). Moreover, the law of the State should establish how rectification of business registration should be carried out in such instances.

[74] At its twenty-ninth session, the Working Group requested the Secretariat to move paragraphs 152, 153 and any reference in paragraph 154 (paras. 149, 150 and 152 of

Recommendation 27: Rejection of an application for registration

The law should provide that the registrar:

(a) Must reject an application for the registration of a business if the application does not meet the requirements specified in the law;

(b) Is required to provide to the registrant in written form the reason for any such rejection;

(c) Is granted the authority to correct its own errors as well as any incidental errors that may appear in the information submitted in support of the registration of the business, provided that the conditions under which the registrar may exercise this authority are clearly established; and

(d) Is not authorized to reject an application for registration based on substantive grounds.[75]

K. Registration of branches

156. Registration of branches of a business is a common practice, although there are jurisdictions in which such registration is not required.[76] Most States require the registration of national branches of a foreign business in order to permit those branches to operate in their jurisdiction and to ensure the protection of domestic creditors, businesses and other interested parties that deal with those branches. In several States, registration of a branch of a business established in another domestic jurisdiction is also required or permitted. Registration of a business branch might not appear to be immediately relevant for MSMEs, whose main concern is more likely to be to consolidate their business without exceeding their human and financial capacity. However, this issue is relevant for those slightly larger businesses that, being of a certain size and having progressed to a certain volume of business, look to expand beyond their local or domestic market. In addition, even micro and very small businesses may be highly successful and may wish to expand their operations. For such businesses, establishing branches in a new location either within or outside the jurisdiction in which they were formed may be both an attractive goal and a realistic option. Although it may seem to be a daunting prospect, in fact, when a business expands, it may find that setting up a branch is cheaper and requires fewer formalities than establishing a subsidiary. This is usually the case even when cross-border branches are established.

157. States have their own rules for governing the operation of foreign businesses, and there may be considerable differences among those States that permit the registration of branches of foreign businesses in terms of what triggers the obligation to register them. Some approaches are based on a broad interpretation of the concept of foreign establishment, for example, those that include not only a branch, but also any establishments with a certain degree of permanence or recognizability, such as a place of business in the foreign State. Other approaches define more precisely the elements that constitute a branch which needs to be registered, possibly including the

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A/CN.9/WG.I/WP.106) to the processing of registration forms in the commentary before recommendation 21 (recommendation 20 in A/CN.9/WG.I/WP.106). However, upon review it is suggested that those paragraphs remain in Section J of the guide for consistency with recommendation 27 (recommendation 26 in A/CN.9/WG.I/WP.106) and in accordance with previous decisions of the Working Group at its twenty-eighth session (para. 93, A/CN.9/900). The Secretariat has thus streamlined Section J by grouping paragraphs 152, 153 and 154 under subsection "1. Rejection due to errors in the application for registration" and relocated paragraph 155 (para. 151 of A/CN.9/WG.I/WP.106) under subsection "2. Rejection of an application for failure to meet the requirements prescribed by law" (para. 75, A/CN.9/928).

[75] Further to a request of the Working Group at its twenty-ninth session, the Secretariat has: (a) deleted the term "objective" in recommendation 27(a) (recommendation 26(a) in A/CN.9/WG.I/WP.106); and (b) added a subparagraph (d) (para. 76, A/CN.9/928).

[76] At its twenty-ninth session, the Working Group requested the Secretariat to consider clarifying that in some jurisdictions, branches were not required to register (para. 77, A/CN.9/928).

presence of some sort of management, the maintenance of an independent bank account, the relation between the branch and the original or main business, or the requirement that the original or main business has its main office registered abroad. Not all States define a branch in their laws, or state under which circumstances a foreign establishment in the State must be registered: laws may simply refer to the existence of a foreign branch. In these cases, registries may fill the gap by issuing guidelines that clarify the conditions under which such a registration should be carried out. When this occurs, the registration guidelines should not be seen as an attempt to legislate by providing a discrete definition of what constitutes a branch, but rather as a tool to explain the features required by a branch of a business in order to be registered.

158. When simplifying or establishing their business registration system, States should consider enacting provisions governing the registration of branches of businesses from other jurisdictions. Those provisions should address, at minimum, issues such as timing of registration, disclosure requirements, information on the persons who can legally represent the branch and the language in which the registration documents should be submitted. Duplication of names could represent a major issue when registering foreign company branches, and it is important to ensure that the identity of a business is consistent in different jurisdictions. In this regard, an optimal approach could be for a business registry to use unique identifiers to ensure that the identity of a business remains consistent and clear within and across jurisdictions (see paras. 104 to 111 above).

Recommendation 28: Registration of branches

The law should establish:

(a) Whether the registration of a branch of a business is required or permitted;

(b) A definition of “branch” for registration purposes that is consistent with the definition provided elsewhere in the law; and

(c) Provisions regarding the registration of a branch to address the following issues:

(i) When a branch must be registered;

(ii) Disclosure requirements, including: the name and address of the registrants; the name and address of the branch; the legal form of the original or main business seeking to register a branch; and current proof of the existence of the original or main business issued by a competent authority of the State or other jurisdiction in which that business is registered; and

(iii) Information on the person or persons who can legally represent the branch.

V. Post-registration

159. While a key function of a business registry is, of course, the registration of a business, registries typically support businesses throughout their life cycle. Once a business’s registered information is collected and properly recorded in the business registry, it is imperative that it be kept current in order for it to continue to be of value to users of the registry. Both the registered business and the registry play roles in meeting these goals.

160. In order for a business to remain registered, it must submit certain information during the course of its life, either periodically or when changes in its registered information occur, so that the registry is able to maintain the information on that business in as current a state as possible. The registry also plays a role in ensuring that its information is kept as current as possible, and may use various means to do so, such as those explored in greater detail below. Both of these functions permit the registry to provide accurate business information to its users, thus ensuring transparency and supplying interested parties, including potential business partners

and sources of finance, the public and the State, with a trustworthy source of information.

A. Information required after registration

161. In many jurisdictions, entrepreneurs have a legal obligation to inform the registry of any changes occurring in the business, whether these are factual changes (for example, address or telephone number) or whether they pertain to the structure of the business (for example, a change in the legal form of business). Information exchange between business registries and different government authorities operating in the same jurisdiction serves the same purpose. In some cases, business registries publish annual accounts, financial statements or periodic returns of businesses that are useful sources of information in that jurisdiction for investors, business clients, potential creditors and government authorities. Although the submission and publication of detailed financial statements might be appropriate for public companies, depending on their legal form, MSMEs should be required to submit far less detailed financial information, if any at all, and such information should only be submitted to the business registry and made public if desired by the MSME. However, to promote accountability and transparency and to improve their access to credit or attract investment, MSMEs may wish to submit and make public their financial information.[77] In order to encourage MSMEs to do so, States should allow MSMEs to decide on an annual basis whether to opt for disclosure of such information or not.

162. The submission of information that a business is required to provide in order to remain registered may be prompted by periodic returns that are required by the registry at regular intervals in order to keep the information in the registry current or it may be submitted by the business as changes to its registered information occur. Information required in this regard may include:

(a) Amendments to any of the information that was initially or subsequently required for the registration of the business as set out in recommendation 21;

(b) Changes in the name(s) and address(es) of the person(s) associated with the business;

(c) Financial information in respect of the business, depending on its legal form; and

(d) Information concerning insolvency proceedings, liquidation or mergers (see para. 64 above).

Recommendation 29: Information required after registration

The law should specify that after registration, the registered business must file with the business registry at least the following information:

(a) Any changes or amendments to the information that was initially required for the registration of the business pursuant to recommendation 21;[78] and

(b) Periodic returns, as required, which may include annual accounts.

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[77] While MSMEs are not generally required to provide the same flow and rate of information as publicly held firms generally, they may have strong incentives for doing so, particularly as they develop and progress. Businesses wishing to improve their access to credit or to attract investment may wish to signal their accountability by supplying information on: (1) the business' objectives; (2) principal changes; (3) balance sheet and off-balance sheet items; (4) its financial position and capital needs; (5) the composition of any management board and its policy for appointments and remuneration; (6) forward-looking expectations; and (7) profits and dividends. Such considerations are not likely to trouble MSMEs while they remain small, but could be important for such businesses as they grow.

[78] Further to a decision of the Working Group at its twenty-ninth session, the Secretariat has deleted the portion of recommendation 29(a) (recommendation 28(a) in A/CN.9/WG.I/WP.106) after the phrase "recommendation 21" (recommendation 20 in A/CN.9/WG.I/WP.106) ("or to the … changes occur") and has reflected the concept deleted in subparagraph 162(a) (para. 159(a) of A/CN.9/WG.I/WP.106) (para. 79, A/CN.9/928).

B. Maintaining a current registry

163. States should enact provisions that enable the business registry to keep its information as current as possible. A common approach through which that may be accomplished is for the State to require registered businesses to file at regular intervals, for example once a year, a declaration stating that certain core information contained in the register concerning the business is accurate or stating what changes should be made. Although this approach may be valuable as a means of identifying businesses that have permanently ceased to operate and may be deregistered, and may not be burdensome for larger business with sufficient human resources, such a requirement could be quite demanding for MSMEs, in particular if there is an associated cost.

164. Another approach, which seems preferable in the case of MSMEs, is to require the business to update its information in the registry whenever a change in any of the registered information occurs. The risk of this approach, which is largely dependent on the business complying with the rules, may be that the filing of changes is delayed or does not occur. To prevent this, States could adopt a system pursuant to which regular prompts are sent, usually electronically, to businesses to request them to ensure that their registered information is current. In order to minimize the burden for registries and to help them make the most effective use of their resources, prompts that registries regularly send out to remind businesses to submit their periodic returns could also include generic reminders to update registered information. If the registry is operated in a paper-based or mixed format, the registry should identify the best means of performing this task, since sending paper-based prompts to individual businesses would be time and resource consuming and may not be a sustainable approach. In one State, where the registry is not operated electronically, reminders to businesses to update their registered information are routinely published in newspapers.

165. Regardless of the approach chosen to prompt businesses to inform the registry of any changes in their registered information, States may adopt enforcement measures for businesses that fail to meet their obligations to file amendments. For example, a State could adopt provisions establishing the liability of the registered business to a fine on conviction if changes are not filed with the business registry within the time prescribed by law (see paras. 212 to 213 and rec. 45 below).

166. A more general method that may help mitigate any potential deterioration of the information collected in the business registry would include enhancing the interconnectivity and the exchange of information between business registries and taxation and social security authorities as well as other public authorities. The adoption of integrated electronic interfaces among the authorities involved in the business registration process allowing for their technical interoperability and the use of unique identifiers could play a key role (see paras. 100 and 101 and 104 to 111 above). Moreover, the registrar could identify sources of information on the registered business that would assist in maintaining a current registry record.[79]

167. Once the registry has received the updated information, it should ensure that all amendments are entered in the registry record without undue delay. Again, the form in which the registry is operated is likely to dictate what might constitute an undue delay. If the registry allows users to submit information electronically without the intervention of the registry staff, the registry software should permit the amendments to become immediately or nearly immediately effective. Where the registry system (whether electronic, paper-based or mixed) requires the registry staff to enter the information on behalf of the business, all amendments should be reflected in the

[79] The final sentence has been added to reflect the view of the Working Group at its twenty-ninth session that there should be an onus on the registrar to proactively identify sources of information to keep the registry up to date (para. 80, A/CN.9/928).

registry as soon as possible, and a maximum time period in which that should be accomplished could be stipulated.

Recommendation 30: Maintaining a current registry[80]

The law should require the registrar to ensure that the information in the business registry is kept current, including through:

(a) Sending an automated request to registered businesses to prompt them to report whether the information maintained in the registry continues to be accurate or to state which changes should be made;

(b) Displaying notices of the required updates in the registry office and sub-offices and routinely publishing reminders on the registry website and social media and in national and local electronic and print media;

(c) Identification of sources of information on the registered businesses that would assist in maintaining the currency of the registry; and

(d) Updating the registry as soon as practicable following the receipt of amendments to registered information and, in any event, without undue delay thereafter.

C. Making amendments to registered information

168. States should also determine the time at which changes to the registered information are effective in order to promote transparency and predictability of the business registration system. Changes should become effective when the information contained in the notification of amendments is entered into the registry record rather than when the information is received by the registry, and the time of the change should be indicated in the registry record of the relevant business. In order to preserve information on the history of the business, amendments to previously registered information should be added to the registry record without deleting previously entered information.

169. As in the case of business registration, if the registry allows users to submit amendments electronically without the intervention of the registry staff, the amendments should become effective immediately or nearly immediately after they are transmitted. If the registry staff must enter the amendments into the registry on behalf of the business, amendments received should be entered into the registry record as soon as practicable, possibly within a maximum time. In a mixed registry system that allows amendments to be submitted using both paper and electronic means, registrants who elect to use the paper form should be alerted that this method may result in some delay in the effectiveness of the amendments.

Recommendation 31: Making amendments to registered information

The law should:

(a) Require the business registry to: (i) process amendments to the registered information in the order in which they are received; (ii) record the date and time when the amendments are entered into the registry record; and (iii) notify the registered business as soon as practicable and in any event, without undue delay, that its registered information has been amended; and

(b) Establish when an amendment to the registered information is effective.

VI. Accessibility and information-sharing

[80] In keeping with the deliberations of the Working Group at its twenty-ninth session that recommendation 30(a) (recommendation 29(a) in A/CN.9/WG.I/WP.106) should be adjusted to reflect additional best practices to keep registered information current, the Secretariat has added subparagraphs (b) and (c) to the recommendation (para. 80, A/CN.9/928).

A. Access to business registry services[81]

170. The law should permit all potential registrants to access business registry services without discrimination based on grounds such as sex, race, ethnic or social origin, religion, belief, or political view. In the interest of promoting domestic economic growth, an increasing number of States allow registrants who are neither citizens of, nor residents in, the State to register a business, provided that such registrants meet certain requirements and comply with certain procedures established by the law concerning foreign registrants.

171. Access of potential registrants to the services of the business registry should only be subject to compliance with minimum age requirements, and with procedural requirements for the use of such services, such as: that the request for registration be submitted via an authorized medium of communication and on the prescribed form; and that the registrant provide identification in the form requested by the registry (see paras. 134 and 135 above and rec. 21) and pay any fee required for registration (see paras. 200 and 202 to 204 and rec. 40 below).[82]

172. The registry should maintain a record of the identity of the registrant. In order to ensure a simple and straightforward registration process, the evidence of identity required of a registrant should be that which is generally accepted as sufficient in day-to-day commercial transactions in the enacting State. When registries are operated electronically and allow for direct access by users, potential registrants should be given the option of setting up a protected user account with the registry in order to transmit information to the registry. This would facilitate access by frequent users of registration services (such as business registration intermediaries or agents), since they would need to provide the required evidence of their identity only when initially setting up the account.[83]

173. Once the registrant has complied with the requirements mentioned in paragraph 171 above (and any others established by the law of the State) for accessing the registry, the registry cannot deny access to the registry services. The only scrutiny that the registry may conduct at this stage (which is carried out automatically in an electronic registry) is to ensure that legible information (even if incomplete or incorrect) is entered in the form for business registration. If the registrant did not meet the objective conditions for access to the registration services, the registry should provide the reasons for denying access (e.g. the registrant failed to provide valid identification) in order to enable the registrant to address the problem. The registry should provide such reasons as soon as practicable (in this respect see paras. 153 to 155 and rec. 27 above).[84]

174. Certain rules relating to access to business registry services may also be addressed in the "terms and conditions of use" established by the registry. These may include offering the user the opportunity to open an account to facilitate quick access to registry services and any necessary payment of fees for those services. The terms and conditions of access may also address the concerns of registrants regarding the security and confidentiality of their financial and other information or the risk of changes being made to registered information without the authority of the business. Assigning a unique user name and a password to the registrant, or employing other modern security techniques would help reduce such risks, as would requiring the registry to notify the business of any changes made by others in the user account information.

Recommendation 32: Access to business registry services

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[81] At its twenty-ninth session, the Working Group agreed to delete the word "public" from the title of the section and of recommendation 32 (recommendation 31 in A/CN.9/WG.I/WP.106) (para. 82, A/CN.9/928).

[82] This approach is consistent with the approach adopted in the UNCITRAL Guide on the Implementation of a Security Rights Registry at paragraphs 95 to 99.

[83] Ibid.

[84] Ibid.

The law should permit any qualified person to access the services of the business registry.

B. Public availability of information

175. In keeping with its functions as a collector and disseminator of business-related information, the registry should make available all public information on a registered business that is relevant for those that interact with the business (whether they be public authorities or private entities) to be fully aware of the business identity and status of that business. This may[85] allow interested users to make more informed decisions about who they wish to do business with, and for organizations and other stakeholders to gather business intelligence. Moreover, since access to the publicly available registered information by general users also enhances certainty of and transparency in the way the registry operates, the principle of public access to the information deposited in the registry should be stated in the law of the enacting State. In most States, public access to the information in the registry is generally unqualified, and allowing full public access does not compromise the confidentiality of certain registered information, which can be protected by allowing users to access only certain types of information. For these reasons, it is recommended that the registry should be fully accessible to the public, subject only to necessary confidentiality restrictions in respect of certain registered information.

176. While providing disclosure of the publicly available registered information is an approach followed in most States, the way in which users access information, the format in which the information is presented and the type of information available varies greatly from State to State. This variation is not only a function of the technological development of a State, but of the framework for accessing such information, for example, in respect of different criteria that may be used to search the registry.

177. It is not recommended that States restrict access to search the information on the business registry or that users be required to demonstrate a reason to request access. Such a policy could seriously compromise the core function of the registry to publish and disseminate information on registered businesses. Moreover, if a discretionary element is injected into the granting of an information request, equal public access to the information in the registry could be impaired, and some potential users might not have access to information that was available to others.

178. Access to the business registry can be made subject to certain procedural requirements, such as requiring users to submit their information request in a prescribed form and to pay any prescribed fee. If a user does not use the prescribed registry form or pay the necessary fee, the user may be refused access to search the registry. As in the case of refusing access to registration services, the registry should be obliged to give the specific reason for refusing access to information services as soon as practicable so that the user can remedy the problem.

179. Unlike the approach adopted for registrants, the registry should not request and maintain evidence of the identity of a user as a precondition to obtaining access to the information on the business registry, since a user is merely retrieving information contained in the public registry record. Identification should be requested of users only if it is necessary for the purposes of collecting any fees applicable to the retrieval of such information.

180. The registry may also reject an information request if the user does not enter a search criterion in a legible manner in the designated field but the registry should provide the grounds for any rejection as soon as practicable, as in the case of non-compliance with the objective conditions for registration by registrants (see paras. 173 and 174 above). In registry systems that allow users to submit information requests electronically to the registry, the software should be designed to prevent

[85] At its twenty-ninth session, the Working Group agreed to replace the term “will” with “may” (para. 83, A/CN.9/928).

automatically the submission of information requests that do not include a legible search criterion in the designated field and to display the reasons for refusal on the user's screen.

181. Further, in order to facilitate dissemination of the information, States should be encouraged to abolish or keep to a minimum fees charged to access basic information on registered businesses (see para. 205 below). This approach may be greatly facilitated by the development of electronic registries that allow users to submit requests or make searches electronically without the need to rely on intermediation by registry personnel. Such an approach is also much cheaper for the registry. Where registration systems are paper-based, users may be required to either visit the registry office and conduct the search on site (whether manually or using ICT facilities that are available) or have information sent to them on paper. In both cases, registry staff may need to assist the user to locate the information and prepare it for disclosure. Again, paper-based information access is associated with delay, higher costs, the potential for error, and the possibility that the information obtained is less current.

182. Finally, States should devise effective means to encourage the use of information services provided by the registry. The adoption of electronic registries that allow direct and continuous access for users (except for periods of scheduled maintenance) will promote the actual use of the information. Communication campaigns on the services available from the business registry will also contribute to the active take-up of information services.

Recommendation 33: Public availability of information

The law should specify that all registered information is fully and readily[86] available to the public unless it is protected under the applicable law.

C. Where information is not made public

183. Access to the business registry should be granted to all interested entities and to the public at large. In order to maintain the integrity and reputation of the registry as a trusted collector of information that has public relevance, access to sensitive information should be controlled to avoid any breach of confidentiality. States should thus put in place proper disclosure procedures. They may do so by adopting provisions that list which information is not available for public disclosure or they may follow the opposite approach and adopt provisions that list the information that is publicly accessible, indicating that information that is not listed cannot be disclosed.

184. Legislation in each State often includes provisions on data protection and privacy. When establishing a registry, in particular an electronic registry, States must consider issues concerning the treatment of protected data that is included in the application for registration and its protection, storage and use. Appropriate legislation should be in place to ensure that such data are protected, including rules on how it may be shared between different public authorities (see para. 120 and rec. 18 above). States should also be mindful that a major trend towards increased transparency in order to avoid the misuse of corporate vehicles for illicit purposes has resulted from international efforts to fight money-laundering, terrorist, and other illicit activities.[87] States should thus adopt a balanced approach that achieves both transparency and the need to protect access to sensitive information maintained in the registry.

Recommendation 34: Where information is not made public

In cases where information in the business registry is not made public, the law should:

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[86] At its twenty-ninth session, the Working Group agreed to include the phrase "fully and readily" before the word "available" in recommendation 33 (recommendation 32 in A/CN.9/WG.I/WP.106) (para. 83, A/CN.9/928).

[87] See supra, note 69 for additional information in respect of FATF Recommendation 24.

(a) Establish which information concerning the registered business is subject to the applicable law on public disclosure of protected data and require the registrar to publicize the types of information that cannot be publicly disclosed pursuant to that law;[88] and

(b) Specify the circumstances in which the registrar may use or disclose information that is subject to confidentiality restrictions.

D. Hours of operation

185. Establishing the operating days and hours of the business registry depends on whether the registry is designed to allow direct electronic registration and information access by users or whether it requires their physical presence at an office of the registry. In the former case, electronic access should be available continuously except for brief periods to undertake scheduled maintenance; in the latter case, registry offices should operate during dependable and consistent hours that are compatible with the needs of potential registry users. In view of the importance of ensuring ease of access to registry services for users, the above criteria[89] should be incorporated in the law of the enacting State or in administrative guidelines published by the registry, and the registry should ensure that its operating days and hours are widely publicized.

186. If the registry provides services through a physical office, the minimum hours and days of operation should be the normal business days and hours of public offices in the State. To the extent that the registry requires or permits paper-based submissions, the registry should aim to ensure that the paper-based information is entered into the registry record and made available as soon as practicable, but preferably on the same business day that the information is received by the registry. Information requests submitted in paper form should likewise be processed on the same day they are received. To achieve this goal, the deadline for submitting paper-based information requests may be set independently from the business hours of the registry office.[90] Alternatively, the business registry could continue to receive paper submissions and information requests throughout its business hours, but set a "cut off" time after which information received may not be entered into the registry record, or information searches performed, until the next business day. A third approach would be for the registry to undertake that information will be entered into the registry record and searches for information will be performed within a stated number of business hours after receipt of the application or information request.

187. The law could also enumerate, in either an exhaustive or an indicative way, the circumstances under which access to registry services may temporarily be suspended. An exhaustive list would provide more certainty, but there is a risk that it might not cover all possible circumstances. An indicative list would provide more flexibility but less certainty. Circumstances justifying a suspension of registry services would include any event that makes it impossible or impractical to provide those services (for example, due to force majeure such as fire, flood, earthquake or war, or to a breakdown in the Internet or network connection).

Recommendation 35: Hours of operation

The law should ensure that:

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[88] At its twenty-ninth session, the Working Group requested the Secretariat to clarify that the registrar should only publicize, and may not decide, the types of information that cannot be publicly disclosed according to the applicable law (para. 84, A/CN.9/928).

[89] At its twenty-ninth session, the Working Group agreed that the phrase "these recommendations" in the final sentence of paragraph 185 (para. 182 of A/CN.9/WG.I/WP.106) should be changed to text along the lines of "the requirements above" (para. 85, A/CN.9/928).

[90] For example, the law or administrative guidelines of the registry could stipulate that, while the registry office is open between 9 a.m. and 5 p.m., all applications, changes and search requests must be received by an earlier time (for example, by 4 p.m.) to ensure that the registry staff has sufficient time to enter the information included in the application into the registry record or conduct the searches.

(a) If access to the services of the business registry is provided electronically, access is available at all times;

(b) If access to the services of the business registry is provided through a physical office:

(i) Each office of the registry is open to the public during [*the days and hours to be specified by the enacting State*]; and

(ii) Information about any registry office locations and their opening days and hours is publicized on the registry's website, if any, or otherwise widely publicized, and the opening days and hours of registry offices are posted at each office; and

(c) Notwithstanding subparagraphs (a) and (b) of this recommendation, the business registry may suspend access to the services of the registry in whole or in part in order to perform maintenance or provide repair services to the registry, provided that:

(i) The period of suspension of the registration services is as short as practicable;

(ii) Notification of the suspension and its expected duration is widely publicized; and

(iii) Such notice should be provided in advance and, if not feasible, as soon after the suspension as is reasonably practicable.

E. Direct electronic access to submit registration, to request amendments and to search the registry

188. If the State opts to implement an electronic registration system, the registry should be designed, if possible, to allow registry users to submit directly and to conduct searches from any electronic device,[91] as well as from computer facilities made available to the public at sub-offices of the registry or other locations. To further facilitate access to business registry services, the registry conditions of use may allow intermediaries (for example, lawyers, notaries or private sector third-party service providers) to carry out registration and information searches on behalf of their clients when the applicable law allows or requires the involvement of such intermediaries. If accommodated by the technological infrastructure of the State, or at a later stage of the reform, States should also consider adopting systems that allow registration, the filing of amendments and searches of the registry to be carried out through the use of mobile technology. This solution may be particularly appropriate for MSMEs in those economies where mobile services are often easier to access than electronic services.

189. When the registry allows for direct electronic access, the registry user (including an intermediary) bears the burden of ensuring the accuracy of any request for registration or amendment, or of any search of the registry. Since the required digital forms are completed by registry users without assistance from the registry staff, the potential for alteration of those forms by the registry staff is greatly minimized, as their duties are essentially limited to managing and facilitating electronic access by users, processing any fees, overseeing the operation and maintenance of the registry system and gathering statistical data. Even when direct electronic access is allowed, however, the possibility of error or misconduct on the part of the registry staff may exist if the registry staff is still required to intervene and enter information submitted to it electronically into the business registry record (see also para. 215 below).[92]

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[91] In keeping with a decision of the Working Group at its twenty-ninth session, the Secretariat has replaced the term "private computer" (para. 86, A/CN.9/928).

[92] The Secretariat has adjusted this paragraph in light of the request of the Working Group at its twenty-ninth session that the focus of paragraph 189 (para. 186 of A/CN.9/WG.I/WP.106) should be on the electronic submission of information and not the entry of data in the registry record (para. 86, A/CN.9/928).

190. Direct electronic access significantly reduces the costs of operation and maintenance of the system, increases accessibility to the registry (including when registration or searches are carried out through intermediaries) and enhances the efficiency of the registration process by eliminating any time lag between the submission of information to the registry and the actual entry of that information into the record. In some States, electronic access (from the premises of a registrant or a business, or from a branch office of the registry) is the only available mode of access for both registration and information searches. In fact, in many States, where the registration system is both electronic and paper-based, electronic submission is by far the most prevalent mode of data submission.

191. It is thus recommended that, to the extent possible, States should establish a business registration system that is computerized and that permits direct electronic access by registry users. Given the practical considerations involved in establishing an electronic registry, multiple modes of access should be made available to registry users at least in the early stages of implementation in order to reassure those who are unfamiliar with the system. To facilitate its use, the registry should be organized to provide for multiple points of access for both electronic and paper submissions and information requests. However, even where States continue to use paper-based registries, the overall objective is the same: that is, to make the registration and information retrieval process as simple, transparent, efficient, inexpensive and publicly accessible as possible.

Recommendation 36: Direct electronic access to submit registration and to request amendments[93]

The law should establish that, in keeping with other applicable law of the enacting State, where information and communications technology is available, the submission of applications for the registration of a business and requests for amendment of the registered information of a business are permitted without requiring the physical presence of the registrant or user in the business registry office.

Recommendation 37: Direct electronic access to search the registry

The law should establish that, where information and communications technology is available, searches of the registry are permitted without requiring the physical presence of the user in the business registry office or the intermediation of the registry staff.

F. Facilitating access to information

1. Type of information provided

192. Information can be of particular value to users if it is available to the public, although the type of registered information that is available will depend on the legal form of the business being searched and on the applicable law regarding what registered information is protected and what may be made available to the public. Valuable information on a business that may be available on the registry: the profile of the business and its officers (directors, auditors); annual accounts; a list of the business's divisions or places of business; the notice of registration or incorporation; the publication of the business's memoranda, articles of association, or other rules governing the operation or management of the business; existing names and history of the business; insolvency-related information; any share capital; certified copies of registry documents; and notifications of events (late filing of annual accounts, newly submitted documents, etc.). Other valuable information relating to the business registry may include the identification of relevant additional laws and regulations, or information on the expected turnaround time in the provision of registry information

[93] At its twenty-ninth session, the Working Group agreed to delete the phrase "and search the registry" from the title of the recommendation and the phrase "or assistance of the registry staff" after the term "registry office" at the end of the recommendation (para. 86, A/CN.9/928).

services and fees for such services.[94] In addition, some registries prepare reports relating to the operation of the business registry that may provide registry designers, policymakers and academic researchers with useful data (for example, on the volume of registrations and searches, operating costs, or registration and search fees collected over a given period). Information on business data, annual accounts and periodic returns, as well as information about fees for registry services, are usually the most popular pieces of information and the most requested by the public. When registration procedures permit, and subject to the law of the enacting State, business registries may also make available to users disaggregated statistical information that has voluntarily been submitted in respect of the gender, ethnicity, or language group of persons associated with the business. Such information can be of particular importance for States wishing to develop policies and programmes to support under-represented societal groups (see paras. 62 and 136 above).[95]

193. If the State is one in which member or shareholder details must be registered, the public may also be granted access to such information. A similar approach may be taken with respect to information on the beneficial ownership of a business, which may be made available to the public in order to allay concerns over the potential misuse of business entities. However, the sensitive nature of the information on beneficial ownership may require the State to exercise caution before opting for disclosure of beneficial ownership without any limitation.[96]

2. Removing unnecessary barriers to accessibility

194. The registry needs to ensure that searchable information is easily accessible; even though the information is available, it does not always mean that it is easy for users to access. There are often different barriers to accessing the information, such as the format in which the information is presented: if special software is required to read the information, or if it is only available in one particular format, it cannot be said to be broadly accessible. In several States, some information is made available in paper and electronic formats; however, information made available only on paper likely entails reduced public accessibility. Other barriers that may make information less accessible are charging fees for it (see para. 205 below),[97] requiring users to register prior to providing access to the information, and charging a fee for user registration. States should find the most appropriate solutions according to their needs, their conditions and their laws.

195. Some States not only provide for electronic information searches but also distribute the information through other channels that can complement the use of the Internet or that may even represent the main method of distribution if an online registration system is not yet fully developed. The following additional means of sharing information are used in some States:

(a) Telephone services to provide information on registered businesses and product ordering;

(b) Subscription services to inform subscribers about events pertaining to specified businesses or for announcements of certain kinds of business registrations;

(c) Ordering services to enable access to various products, most often using an Internet browser; and

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[94] The Secretariat has adjusted the text further to a decision of the Working Group at its twenty-ninth session that paragraph 192 (para. 189 of A/CN.9/WG.I/WP.106) should not duplicate information on business registration that might also be found in the commentary to recommendation 19 (recommendation 18 in A/CN.9/WG.I/WP.106) (para. 87, A/CN.9/928).

[95] The Secretariat has added two sentences (“When registration … social groups”) at the end of paragraph 192 (para. 189 of A/CN.9/WG.I/WP.106) in response to the comment of the Working Group at its twenty-ninth session that reference to gender-disaggregated data could be included in appropriate section of the draft guide (para. 33, A/CN.9/928).

[96] See, supra, note 69 for further information in respect of FATF Recommendation 24.

[97] The Secretariat has entered a reference to paragraph 205 (para. 202 of A/CN.9/WG.I/WP.106) further to a request of the Working Group at its twenty-ninth session (para. 87, A/CN.9/928).

(d) Delivery services to convey various products, such as transcripts of publicly available registered information on a business, paper lists, or electronic files with selected data.[98]

196. One often overlooked barrier to accessing information, whether in order to register a business or to review data and information in the registry, is a lack of knowledge of the official language(s). Providing forms and instructions in other languages is likely to make the registry more accessible to users. However, business registries seldom offer such services in languages additional to the official language(s). Making all information available in additional languages may incur additional expense for the registry, a more modest approach may be to consider making information on only core aspects of registration, for example in respect of instructions or forms, available in a non-official language. In deciding which non-official language would be most appropriate, the registry may wish to base its decision on historical ties, the economic interests of the jurisdiction and the geographic area in which the jurisdiction is situated (see paras. 139 to 141 and rec. 22 above), as well as consider the use of a widely used language that facilitates cross-border communication.

3. Bulk information

197. In addition to making information on individual businesses available, business registries in some jurisdictions also offer the possibility of obtaining "bulk" information, i.e. a compilation of information on selected, or all, registered businesses. Such information can be requested for commercial or non-commercial purposes and is often used by public authorities as well as private organizations (such as banks) that deal with businesses and perform frequent data processing on them. Distribution of bulk information varies according to the needs and capability of the receiving entity. In performing this function, one approach would be for the registry to ensure the electronic transfer of selected data on all registered entities, combined with the transfer of data on all new registrations, amendments, and deregistration during a specified period. Another option for the registry would be to make use of web-based or similar services for system-to-system integration that provide both name searches and direct access to selected data on specific entities. Direct access avoids unnecessary and redundant storage of information by the receiving organization, and States where such services are not yet available should consider it as a viable option when streamlining their business registration system. Distribution of bulk information can represent a practical approach for the registry to derive self-generated funds (see para. 205 below).

Recommendation 38: Facilitating access to information

The law should ensure the facilitation of access to public information on registered businesses by avoiding the creation of unnecessary barriers such as: requirements for the installation of specific software; charging expensive access fees; or requiring users of information services to register or otherwise provide information on their identity.[99]

G. Cross-border access to publicly available registered information

198. The internationalization of businesses of all sizes creates an increasing demand for access to information on businesses operating outside their national borders. However, official information on registered businesses is not always readily available on a cross-border basis due to technical or language barriers. Making such

[98] For improved consistency of the guide, the Secretariat has: (a) moved this paragraph (para. 191 of A/CN.9/WG.I/WP.106) to subsection 2; and (b) made editorial adjustments to its two opening sentences.

[99] In keeping with comments of the Working Group at its twenty-ninth session, the Secretariat has adjusted recommendation 38 (recommendation 37 in A/CN.9/WG.I/WP.106) as follows: (a) the phrase "to business registration and" has been replaced with "public information on registered businesses that are"; and (b) the word "prohibitively" has been deleted (para. 88, A/CN.9/928).

cross-border access as simple and fast as possible is thus of key importance in order to ensure the traceability of businesses, the transparency of their operations and to create a more business-friendly environment.

199. A range of measures can be adopted to facilitate access by foreign users of the business registry. Certain measures can be implemented to ensure the easy retrieval of information stored in the business registry by such users. In addition to allowing for registration and search requests in at least one non-official language (see para. 196 above), adopting easy-to-use search criteria and a simply understood information structure would further simplify access by users from foreign jurisdictions. States may wish to consider coordinating with other States (at least with those from the same geographic region) in order to adopt approaches that would allow for cross-border standardization and comparability of the information transmitted. Another group of measures that could be adopted pertain to providing information in a non-official but widely understood language on how foreign users can access the services of the business registry. As in the case of domestic users, users from foreign jurisdictions should be advised of the possibility of establishing direct contact with registry personnel through a dedicated email account of the registry, electronic contact forms or client service telephone numbers (see para. 126 above).[100]

Recommendation 39: Cross-border access to publicly available registered information

The law should ensure that systems for the registration of businesses adopt solutions that facilitate cross-border access to the public information in the registry.

VII. Fees

200. It is standard practice in many States to require the payment of a fee for registration services. In return for that fee, registered businesses receive access to business registry services and to the many advantages that registration offers them. The most common types of fees are those payable for registration of a business and for the provision of information products and services, while to a lesser extent, fines may also generate funds. In some jurisdictions, registries may also charge an annual fee to keep a business in the registry (these fees are unrelated to any particular activity), as well as fees to register annual accounts or financial statements.

201. Although they generate revenue for the registries, fees can affect a business's decision whether to register, since such payments may impose a burden, in particular on MSMEs. Fees for new registration, for example, can prevent businesses from registering, while annual fees to keep a company in the registry or to register annual accounts could discourage businesses from maintaining their registered status. States should take these and other indirect effects into consideration when establishing fees for registration services. States seeking to increase the business registration of MSMEs and to support such businesses throughout their lifecycle should consider offering registration and post-registration services free of charge. In several States that consider business registration as a public service intended to encourage businesses of all sizes and legal forms to register rather than as a revenue-generating mechanism, registration fees are often set at a level that is not prohibitive for MSMEs.[101] In such States, the use of flat fee schedules for registration, regardless of the size of the business, is the most common approach. There are also examples of States that provide business registration free of charge. In States with enhanced interoperability among the business registry, taxation and social security authorities that results in the adoption of integrated registration and payment forms, a uniform approach should be taken to fees charged for registration by all relevant authorities.

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[100] The Secretariat has made adjustments to this paragraph to reflect drafting proposals made by the Working Group at its twenty-ninth session (para. 89, A/CN.9/928).

[101] In keeping with drafting suggestions made by the Working Group at its twenty-ninth session, the Secretariat has adjusted paragraph 201 (para. 91, A/CN.9/928).

A. Fees charged for business registry services

202. Striking a balance between the sustainability of the registry operations and the promotion of business registration is a key consideration when setting fees, regardless of the type of fee. One recommended approach followed in many States is to apply the principle of cost-recovery, according to which there should be no profit generated from fees in excess of costs. When applying such a principle, States should first assess the level of revenue needed from registry fees to achieve cost-recovery, taking into account not only the initial costs related to the establishment of the registry but also the costs necessary to fund its operation. These costs may include: (a) the salaries of registry staff; (b) upgrading and replacing hardware and software; (c) ongoing staff training; and (d) promotional activities and training for registry users. In the case of online registries, if the registry is developed in partnership with a private entity, it may be possible for the private entity to make the initial capital investment in the registry infrastructure and recoup its investment by taking a percentage of the service fees charged to registry users once the registry is operational.

203. Even when the cost-recovery approach is followed, there is considerable variation in its application by States, as it requires a determination of which costs should be included. In one State, fees for new registrations are calculated according to costs incurred by an average business for registration activities over the life cycle of the business. In this manner, potential amendments, apart from those requiring official announcements, are already covered by the fee that companies pay for new registration. That approach is said to result in several benefits, such as: (a) rendering most amendments free of charge, which encourages compliance among registered businesses; (b) saving resources related to fee payment for amendments for both the registry and the businesses; and (c) using the temporary surplus produced by advance payment for amendments to improve registry operations and functions. In other cases, States have decided to charge fees below the actual cost that the business registry incurs in order to promote business registration. In such cases, however, the services provided to businesses would likely be subsidized with public funds.

204. In setting fees in a mixed registry system, it may be reasonable for the State to charge higher fees to process applications and information requests submitted in paper form because they must be processed by registry staff, whereas electronic applications and information requests are directly submitted to the registry and are less likely to require attention from registry staff. Charging higher fees for paper-based registration applications and information requests will also encourage the user community to eventually transition to using the direct electronic registration and information request services. However, in making that decision, States may wish to consider whether charging such fees may have a disproportionate effect on MSMEs that may not have ready access to electronic services.

Recommendation 40: Fees charged for business registry services[102]

The law should establish fees, if any, for business registration and post-registration services at a level that is low enough to encourage business registration, in particular of MSMEs, and that, in any event, does not exceed a level that enables the business registry to cover the cost of providing those services.

B. Fees charged for information

205. In various States, fees charged for the provision of information services are a more viable option for registries to derive self-generated funding. Such fees also motivate registries to provide valuable information products to their users, to maintain the currency of their records and to offer more advanced information services. A recommended good practice for States aiming to improve this type of revenue

[102] The Secretariat has adjusted the text further to a proposal by the Working Group at its twenty-ninth session that terminology in the recommendation should be consistent with other parts of the legislative guide in referring to “business registry services” (para. 92, A/CN.9/928).

generation would be to avoid charging fees for basic information services such as simple name or address searches, but to charge for more advanced information services that require greater processing by the business registry or that are more expensive to provide (e.g. direct downloading, subscription services or bulk information services; see also paras. 197 and 200 above). Since fees charged for information services are likely to influence users, such fees should be set at a level low enough to make the use of such services attractive. Again, the level of any such fee should be established according to the principle of cost-recovery, so as not to generate a profit in addition to covering the cost of the service. Moreover, when fees for information services are charged, States might consider establishing different fee regimes for different categories of user, such as private users, corporate or public entities, occasional users and users with an established user account. This approach would take account of the frequency with which or the purpose for which users request information services, their need for expedited or regular service, or the type of information products requested (e.g. on individual businesses or bulk information).[103]

Recommendation 41: Fees charged for information

The law should establish that:

(a) Information contained in the business registry should be available to the public free of charge; and

(b) Information services that require greater processing by the business registry could be provided for a fee that reflects the cost of providing the information products requested.[104]

C. Publication of fee amounts and methods of payment

206. Regardless of the approach taken in determining applicable fees, States should clearly establish the amount of any registration and information fees charged to registry users, as well as the acceptable methods of payment. Such methods of payment should include allowing users to enter into an agreement with the business registry to establish a user account for the payment of fees. States in which businesses can register directly online should also consider developing an electronic platform that enables businesses to pay online when filing their application with the registry (see paras. 83 above and 207 below). When publicizing the amount of registration and information fees, one approach would be for the State to set out the fees in either a formal regulation or more informal administrative guidelines, which the registry can revise according to its needs. If administrative guidelines are used, this approach would provide greater flexibility to adjust the fees in response to subsequent events, such as the need to reduce the fees once the capital cost of establishing the registry has been recouped. The disadvantage of this approach, however, is that this greater flexibility could be abused by the registry to adjust the fees upwards unjustifiably. Alternatively, a State may choose not to specify the level of the fees payable, but rather to designate the authority that is authorized to establish the fees payable. The State may also wish to consider specifying in the law the types of service that the registry may or must provide free of charge.

Recommendation 42: Publication of fee amounts and methods of payment

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[103] Further to a decision of the Working Group at its twenty-ninth session, the Secretariat has clarified paragraph 205 (para. 94, A/CN.9/928).

[104] Further to a decision of the Working Group at its twenty-ninth session, the Secretariat has split recommendation 41 (recommendation 40 in A/CN.9/WG.I/WP.106) into two parts to first emphasize that information services should be free of charge and then to clarify that fees for information services, if any, should be established on a cost-recovery basis (para. 93, A/CN.9/928).

The law should ensure that fees payable, if any,[105] for registration and information services are widely publicized, as are the acceptable methods of payment.

D. Electronic payments

207. States should consider developing an electronic platform that enable businesses to pay online (including the use of mobile payment systems and other modern forms of technology[106]) to access registry services for which a fee is charged (see para. 83 above). This will require enacting appropriate laws concerning electronic payments in order to enable the registry to accept online payments. Such laws should address issues such as who should be allowed to provide the service and under which conditions; access by users to online payment systems; the liability of the institution providing the service; customer liability and error resolution. Finally, such laws should also be consistent with the general policy of the State on financial services.

Recommendation 43: Electronic payments

The law should enable and facilitate electronic payments.

VIII. Liability and sanctions

208. While each business must ensure that its registered information is kept as accurate as possible by submitting amendments in a timely fashion, the State should have the ability to enforce proper compliance with initial and ongoing registration requirements. Compliance with those requirements is usually encouraged through the availability of enforcement mechanisms such as the imposition of sanctions on businesses that fail to provide timely and accurate information to the registry (see paras. 161 and 162 and rec. 29 above).

209. In addition, a system of notices and warnings could be set up in order to alert businesses of the consequences of failure to comply with specific requirements of business registration (for example, late filing of periodic returns). When the registry is operated electronically, automated warnings and notices could be periodically sent out to registered businesses. In addition, notices and warnings could be visibly displayed on the premises of the registration offices and routinely published electronically and in print media. To better assist businesses, in particular MSMEs, States could also consider designing training programs to raise the awareness of businesses regarding their liability to comply with registration requirements and to advise them on how to discharge that liability.[107]

A. Liability for misleading, false or deceptive information

210. States should adopt provisions that establish liability for any misleading, false or deceptive information that is submitted to the registry upon registration or amendment of the registered information of a business, and for failure to submit information required by the business registry when it ought to have been submitted. Care should be taken, however, to distinguish inadvertent failure to submit the required information from intentional submission of misleading, false or deceptive information, as well as from the intentional failure to submit information that could amount to submitting misleading, false or deceptive information. While wilful actions or omissions should be sanctioned with appropriate measures, inadvertent failure to

[105] At its twenty-ninth session, the Working Group agreed to insert the phrase “if any” after “fees payable” (para. 95, A/CN.9/928).

[106] As agreed by the Working Group at its twenty-ninth session, the Secretariat has deleted the opening phrase (“Once States have reached a certain level of technological maturity”) and has added the phrase “and other modern forms of technology” after “mobile payments” in the first sentence of the paragraph (para. 97, A/CN9/928).

[107] The Secretariat has relocated this paragraph (para. 209 of A/CN.9/WG.I/WP.106) here further to a suggestion of the Working Group at its twenty-ninth session (para. 98, A/CN.9/928).

submit the required information should result in less punitive measures, in particular if the inadvertent failure is rectified in a timely fashion.

211. In order to further clarify potential liability, States should also ensure that a notice on the business registry clearly specifies whether the information it contains has legal effect and is opposable to third parties in the form in which it is deposited in the registry (see also para. 58(f) above).[108]

Recommendation 44: Liability for misleading, false or deceptive information

The law should establish appropriate liability for any misleading, false or deceptive information that is provided to the business registry or for failure to provide the required information.

B. Sanctions

212. The establishment of fines for the breach of obligations related to business registration, such as late filing of periodic returns or failure to record changes in the registered information (see para. 163 above) are measures often adopted by States to enforce compliance. Fines can also represent a means of revenue generation, but their imposition again requires a balanced approach. Several States use fines as disincentives for businesses that are required to register to operate outside of the legally regulated economy. In some cases, legislative provisions link the company's enjoyment of certain benefits to the timely filing of required submissions; in others, a series of increasing fines for late filing is enforced that can ultimately result in compulsory liquidation. However, if fines are used as the main source of funding for the business registry, it can have a detrimental effect on the efficiency of the registry. Since registries in such States lose revenue generated by fines when compliance improves, there is little motivation for such registries to improve the level of compliance. States should, therefore, not rely upon fines as the main source of revenue of a business registry; instead, fines should be established and imposed at a level that encourages business registration without negatively affecting the funding of registries once compliance improves.

213. The recurrent use of fines to sanction the breach of initial and ongoing registration obligations might discourage businesses, in particular MSMEs, from registering or properly maintaining their registration. States should consider establishing a range of possible sanctions that would apply depending on the seriousness of the violation or, in the case of MSMEs failing to meet certain conditions established by the law, to forego any sanction for businesses defaulting for the first time.

Recommendation 45: Sanctions

The law should:

(a) Establish appropriate sanctions that may be imposed on a business for a breach of its obligations regarding information to be submitted to the registry in an accurate and timely fashion;[109]

(b) Include provisions pursuant to which a breach of obligation may be forgiven provided it is rectified within a specified time; and

(c) Require the registrar to ensure broad publication of those rules.

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[108] At its twenty-ninth session, the Working Group agreed that the commentary to recommendation 44 (recommendation 43 in A/CN.9/WG.I/WP.106) should: (a) clarify the different consequences of inadvertent failure to submit the required information to the business registry and of intentional submission of false and misleading information as well as intentional failure to submit the required information; and (b) include the concept of opposability of information to third parties (paras. 99 and 100, A/CN.9/928).

[109] The Secretariat has redrafted recommendation 45(a) as requested by the Working Group at its twenty-ninth session (para. 102, A/CN.9/928).

C. Liability of the business registry

214. The law[110] of the State should provide for the allocation of liability for loss or damage caused by error or through negligence in the administration or operation of the business registration and information system.

215. As noted above, users of the registry bear the liability for any errors or omissions in the information contained in an application for registration or a request for an amendment submitted to the registry, and bear the burden of making the necessary corrections. If applications for registration and amendment are directly submitted by users electronically without the intervention of registry staff, the potential liability of the enacting State would be limited to system malfunctions, since any other error would be attributable to users. However, if paper-based application forms or amendment requests are submitted, the State must address the extent of its potential liability for the refusal or failure of the registry to enter such information correctly. A similar approach should be taken in States with electronic business registration systems that require certain information submitted electronically to nonetheless be entered by registry staff into the registry record and where such entry might also be subject to error (see also para. 189 above).[111]

216. Further, it should be made clear to registry staff and registry users that registry staff are not allowed to provide legal advice on requirements for effective registration and amendment, or on their legal effects, nor should staff make recommendations on which intermediary (if any) the business should choose to take charge its registration or amendment process. However, registry staff should be permitted to give practical guidance with respect to the registration and amendment processes. In States that opt for an approval system, this restriction on the provision of legal advice should, of course, not be applicable to the judges, notaries and lawyers acting as intermediaries or entrusted with the administration of registration procedures.

217. While it should be made clear that registry staff may not provide legal advice (subject to the type of registration system of the State), the State must also address whether and to what extent it should be liable if registry staff nonetheless provide incorrect or misleading information on the requirements for effective registration and amendment or on the legal effects of registration.

218. In addition, in order to minimize the potential for misconduct by registry staff, the registry should consider establishing certain practices such as instituting financial controls that strictly monitor staff access to cash payments of fees and to the financial information submitted by users who use other modes of payment. Such practices may include the institution of audit mechanisms that regularly assess the efficiency and the financial and administrative effectiveness of the registry.

219. If States accept liability for loss or damage caused by system malfunction or error or misconduct by registry staff, they may consider whether to allocate part of the registration and information fees collected by the registry to a compensation fund to cover possible claims, or whether the claims should be paid out of general revenue. States might also decide to set a maximum limit on the monetary compensation payable in respect of each claim.

Recommendation 46: Liability of the business registry

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[110] At its twenty-ninth session, the Working Group requested the Secretariat to clarify that in many States the question of business registry liability was dealt with by other laws of the State and not the law on business registration. The Secretariat, however, has left the commentary unaltered, since the term "law" as defined in paragraph 16 (para. 13 of A/CN.9/WG.I/WP.106) already includes the broader body of domestic law and was not limited to provisions on business registration (para. 103, A/CN.9/928).

[111] The Secretariat has added a new sentence at the end of paragraph 215 (para. 211 of A/CN.9/WG.I/WP.106) further to the decision of the Working Group at its twenty-ninth session that the paragraph should reflect the practice of States where registry staff must enter information submitted electronically into the registry (para. 103, A/CN.9/928).

The law should establish whether and to what extent the State is liable for loss or damage caused by error or negligence of the business registry in the registration of businesses or the administration or operation of the registry.[112]

IX. Deregistration

A. Deregistration

220. Deregistration of a business means that a notation has been made in the registry that it is no longer registered, and that it has ceased to operate. In such instances, the public details in respect of the business usually remain visible on the register, but the status of the business has been changed to indicate that it has been removed or that the business is no longer registered. Deregistration occurs once the business, for whatever reason, has permanently ceased to operate, including as a result of a merger, or forced liquidation due to bankruptcy, or in cases where applicable law requires the registrar to deregister the business for failing to fulfil certain legal requirements.

221. States should consider the role of the registry in deregistering a business. In most jurisdictions, deregistration of a business is included as one of the core functions of the registry. It appears to be less common, however, to entrust the registry with the decision whether or not a business should be deregistered as a result of insolvency proceedings or winding-up. In States where this function is included, statutory provisions determine the conditions that result in deregistration and the procedures to follow in carrying it out.

222. Because deregistration pursuant to winding-up or insolvency proceedings of a business are matters regulated by laws other than those governing the registration of a business, and since such laws vary greatly from State to State, this legislative guide refers only to deregistration of those solvent businesses that the enacting State has deemed dormant or no longer in operation pursuant to the legal regime governing the business registry. In such cases, most States allow for deregistration to be carried out either upon the request of the business (often referred to as "voluntary deregistration") or at the initiative of the registry (frequently referred to as "striking-off"). In order to avoid difficulties for the registrar in determining when an exercise of the power to deregister is warranted because a business is a dormant solvent business or when it is no longer in operation, the law should clearly establish the conditions that must be fulfilled. This approach will also avoid a situation where that power may be exercised in an arbitrary fashion. Permitting a registrar to carry out deregistration pursuant to clear rules permits the maintenance of a current registry and avoids cluttering the record with businesses that do not carry on any activity. When deregistration is initiated by the registrar, there must be reasonable cause to believe that a registered business has not carried on business or that it has not been in operation for a certain period of time. Such a situation may arise, for example, when the State requires the business to submit periodic reports or annual accounts and a business has failed to comply within a certain period of time following the filing deadline. In any case, the ability of the registrar to deregister a business should be limited to ensuring compliance with clear and objective legal requirements for the continued registration of a business. In several States, before commencing deregistration procedures, the registrar must inform the business in writing of its pending deregistration and allow sufficient time for the business to reply and to oppose that decision. Only if the registrar receives a reply that the business is no longer active or if no reply is received within the time prescribed by law will the business be deregistered.

223. Deregistration may also be carried out upon the request of the business, which most often occurs if the business ceases to operate or has never operated. States should specify in which circumstances businesses can apply for deregistration and which persons associated with the business are authorized to request deregistration on behalf of the business. Voluntary deregistration is not an alternative to more formal

[112] Further to a decision of the Working Group at its twenty-ninth session, the Secretariat has redrafted recommendation 46 as requested (para. 104, A/CN.9/928).

proceedings, such as winding-up or insolvency, when those proceedings are prescribed by the law of the State in order to liquidate a business.

224. Deregistration should in principle be free of charge regardless of whether it is carried out at the initiative of the registrar or upon the request of the business. Further, States should consider adopting simplified procedures for the deregistration of MSMEs.

Recommendation 47: Voluntary deregistration

The law should:

(a) Specify the conditions under which a business can request deregistration;

(b) Require the registrar to deregister a business that fulfils those conditions; and

(c) Permit the State to adopt simplified procedures for deregistration of MSMEs.[113]

Recommendation 48: Involuntary deregistration

The law should specify the conditions pursuant to which a registrar can deregister a business.[114]

B. Process of deregistration and time of effectiveness of deregistration[115]

225. Regardless of whether deregistration is requested by the business or initiated by the registrar, where the business is registered as a separate entity, the registry must issue a public notice of the proposed deregistration and when that deregistration will become effective. Such an announcement is usually published on the website of the registry or in official publications such as the National Gazette or in both. This procedure ensures that businesses are not deregistered without providing interested third parties (e.g. creditors, members of the business) the opportunity to protect their rights (the usual practice is to submit a written complaint corroborated by any required evidence to the registry). After the period indicated in the announcement has passed, a notation is made in the registry that the business is deregistered. Prior to the deregistration becoming effective, the applicable law may require that a further notice be published. Pending completion of the deregistration procedure, the business remains in operation and will continue to carry on its activities.

226. The law should establish the time of effectiveness of the deregistration, and the status of the business in the registry should indicate the time and date of its effect, in addition to the reasons for the deregistration. The registrar should enter such information in the registry as soon as practicable so that users of the registry are apprised without undue delay of the changed status of the business.

227. Registries should retain historical information on businesses that have been deregistered, leaving it to the State to decide the appropriate length of time for which such information should be preserved (see paras. 229 to 232 and rec. 51 below). When the State has adopted a unique identifier system, the information related to the business should remain linked to that identifier even if the business is deregistered.

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[113] The Secretariat has added subparagraph (c) to the recommendation and reference in the commentary to reflect the decision of the Working Group at its twenty-ninth session that States should be encouraged to adopt simplified procedures for the deregistration of MSMEs (para. 105, A/CN.9/928).

[114] At its twenty-ninth session the Working Group requested the Secretariat to eliminate the phrase "at its own initiative" from the recommendation and to change its title to "Involuntary deregistration" (para. 106, A/CN.9/928).

[115] The Secretariat has revised the commentary in this section in accordance with the views expressed by the Working Group at its twenty-ninth session (paras. 107 and 108, A/CN.9/928).

Recommendation 49: Process of deregistration and time and effectiveness of deregistration

The law should:

(a) Provide that a written notice of the deregistration is sent to the registered business;

(b) Establish that the deregistration is publicized in accordance with the legal requirements of the enacting State;

(c) Specify when the deregistration of a business is effective; and

(d) Specify the legal effects of deregistration.[116]

C. Reinstatement of registration

228. In several States, it is possible to reinstate the registration of a business that has been deregistered at the initiative of the registrar or upon the request of the business, provided that the request to the registrar for reinstatement meets certain conditions (in some States, this latter procedure is called "administrative restoration") or is made by court order. In certain States, both procedures are available and choosing either of them usually depends on the reason for which the business was deregistered or the purpose of restoring the business. The two procedures usually differ in some key aspects, such as who can apply to have the business restored, which business entities are eligible for restoration and the time limit for filing an application for restoration. The requirements for "administrative restoration" in States that provide for both procedures are often stricter than those for restoration by court order. For example, in such States, only an aggrieved person, which may include a former director or member, can submit an application for reinstatement to the registrar, and the time limit within which the application can be submitted to the registry may be shorter than the time granted to apply for a court order. Regardless of the method(s) chosen by the State to permit reinstatement of the registration of a business, once the registration has been reinstated, the business is deemed to have continued its existence as if it had not been deregistered, which includes maintaining its former business name. In cases where the business name is no longer available (as having been assigned to another business registered in the interim), procedures are usually established by the State to govern the change of name of the reinstated business.

Recommendation 50: Reinstatement of registration

The law should specify the circumstances under which and the time limit within which the registrar is required to reinstate a business that has been deregistered.

X. Preservation of records

A. Preservation of records

229. As a general rule, the information in the business registry should be kept indefinitely. The enacting State should decide on the appropriate length of time for which such information should be kept and may choose to apply its general rules on the preservation of public documents.

230. However, the length of the preservation period for records is most often influenced by the way the registry operates, and whether the registry is electronic, paper-based or a mixed system. In the case of electronic registries, the preservation for extended periods of time of original documents submitted in hard copy might not

[116] As requested by the Working Group at its twenty-ninth session, the Secretariat has deleted subparagraph (b) of recommendation 49 (recommendation 49 in A/CN.9/WG.I/WP.106) and combined the remainder with what was formerly recommendation 48 in A/CN.9/WG.I/WP.106 (para. 107, A/CN.9/928).

be necessary, provided that the information contained in such documents has been recorded in the registry or that the paper documents have been digitized (through scanning or other electronic processing).

231. Those States with paper-based or mixed registration systems, for example, must decide the length of time for which the paper documents submitted to it should be kept by the registry, in particular in situations where the relevant business has been deregistered. Considerations relating to the availability of storage space and the expense of storing such documents would likely play a role in that decision.

232. Regardless of the way in which the business registry is operated, providing prospective future users with long-term access to information maintained in the registry is of key importance, not only for historical reasons, but also to provide evidence of past legal, financial and management issues relating to a business that might still be of relevance. The preservation of electronic records is likely to be easier and more cost-effective than preserving paper records. In order to minimize the cost and considerable storage space required for the preservation of documents in hard copy, paper-based registries that cannot convert the documents received by it into an electronic form may adopt alternative solutions (for example, the use of microfilm) that allow for the transmission, storage, reading, and printing of the information.

Recommendation 51: Preservation of records

The law should provide that documents and information submitted by the registrant and the registered business, including information in respect of deregistered businesses, should be preserved by the registry so as to enable the information to be retrieved by the registry and other interested users.

B. Alteration or deletion of information

233. The law should establish that the registrar may not alter or remove registered information, except as specified by law and that any change to that information can be made only in accordance with the applicable law. However, to ensure the smooth functioning of the registry, in particular when registrants submit registration information using paper forms, the registrar[117] should be authorized to correct its own clerical errors (see paras. 33, 51 and 153 above) made in entering the information from the paper forms into the registry record. If this approach is adopted, notice of this or any other correction should promptly be sent to the business (and a notification of the nature of the correction and the date it was effected should be added to the public registry record linked to the relevant business). Alternatively, the State could require the registrar to notify the business of its error and permit the submission of an amendment free of charge.

234. Further, the potential for misconduct by registry staff should be minimized by: (a) designing the registry system to make it impossible for registry staff to alter the time and date of registration or any registered information entered by a registrant; and (b) designing the registry infrastructure so as to ensure that it can preserve the information and the documents concerning a deregistered business for as long as prescribed by the law of the enacting State.

Recommendation 52: Alteration or deletion of information

The law should provide that the registrar does not have the authority to alter or delete information contained in the business registry record except in those cases specified in the law.

[117] At its twenty-ninth session, the Working Group requested the Secretariat to replace the term "registry staff" with "registrar" in paragraph 233 (para. 228 of A/CN.9/WG.I/WP.106) and elsewhere in the text (para. 111, A/CN.9/928). The Secretariat has made appropriate adjustments to the text.

C. Protection against loss of or damage to the business registry record

235. To protect the business registry from the risk of loss or physical damage or destruction, the State should maintain back-up copies of the registry record. Any rules governing the security of other public records in the enacting State might be applicable in this context.

236. The threats that can affect an electronic registry also include criminal activities that may be committed through the use of technology. Providing effective enforcement remedies would thus be an important part of a legislative framework aimed at supporting the use of electronic solutions for business registration. Typical issues that should be addressed by enacting States would include unauthorized access or interference with the electronic registry; unauthorized interception of or interference with data; misuse of devices; fraud and forgery.

Recommendation 53: Protection against loss of or damage to the business registry record

The law should:

(a) Require the registrar to protect the registry records from the risk of loss or damage; and

(b) Establish and maintain back-up mechanisms to allow for any necessary reconstruction of the registry record.

D. Safeguard from accidental destruction

237. An aspect that may warrant consideration by States is that of natural hazards or other accidents that can affect the processing, collection, transfer and protection of the data housed in the electronic registry and under the liability of the registry office. Given user expectations that the business registry will function reliably, the registrar should ensure that any interruptions in operations are brief, infrequent and minimally disruptive to users and to States. For this reason, States should devise appropriate measures to facilitate protection of the registry. One such measure could be to develop a business continuity plan that sets out the necessary arrangements for managing disruptions in the operations of the registry and ensures that services to users can continue. In one State, for example, the registry has established a “risk register”, i.e. a dynamic document that is updated as changes in the operation of the registry occur. Such a risk register allows the registrar to identify possible risks for the registration service as well as the appropriate mitigation measures. Designated staff are required to report on an annual basis the threats to the registry and the relevant actions taken to mitigate such threats.

Recommendation 54: Safeguard from accidental destruction

The law should provide that appropriate procedures should be established to mitigate risks from force majeure, natural hazards, or other accidents that can affect the processing, collection, transfer and protection of data housed in electronic or paper-based business registries.

Annex*

The underlying legislative framework

A. Changes to underlying laws and regulations

1. Business registration reform can entail amending either primary legislation or secondary legislation or both. Primary legislation concerns texts such as laws and codes that must be passed by the legislative bodies of a State. Reforms that consider this type of legislation thus require the involvement of the legislature and, for this reason, can be quite time-consuming. Secondary legislation is that body of texts composed of regulations, directives and other similar acts made by the executive branch within the boundaries laid down by the legislature. Reform of secondary legislation does not need to be reviewed by the legislature and thus it can be carried out in a shorter time frame. Therefore, when possible, the use of secondary legislation may be a more attractive option than the reform of primary legislation.

2. Business registration reform can entail amending different aspects of the domestic legislation of a State. In addition to legislation that is meant to prescribe the conduct of business registration, States may need to update or change laws that may simply affect the registration process in order to ensure that such laws respond to the needs of MSMEs and other businesses. There is no single solution in this process that will work for all States, since the reforms will be influenced by a State's legislative framework. However, the reforms should aim at developing domestic laws that support business registration with features such as: transparency and accountability, clarity of the law and the use of flexible legal entities.

3. Regardless of the approach chosen and the extent of the reform, changes in domestic laws should carefully consider the potential costs and benefits of this process, as well as the capacity and the will of the government and the human resources available. An important preparatory step of a reform programme involves a thorough inventory and analysis of the laws that are relevant to business registration with a view to evaluating the need for change, the possible solutions, and the prospects for effective reform. In some cases, this assessment could result in deferring any major legislative reform, particularly if significant gains to the process of simplification can be achieved by the introduction of operational tools. Once it has been decided what changes should be made and how, it is equally important to ensure their implementation. In order to avoid the possible risk of unimplemented reforms, the government, the reform steering committee and the project teams should carefully monitor the application of the new legal regime. The following paragraphs offer some examples of approaches that can be taken to streamline domestic laws and regulations with a view to simplifying business registration and to making it more accessible to MSMEs.

B. Clarity of the law

4. For States wishing to facilitate the establishment of businesses, in particular of MSMEs, it is important to review existing law to identify possible impediments to the simplification of the registration process. The nature of the reform would depend on the status of the domestic law, and a variety of examples based on States' experiences are available.

5. These reforms may include decisions by States to shift the focus of the law towards privately held businesses, and away from public limited companies, particularly if the former currently account for the majority of the firms in the State. Reforms could also include the decision to move the legal provisions pertaining to

* At its twenty-eighth session, the Working Group agreed with the substance of the sections reproduced in this Annex (Chapter XI, Sections A through E of A/CN.9/WG.I/WP.101) and recommendations 52 to 54 of A/CN.9/WG.I/WP.101, but decided to move them into an annex to the legislative guide (para. 142, A/CN.9/900).

small businesses to the beginning of any new law on business forms in order to make such provisions easier to find or to use simpler language in any updated legislation.

6. One reform that would greatly clarify the law would be a comprehensive review of all laws affecting business registration and a unification of the various rules into a single piece of legislation. This could also allow for some flexibility to be built into the system, with the adoption of certain provisions as regulations, or simply providing the legal basis to introduce regulations at a later stage.

Recommendation 1/Annex: Clarity of the law

The law should, to the extent possible, consolidate legal provisions pertaining to business registration in a single clear legislative text.

C. Flexible legal forms[1]

7. Entrepreneurs tend to choose the simplest legal form available for their business when they decide to register, and that States with rigid legal forms have an entry rate considerably lower than those with more flexible requirements. In States that have introduced simplified legal forms for business, the registration process for these business types is much simpler and less costly. Entrepreneurs are not required to publish the rules governing the operation or management of their business in the Official Gazette; instead, these can be posted online through the business registry. There are many States in which the involvement of a lawyer, notary or other intermediary is not obligatory for the preparation of documents or conducting a business name search.[2]

8. Legislative changes to abolish or reduce the minimum paid in capital requirement for businesses also tend to facilitate MSME registration, since micro and small businesses may have limited funds to meet a minimum capital requirement, or they may be unwilling or unable to commit their available capital in order to establish their business. Instead of relying on a minimum capital requirement to protect creditors and investors, some States have implemented alternative approaches such as the inclusion of provisions on solvency safeguards in their legislation; conducting solvency tests; or preparing audit reports that show that the amount a company has invested is enough to cover the establishment costs.

9. Introducing simplified forms of limited liability and other types of businesses is often coupled with a considerable reduction or complete abolition of the minimum capital requirements that other legal forms of business are required to meet upon formation. In several States that have adopted simplified business entities, the minimum capital requirement has been abolished completely, and in other cases, initial registration or incorporation has been allowed upon deposit of a nominal amount. In other States, progressive capitalization has been introduced, requiring the business to set aside a certain percentage of its annual profits until its reserves and the share capital jointly total a required amount. In other cases, progressive capitalization is required only if the simplified limited liability entity intends to graduate into a full-fledged limited liability company (for which a higher share capital would be required), but there is no obligation to do so.

10. Another reform that would be conducive to improved business registration is to provide freedom to entrepreneurs to conduct all lawful activities without requiring

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[1] The Working Group may wish to note parallel work that it is undertaken in respect of an UNCITRAL limited liability organization (A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1).

[2] At its twenty-ninth session, the Working Group agreed to the following changes in paragraph 7: (a) the phrase “and less costly” should be added at the end of the second sentence; (b) a full stop should be inserted instead of a semi-colon after the phrase “through the business registry” in the next to the last sentence; and (c) the term “and” should be deleted and the phrase “There are many States in which” inserted before the phrase “the involvement of a lawyer …” in the final sentence (para. 114, A/CN.9/928).

them to specify the scope of their venture.[3] This is particularly relevant in those jurisdictions where entrepreneurs are required to list in their articles of association the specific activity or activities in which they intend to engage so as to restrain firms from acting beyond the scope of their goals and, according to certain literature, to protect shareholders and creditors. Allowing for the inclusion in the articles of association (or other rules governing the operation or management of a business) of a so-called "general purpose clause" which states that the company's aim is to conduct any trade or business and grants it the power to do so, facilitates business registration. This approach is far less likely to require additional or amended registration in the future, as businesses may change their focus since entrepreneurs could change activities without amending their registration, provided that the new business activity is a lawful one and that the appropriate licences have been obtained. Additional options to the inclusion of a general purpose clause, which would support the same goal, could be passing legislation that makes unrestricted objectives the default rule in the jurisdiction, or abolishing any requirement for businesses, in particular those that are privately held, to state objectives for registration purposes.

Recommendation 2/Annex: Flexible legal forms

(a) The law should permit flexible and simplified legal forms for business in order to facilitate and encourage registration of businesses of all sizes, including those forms considered in the [UNCITRAL legislative guide on an UNCITRAL limited liability organization]; and

(b) States should consider providing for the optional use of intermediaries by MSMEs.[4]

D. Primary and secondary legislation to accommodate the evolution of technology

11. Since information technology is a field marked by rapid technological evolution, it would be advisable to establish guiding legal principles in the primary legislation, leaving secondary legislation to stipulate the specific provisions regulating the detailed functioning and the requirements of the system. Once the business registration process is fully automated, States should establish provisions (preferably in the secondary legislation) or policies that discipline government-to-government data exchange in order to avoid any lack of cooperation among different authorities.

Recommendation 3/Annex: Primary and secondary legislation to accommodate the evolution of technology

The law should establish guiding legal principles in relation to electronic registration in primary legislation, and should set out specific provisions on the detailed functioning and requirements of the electronic system in secondary legislation.

E. Electronic documents and electronic authentication methods

12. Entering information into an online registry is a business-to-government transaction that should be subject to the same treatment, under domestic legislation, as any other electronic transaction. Therefore, if an appropriate domestic legislative framework for electronic transactions is not in place, a preliminary step for a reform aimed at supporting electronic business registration would be to recognize and regulate the use of such electronic transactions. Among other things, States should

[3] This is a feature on which the Working Group has already agreed in its discussion of a legislative text on a simplified business entity (para. 70, A/CN.9/825). See also paras. 31 to 34, A/CN.9/WG.I/WP.99.

[4] At its twenty-ninth session, the Working Group agreed to add recommendation 2/Annex (b) (para. 113, A/CN.9/928).

adopt laws permitting electronic signatures and the submission of electronic documents.[5] In some States, for example, the use of an advanced electronic signature is mandatory when transmitting information to a business registry. When laws on electronic communication are enacted, they should establish, at minimum, principles of non-discrimination, technological neutrality and functional equivalence, allowing for equal treatment of electronic and paper-based information. The principle of non-discrimination ensures that a document would not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form. The principle of technological neutrality requires the adoption of provisions that are neutral with respect to the technology used. The principle of functional equivalence lays out criteria under which electronic communications and electronic signatures may be considered equivalent to paper-based communications and hand-written signatures.

13. Further, it would be advisable that the law includes provisions to mitigate the risks that the use of ICT can carry with it and that can affect the validity, and in certain jurisdictions the legal validity, of the information transmitted through the electronic means. The most common risks include: confirming the identity of the entrepreneur filing for registration (referred to as "authentication"); preventing conscious or unconscious alteration of information during transmission (referred to as "integrity"); ensuring that sending and receiving parties cannot deny having sent or received the transferred message (referred to as "non-repudiation") and preventing disclosure of information to unauthorized individuals or systems (referred to as "confidentiality"). In those States where the law does not require business registries to check the veracity of the information submitted during the registration process, these risks may be more problematic as it can be relatively easy to manipulate registration systems and filing processes.

14. Verifying the identity of the registrant and ensuring the integrity of the application and the supporting information are key elements to ensure trust in ICT-supported registration systems and their corresponding use. Consequently, States should carefully consider the requirements that electronic signatures and electronic documents should have in order to minimize any risk of corporate identity theft[6] and the transmission of invalid information.

15. Whether or not the adoption of legislation on electronic signatures is premature due to the technological infrastructure of the State, various other techniques can prevent corporate identity theft and ensure security. The experience of several States has laid the groundwork for practices that may be replicated in other regions. Simple methods include the use of user names and passwords; electronic certificates; biometric verification (for example, fingerprints); monitoring systems and email systems that notify registered users about changes or whenever documents are filed on their business record; and the implementation or increase of penalties for false or misleading information submitted to the commercial registries. In order to facilitate MSME registration, States may wish to opt for the adoption of such simple ways of ensuring the authentication of the identity of business entrepreneurs.

F. Dispatch and receipt of electronic messages

16. Another issue to consider when implementing a business registry through the use of ICT solutions is that electronic registries may make it difficult to ascertain the time and place of dispatch and receipt of information. This is an aspect that may be

[5] UNCITRAL has adopted several texts dealing with electronic commerce. Those texts and relevant information on them can be found on the UNCITRAL website at: http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce.html (see also para. 89 above).

[6] Corporate identity theft can occur through the theft or misuse of key business identifiers and credentials, manipulation or falsification of business filings and records, and other related criminal activities. Despite the use of the term "corporate", corporations are not the only business entities that are victimized by this crime. Any type of business or organization of any size or legal structure, including sole proprietorships, partnerships and limited liability companies can be targets of business identity theft.

relevant due to the time sensitivity of certain submissions, such as establishing the exact time and place at which a business has been registered. For this reason, it is important to have clear rules that define the time of “dispatch” and “receipt” of electronic messages. If such rules are not clearly defined in a State’s legislative framework, or if they are not defined with the specificity required for the purposes of time-sensitive registration applications, then ad hoc laws addressing the issues of dispatch and receipt may be required.

F. Note by the Secretariat on reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs)

(A/CN.9/WG.I/WP.110)

[Original: English]

Contents

Introduction

1. At its twenty-sixth session (April 2016), the Working Group considered document A/CN.9/WG.I/WP.92 (paras. 86 to 88, A/CN.9/866) which had been prepared by the Secretariat to provide the overall context for work prepared by the United Nations Commission on International Trade Law (UNCITRAL) in respect of micro, small and medium-sized enterprises (MSMEs). While the Working Group did not have sufficient time to consider A/CN.9/WG.I/WP.92 in detail, there was broad support for the proposal that a document along those lines could accompany its MSME work as an introduction to the final text and that it could provide an overarching framework for UNCITRAL's current and future work on MSMEs. Further, the Working Group was of the view that, once specifically considered and adopted by the Working Group and the Commission, that contextual framework could be underpinned by legal standards that would provide legislative pillars to the framework; importantly, such an approach could accommodate expansion through the addition of other legislative texts regarding MSMEs as such texts might be adopted by the Commission. Those views were noted by the Commission at its forty-ninth session (2016), at which the Working Group was commended for the progress that it had made on its work to date.[1]

2. This working paper is a revised version of A/CN.9/WG.I/WP.92 (and its update, A/CN.9/WG.I/WP.107, which there was insufficient time to consider at the twenty-ninth session of the Working Group), taking into account the general views expressed by the Working Group at its twenty-sixth session (paras. 86 to 88, A/CN.9/866), as well as appropriate material drawn from the contribution by the United Nations Conference on Trade and Development (UNCTAD) in document A/CN.9/WG.I/WP.98. Necessary amendments have also been made in light of the development by the Working Group of the draft legislative guides on key principles of a business registry (A/CN.9/WG.I/WP.109) and on an UNCITRAL limited liability organization (A/CN.9/WG.I/WP.99 and Add.1).

[1] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 222 and 224.

I. Micro, small and medium-sized enterprises (MSMEs)

3. At its forty-sixth session, in 2013, UNCITRAL decided to commence work on reducing the legal obstacles faced by MSMEs throughout their life cycle, and in particular, specified that such work should focus on MSMEs in developing economies. This matter was placed on UNCITRAL's work programme for Working Group I, which was requested to begin work on its mandate with a focus on the legal questions surrounding the simplification of incorporation.[2] In taking up this topic, UNCITRAL has decided to focus its attention, at least initially, on the reduction of legal obstacles that MSMEs face at the beginning of their life cycle.

4. In light of the disadvantaged position in which many MSMEs are found globally, undertaking this work emphasizes the relevance and importance of UNCITRAL's work and programmes for the promotion of the rule of law at the national and international levels and for the implementation of the international development agenda. These include the achievement of the Sustainable Development Goals, which build upon the successes of the Millennium Development Goals, and which specifically note the encouragement of the formalization and growth of MSMEs in target 3 of goal 8 to "Promote inclusive and sustainable economic growth, employment and decent work for all". The global community has recognized both the importance of fair, stable and predictable legal frameworks for: generating inclusive, sustainable and equitable development, economic growth and employment; stimulating investment; and facilitating entrepreneurship, as well as UNCITRAL's contribution to the attainment of those goals through its efforts to modernize and harmonize international trade law.[3] Work aimed at supporting and fostering the establishment and growth of MSMEs further underpins UNCITRAL's contribution in providing internationally acceptable rules in commercial law, and supporting the enactment of those rules to assist in strengthening the economic fibre of States.

5. The international community has underscored the importance of business law as one of four pillars key to strengthening the legal empowerment of the poor, many of whom rely upon micro and small businesses for their livelihood.[4] In addition to other pillars (such as access to justice and the rule of law; property rights; and labour rights), business rights are seen as important to empower the less advantaged, not only in terms of their employment by others, but in developing micro and small businesses of their own. Business rights may be regarded as a composite of existing rights of groups and individuals to engage in economic activity and market transactions, and which include the right to start a business in the legally regulated economy without facing arbitrarily enforced regulations or discrimination, removing unnecessary barriers that limit economic opportunities, and protecting business investments, regardless of their size.[5] Measures that have been called for to strengthen business rights include:

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[2] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

[3] See, for example, "Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels", United Nations General Assembly resolution A/RES/67/1 (67th session, 2012), para. 8; and "Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)", United Nations General Assembly resolution A/RES/69/313 (69th session, 2015), Annex, para. 89.

[4] See, for example, "Making the Law Work for Everyone", Volume I, Report of the Commission on Legal Empowerment of the Poor (2008) (downloadable at https://www.un.org/ruleoflaw/blog/document/making-the-law-work-for-everyone-vol-1-report-of-the-commission-on-legal-empowerment-of-the-poor/). The findings of this Commission formed an integral part of the United Nations Development Programme's (UNDP) Initiative on Legal Empowerment of the Poor (www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/legal_empowerment.html) and have contributed to similar work on Legal Empowerment of the Poor in international organizations such as the World Bank Group.

[5] Ibid, pp. 30–31.

(a) Guaranteeing basic business rights, including the right to sell, the right to have a workspace and the right to have access to the necessary infrastructure and services (for example, to electricity, water and sanitation);

(b) Strengthening, and making effective, economic governance in order to permit entrepreneurs to easily and affordably establish and operate a business, to access markets, and to exit a business;

(c) Expanding the accessibility of entrepreneurs to limited liability entities and to other legal mechanisms that allow owners to separate their business and personal assets;

(d) Promoting inclusive financial services that offer savings, credit, insurance, pensions and other tools for risk management; and

(e) Expanding the access of entrepreneurs to new business opportunities through specialized programmes to familiarize entrepreneurs with new markets, assisting them in creating links with other businesses of all sizes, and in complying with regulations and requirements.[6]

6. UNCITRAL's experience in developing international trade law texts may assist in the identification of the legal and regulatory framework that can best assist entrepreneurs and MSMEs in establishing business rights, thereby reducing some of the legal obstacles that such businesses face.

A. The importance of MSMEs in the global economy

7. UNCITRAL's decision to work on reducing the legal obstacles faced by MSMEs recognizes the importance of such enterprises to the economic health of the States in which they are found, and to the global economy more generally. This importance is underscored by a number of key facts that illustrate that MSMEs are seen as the backbone of the economy in both the developed and the developing world.

8. The total number of MSMEs worldwide is estimated to be around 500 million, of which approximately 85 per cent are in emerging markets.[7] Statistics for small and medium-sized enterprises (SMEs), a subset of MSMEs, indicate that such businesses account for over 70 per cent of total employment and 64 per cent of Gross Domestic Product (GDP) in developed economies, and approximately 45 per cent of employment and 63 per cent of GDP in low-income countries.[8]

9. It may also be instructive to review some of the statistics on such enterprises on a regional and subregional basis. In the European Union (EU), over 95 per cent of all businesses are SMEs, which provide two out of three private sector jobs and contribute to more than half of total value-added created by business in the EU. Further, nine out of ten SMEs in the EU are microenterprises (defined in the EU as enterprises having fewer than 10 employees), thus illustrating that the mainstays of Europe's economy are micro firms.[9]

10. Microenterprises are no less influential in other developed States. Over 90 per cent of all businesses in the United States of America are microenterprises (defined in the United States as enterprises having fewer than 5 employees, including the owner). The direct, indirect and induced effect of microenterprises have an impact on over 40 million jobs in the United States: directly accounting for over 25 million jobs; indirectly supporting close to 2 million jobs through business purchases; and having

[6] Ibid, pp. 8–9.

[7] World Bank Group Study, http://www.worldbank.org/en/topic/financialsector/brief/smes-finance.

[8] "IFC Jobs Study: Assessing Private Sector Contributions to Job Creation and Poverty Reduction", 2013, pp. 10–11 (https://www.ifc.org/wps/wcm/connect/0fe6e2804e2c0a8f8d3bad7a9dd66321/IFC_FULL+JOB+STUDY+REPORT_JAN2013_FINAL.pdf?MOD=AJPERES).

[9] See European Commission's Annual report on European SMEs 2015/16: SME recovery continues (https://ec.europa.eu/jrc/sites/jrcsh/files/annual_report_-_eu_smes_2015-16.pdf).

an induced effect (through the personal purchasing power of owners and employees of microbusinesses) on over 13 million jobs.[10]

11. MSMEs are also of great importance in regions of the world where a large number of developing States are found. In the Caribbean Community and Common Market (CARICOM), MSMEs provide more than 50 per cent of GDP and account for around 70 per cent of jobs,[11] while in Latin America, MSMEs provide employment to about 70 per cent of the regional workforce and contribute almost 50 per cent of the region's GDP.[12] Statistics available for SMEs, a subcategory of MSMEs, are no less impressive: in the Association of Southeast Asian Nations (ASEAN) region, they represent over 95 per cent of all enterprises and contribute approximately 50 per cent of GDP;[13] in Asia-Pacific Economic Cooperation (APEC) economies, SMEs account for over 95 per cent of all businesses and employ over half of the work force;[14] and in Africa, they provide more than 45 per cent of employment and contribute over 30 per cent of GDP.[15]

B. Defining MSMEs

12. There is no standardized international definition of what constitutes an MSME, since each economy will define its own parameters for each category of business size by taking into account its own specific economic context. For the purposes of work undertaken by UNCITRAL, it is not necessary or advisable to seek consensus on a definition for each category of MSME, since any legislative texts produced will be applied by States or regional economic groups to MSMEs in accordance with their own definitions, based on each unique economic context. The important common factor from State to State is that MSMEs, regardless of how they are defined, are enterprises that, by virtue of being the smallest and most vulnerable, face a number of common obstacles irrespective of the particular jurisdiction in which they are found. For that reason, these materials do not offer guidance on how a State should define the different categories of MSMEs.[16]

C. The nature of MSMEs

13. MSMEs are incredibly varied in nature. They may consist of sole entrepreneurs, small family businesses or larger enterprises with several or many employees, and may operate in virtually any commercial sector, including in the service industry and the artisanal and agricultural sectors.

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[10] See, for example, "Bigger than you think: The Economic Impact of Microbusinesses in the United States", Association of Enterprise Opportunity (AEO), September 2014 (http://microenterprisealabama.org/wp-content/uploads/2014/09/Bigger-Than-You-Think-The-Economic-Impact-of-Microbusiness-in-the-United-States-copy.pdf).

[11] See www.oas.org/en/media_center/press_release.asp?sCodigo=E-061/12.

[12] Available at www.informeavina2008.org/english/develop_case2_SP.shtml.

[13] P. Manawanitkul, Enabling Environment for Microbusiness – ASEAN Experience, Presentation delivered at the International Joint Conference on "Enabling Environment for Microbusiness and Creative Economy", organized by UNCITRAL, the Ministry of Justice in the Republic of Korea and the Korean Legislation Research Institute, Seoul, 14–15 October 2013.

[14] See www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Small-and-Medium-Enterprises.aspx.

[15] See the African Development Group News and Events page, "The AfDB SME Program Approval: Boosting Inclusive Growth in Africa", 2013, available at www.afdb.org/en/news-and-events/article/the-afdb-sme-program-approval-boosting-inclusive-growth-in-africa-12135.

[16] States may wish to note the definitions of the different categories of businesses included in MSMEs that have been established either by various States or by regional economic groups. Those definitions tend to be based on a number of elements, considered separately or along with other factors, including: (i) the number of employees at a specific point in time, such as the end of the financial or calendar year; (ii) the amount of annual revenue or turnover generated by the enterprise, or the balance sheet total of the business; (iii) the asset base of the business; (iv) the total monthly wages paid by the enterprise; or (v) the amount of capital invested in the enterprise.

14. Moreover, MSMEs may be expected to vary depending on the local economic conditions, cultural traditions and the different motivations and characteristics of the entrepreneurs establishing them. Enterprises that operate in the legally regulated economy may also take various legal forms, depending on the options available to them under applicable law, and on how those different forms may meet their needs.

15. In addition, although MSMEs may be seen, particularly in the context of developing economies, mainly as a source of livelihood for the working poor, such enterprises need not be static; in fact, MSMEs may also serve a dynamic purpose as a source of entrepreneurial talent in an economy. Indeed, their importance in the world economy suggests that providing for and fostering the growth of MSMEs is a key goal in order to achieve economic progress, innovation and success.

16. However, despite their disparate nature, certain characteristics of MSMEs may be broadly shared, including:

(a) Small size; they are and remain small operations;

(b) Disproportionate impact of burdensome regulatory hurdles;

(c) Reliance on family and friends for loans or risk-sharing;

(d) Limited access to capital or to banking services;

(e) Limited source of employees; if any, they are often drawn from family and friends and may be unpaid and unskilled, including having limited administrative capacity;

(f) Limited markets; these may comprise only relatives, close friends and local contacts;

(g) Vulnerability to arbitrary and corrupt behaviour;

(h) Limited access to dispute settlement mechanisms, which puts them at a disadvantage in disputes with the State or with larger businesses;

(i) Lack of ability to partition assets, so business failure often means that personal assets are also lost;

(j) Vulnerability to financial distress; and

(k) Difficulty in transferring or selling a business and in profiting from both tangible and intangible assets (such as client lists or relationships with customers).[17]

D. Creating sound business environments for all businesses

17. Efforts to assist MSMEs at the start of their life cycle might first begin with consideration of the business environment in which an MSME will be conducting its affairs. A “business environment” may be defined in a number of different ways, but could be said to comprise the policy, legal, institutional and regulatory conditions that govern business activities, and the administration and enforcement mechanisms established to implement government policy, as well as the institutional arrangements that influence the way key actors operate. These key actors may include government agencies, regulatory authorities, business organizations, trade unions, and civil society organizations. All of these factors affect business performance.[18]

18. Sound business environments can have a positive influence on economic growth and poverty reduction. While views differ as to the significance and measurability of the link between the business environment, on one hand, and economic growth and poverty reduction, on the other, poor business environments are unlikely to provide sufficient incentives and opportunities for entrepreneurs to carry on their commercial activities in the legally regulated economy. In addition, poor business environments tend to be more susceptible to corruption and usually have a disproportionate gender

[17] See, for example, supra note 4, pp. 8–9, 38–39 and 70–73.

[18] Donor Committee for Enterprise Development (DCED), 2008, “Supporting Business Environment Reforms”, p. 2.

impact, since the businesses most vulnerable in a weak business environment are micro-businesses, which are often owned by women.[19]

19. It should be noted that the quality of the business environment varies not only as between States, but also within the different regions of those States. Such regional variations make it unlikely that a single solution will provide the answer for improving the business environment in every State. Similarly, the challenges faced by MSME entrepreneurs vary depending on the context in which they are doing business. However, the two concepts are linked, since many of the challenges faced by MSMEs are similar to those considered detrimental to a favourable business environment in general, including: burdensome regulation, high economic inequality, low institutional quality, low quality of public infrastructure, and a lack of access to credit and other resources.[20]

20. Improving the quality of the business environment and assisting MSMEs in overcoming the particular challenges facing them often require a State to take measures towards legal and policy reform. These reforms may include, among others, providing for a simple and effective system of registration with those public authorities with which a business may be required to register (which may include the business or commercial registry, as well as taxation and social security authorities), as well as providing for a range of simplified and flexible legal forms for business so as to meet the varied needs of MSMEs. States most often initiate such reforms in order to: facilitate business start-up and operations, stimulate investment opportunities, and increase growth rates and employment. Such reforms require careful planning and commitment on the part of the State, as well as the involvement of many different entities at various administrative and governmental levels.[21]

II. The extralegal economy

21. As outlined above in paragraph 16, MSMEs generally face a number of key challenges, some of which are caused, and many of which are exacerbated, by operating in the extralegal economy,[22] also referred to as the "informal" economy. While developing States host over 85 per cent of the large number of MSMEs in business globally, an estimated 77 per cent of them operate in the extralegal economy.[23] Statistics for SMEs (a subset of MSMEs) that are operating in the extralegal economy indicate that such businesses are estimated to provide over 45 per cent of all jobs in developing States and 25 per cent in developed States, but that they account for only around 35 per cent and 15 per cent of the GDP, respectively, in those economies.[24]

22. "Informality" is by no means a uniform concept. Many businesses that might be considered "informal" actually operate in fixed premises and according to locally accepted commercial rules. In addition, they may be well-known by local authorities, pay some form of local taxes, and may even engage in cross-border trade. Others, on the other hand, may have little interaction with the State.

23. Although measurement tools are imperfect and no clear boundaries exist between formal (or legally regulated) and informal (or extralegal) sectors, businesses can be viewed as operating on a formality-informality (or legal-extralegal) spectrum, according to the extent to which their operations fall within the ambit of a State's official laws or take place outside its official structures. Reference in these materials

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[19] Ibid, p. 3; see also, "Making the Law Work for Everyone", Volume I, Report of the Commission on Legal Empowerment of the Poor, supra note 4.

[20] See K. Kushnir, M. L. Mirmulstein and R. Ramalho, "Micro, small and medium enterprises around the world: How many are there, and what affects their count?", 2010, World Bank/IFC.

[21] See Donor Committee for Enterprise Development (DCED), Supporting Business Environment Reforms: Practical Guidance for Development Agencies, Annex: How Business Environment Reform Can Promote Formalisation, 2011.

[22] See, for example, A. M. Oviedo, M. R. Thomas, K. K. Özdemir, Economic Informality, causes, costs and polices – a literature survey, 2009, pp. 14 et seq.

[23] Supra, note 7.

[24] Supra, note 8.

to the "legally regulated economy" thus refers to the sector of the economy characterized by activities that are conducted within the ambit of formal regulation and structure, and commercial activity that falls outside of this scope will be referred to as "extralegal" rather than "informal". Moreover, since the entry point for businesses wishing to access the legally regulated economy is often by way of mandatory registration with certain public authorities (often the commercial or business registry, as well as taxation or social security authorities), extralegal enterprises will refer to those that have not complied with mandatory registration with the authorities as required by the applicable law of the State. Mandatory registration with those public authorities will be considered in these materials to be the main conduit through which businesses are encouraged to operate in the legally regulated economy. However, it should be noted that in some States, certain businesses (due to their size and legal form) are not required to register with the business registry, taxation or social security authorities and provided those businesses fulfil other mandatory requirements, they are regarded as operating in the legally regulated economy.[25]

24. In addition, the extralegal economy is not related to illegal or criminal activity. Illegal activities are contrary to the law, but informal activities are extralegal, in that they are not officially declared and occur outside the legal and regulatory regime that should govern such activities. The discussion in these materials is limited to extralegal commercial activities and does not address illicit trade in goods or services.

25. Further, extralegal commercial activity may be mainly of a different nature in some States, such as in developed economies. In such States, the extralegal economy may consist mainly of formal firms and workers that underreport their income to tax authorities, or that use undeclared labour in certain business domains.[26] These types of extralegal activities are not the focus of these materials.

26. It is also important to note that although extralegal commercial activity, particularly in the developing world, may exist largely as a result of economic necessity (as noted above in respect of MSMEs in general)[27] components of the extralegal economy may also be seen as quite dynamic and as an incubator for business potential that in fact provides economies with a large number of potential contributors to business development. In fact, businesses operating in the extralegal economy may be seen to provide a pool of talent and an important base of operations from which entrepreneurs can access, and graduate into, the legally regulated economy. There is increasing recognition that the extralegal sector is growing and that it should not be considered a marginal or peripheral sector, but rather as an important building block of a State's overall economy.[28]

27. In fact, a majority of the world's working population operates in the extralegal economy; that number is projected to grow to two-thirds of the global work force by 2020.[29] Although the very nature of such enterprises prevents the identification of precise statistics, estimates of the regional prevalence of extralegal economic activity as a percentage of GDP are as follows: 38 per cent in sub-Saharan Africa; 18 per cent in East Asia and the Pacific; 36 per cent in Europe and Central Asia; 35 per cent in Latin America and the Caribbean; and 27 per cent in the Middle East and North Africa. By way of comparison, the level of the extralegal economy as a percentage of GDP is estimated at 13 per cent in high-income Organisation for

[25] Further to the request of the Working Group at its twenty-ninth session, the Secretariat has clarified throughout this text that the operation of a business in the legally regulated economy refers to a business that has complied with the system of mandatory registrations and other requirements of the jurisdiction in which it operates (para. 22, A/CN.9/928).

[26] Supra, note 23, pp. 6 et seq.

[27] See para. 15 above.

[28] See, for example, UNCTAD's information on business facilitation (www.businessfacilitation.org/topics/formalization/).

[29] "How to formalize the informal sector: Make formalization easy and desirable", UNCTAD, (www.businessfacilitation.org/topics/formalizing-the-informal-sector.pdf).

Economic Co-Operation and Development (OECD) States, and at 17 per cent globally.[30]

28. The institution of reforms to improve the business environment, as noted above in paragraphs 17 to 20, may encourage and facilitate the operation of enterprises in the legally regulated economy. However, in order to achieve success, policies encouraging businesses to operate in that economy should take into account the different motivations and characteristics of entrepreneurs operating in the extralegal sector, and ensure sufficient incentives are offered to encourage them to operate in the legally regulated economy. An entrepreneur's reasons for operating a business in the extralegal sector will vary depending on the economy, but may include: high entry barriers and costs (including taxes and other social contributions) that outweigh the benefits that can be expected from entering the legally regulated economy; lack of information required to access the legally regulated economy; and a lack of job opportunities in the legally regulated economy.[31]

29. Variations in the size and characteristics of the extralegal economy are also apparent from region to region. An analysis of one region, for example, indicates high levels of extralegal commercial activity, partially due to the fact that the extralegal economy is where most new jobs are found, and where many entrepreneurs must trade by necessity.[32] In this region, a job, an enterprise and a household are often the same thing,[33] and lack of entrepreneurial skills, access to credit, and infrastructure are seen as the most obvious constraints to growth. In other regions, the extralegal sector tends to behave like a typical small business sector, and is often the main entry point for young, uneducated workers seeking employment, as well as for those seeking part-time work.[34] Other regions have experienced growth of the extralegal economy in recent years, apparently driven by a lack of jobs in the legally regulated sector and reduced demand for goods and services from those employed in that sector.[35]

30. The debate on the reasons for the extralegal sector, on its effect on national economies and on how to approach the issue has been vibrant for decades and has in recent years had a major influence on policymaking. The view that extralegal commercial activity is the result of burdensome regulation and costly procedures required by the State for businesses to enter the legally regulated economy, and that a reduction of those barriers will help extralegal MSMEs move towards a higher degree of compliance with mandatory registration requirements, has generated strong momentum for reforming regulations and laws in order to simplify business entry into the legally regulated economy.[36] A wide array of policies has been designed and implemented in several States and regions of the world, since, as noted earlier, the variable nature of the extralegal sector, and the different levels of development of States, render elusive the identification of a single optimal approach. The most successful interventions have been comprehensive policy packages aimed at achieving various goals, such as economic growth, social protection and inclusion, and which often include:

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[30] "Economic Developments in Africa Report, 2013: Intra-African Trade: Unlocking Private Sector Dynamism", UNCTAD, pp. 65–66 (http://unctad.org/en/PublicationsLibrary/aldcafrica2013_en.pdf).

[31] M. Jaramillo, "Is there demand for formality among firms?", Discussion paper, 2009, pp. 2 et seq; see also "Enterprise Surveys – Enterprise Note Series: Formal and Informal Microenterprises", World Bank Group, Enterprise Note No. 5, 2009.

[32] See Sub-Saharan Africa; United Nations Industrial Development Organization (UNIDO), GTZ, 2008, Creating an enabling environment for private sector development in sub-Saharan Africa, p. 16.

[33] See Sub-Saharan Africa, Donor Committee for Enterprise Development (DCED), 2009, Business Environment Reforms and the Informal Economy – Discussion Paper, p. 2.

[34] See Latin American and Caribbean States; Donor Committee for Enterprise Development (DCED), 2009, Business Environment Reforms and the Informal Economy – Discussion Paper, p. 2.

[35] See Asia and southeast Europe; Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), website, Toolkit: Learning and Working in the informal economy, www.giz.de/expertise/html/10629.html.

[36] Supra, note 31, pp. 2 et seq.

(a) Reducing the costs of a business entering and operating in the legally regulated sector, which include entry costs, taxes, fees and social contributions, and costs of compliance;

(b) Improving the benefits of operating in the legally regulated economy by reducing the bureaucracy and expense involved in obtaining fixed premises, and providing access to business development services and new markets;

(c) Improving the general business environment, so that policies to reduce costs and to improve the benefits of entering the legally regulated economy also assist firms already operating in that sector; and

(d) Strengthening the enforcement of a State's legal regime in order to encourage operation in the legally regulated economy.[37]

III. Ensuring that operation in the legally regulated economy is simple and desirable for MSMEs

31. In order to encourage MSMEs to operate their business in the legally regulated economy, States may wish to consider how best to effectively convey to MSMEs the availability of and the advantages offered by that approach. In addition, States should also consider what steps they can take to motivate such behaviour by making it a desirable, easily accessible process, that will impose the least burden possible on the MSME.

A. Explaining the meaning of operating in the legally regulated economy

32. To ensure widespread understanding of the advantages available to MSMEs, steps must be taken to explain the meaning of participating in the legally regulated economy and to provide clear and accessible information on how to achieve that aim. The State should consider how best to effectively convey relevant information to MSMEs, including on the necessary requirements in their jurisdiction and how such businesses can fulfil them, and any other information necessary for them to operate in the legally regulated economy. In addition to advising on the benefits of operating in the legally regulated economy, information should also be provided on the types and advantages of the legal forms that are available to a business, and the public authorities with which registration might be necessary (e.g. business registration, taxation and social security authorities). Ideally, a business should be able to use a single physical or electronic interface (a "one-stop shop") to register simultaneously with all necessary public authorities. Information in respect of these matters should be specifically adapted so that it is tailored to and clear and easily understandable by the target audience.

1. The advantages of the legally regulated economy

33. Part of the message that must be conveyed to MSMEs in order to persuade them to operate their businesses in the legally regulated economy is an explanation of the advantages of that approach. These advantages are outlined below.

(a) Advantages for the State

34. States have a clear interest in encouraging MSMEs to operate in the legally regulated economy. One of the reasons often cited for that interest is in terms of taxation, since encouraging MSMEs to operate in the legally regulated economy will

[37] International Labour Organization (ILO), GIZ, Enterprise formalization: fact or fiction?, A quest for case studies, 2014, p. 24.

broaden the tax base of the State.[38] It may also help reduce any friction that may exist with enterprises already operating in the legally regulated economy and paying taxes, but that must compete for market share with extralegal businesses. Additional reasons for a State to take action to encourage businesses to operate in the legally regulated economy, may include, depending upon the specific economic sector, ensuring consumer protection and, in general, engendering trust in business and commerce in the State for stakeholders including consumers, business partners and banks.

35. Other advantages to the State may be less direct, but are no less valuable. For example, providing previously extralegal businesses with the means to enter the legally regulated economy will permit those MSMEs to grow, to create jobs, and to increase their earnings and contribution to the creation of wealth and the reduction of poverty in the State. Businesses that operate in the legally regulated economy can be expected to attract more qualified employees and to stay in business longer, thus making investment in the training of personnel and the acquisition of capital more profitable. The increase in the number of businesses that comply with mandatory registrations will mean that there is more and better economic data available, that more information will be exchanged in respect of such businesses and that information will become more transparent. All of these effects will have an overall positive impact on the economy of the State.[39]

(b) Advantages for entrepreneurs

36. States must also ensure that they convey clearly and effectively to MSMEs and entrepreneurs the benefits of doing business in the legally regulated economy. The following factors are often cited as key advantages for MSMEs that operate in that commercial context.

(a) Visibility to the public and to markets

Registering a business with public authorities, including mandatory or non-mandatory registration in the business registry, can be a primary means through which the business becomes visible to the public and to markets, thus providing a means for exposure to potential clients and business contacts, and an expansion of market opportunities. This membership in the marketplace may provide opportunities to become a supplier of goods and services under favourable conditions, and can dramatically improve the profitability of the business. Moreover, such visibility both reduces the costs of and enables MSMEs to trade in economic circles beyond their relatives, friends and local contacts, thus opening up new markets.

(b) Visibility to the banking system and financial institutions

Registration with public authorities, including mandatory or non-mandatory business registration, can also provide an enterprise with improved access to banking and financial services, including to bank accounts, loans and credit. This permits MSMEs to move away from financial reliance on relatives and friends, making it easier for them to raise capital from a broader group of investors, as well as lowering the cost of that capital. This, in turn, permits businesses to expand, to make new investments, to diversify their risk, and to take up new business opportunities.

(c) Public procurement

In most States, public procurement contracts are only available to those businesses that are in compliance with mandatory registration requirements and are part of the legally regulated economy. Access to such contracts may be enhanced for certain groups, since some States have developed specific programmes to ensure that a certain percentage of public procurement contracts are granted to less entitled entrepreneurs, including women, youth, the disabled and the elderly.

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[38] States may wish to note that reduced taxation rates and administration may be an incentive offered to MSMEs to join the legally regulated economy, and that too great an emphasis on expanding the tax base might be counterproductive.

[39] See, for example, supra, note 22, pp. 14 et seq.

(d) Legal validation

Compliance with mandatory registration requirements permits a business to operate legally in the jurisdiction and provides the entrepreneur with documentation proving that status. This status also enables such businesses to have access to justice for commercial purposes, to enter into and enforce contracts more easily, and may facilitate access to exit mechanisms, such as reorganization or liquidation, in the event of financial difficulty. In some legal systems, compliance with all mandatory registrations provides additional legal rights for the entrepreneur operating in the commercial sector, including flexible provisions on commercial contracts, specialized commercial court divisions, a relaxation of certain requirements in terms of legal forms of business, and similar benefits.

(e) Legal compliance

While related to the concept of legal validation, compliance with the law can itself be seen as an advantage, since it alleviates entrepreneurial anxiety in respect of operating extralegally, and makes it less likely that fines may be imposed. Being in compliance with the law will also reduce the business' vulnerability to corruption and bribery, and should assist the entrepreneur by providing recourse in cases of tax and other inspections.

(f) Access to flexible business forms and asset partitioning

Through registration, the entrepreneur will be entitled to choose the legal business form available in the jurisdiction that is best suited to his or her needs; ideally, the State will provide for a range of legal business forms for that purpose. Most jurisdictions have at least one legal form that permits the entrepreneur to separate personal finances from business finances; such asset partitioning can be invaluable to a business, particularly if financial difficulty is encountered, as the entrepreneur is not in danger of losing all personal assets, and the value of the business assets can be maximized in the case of reorganization or liquidation. Moreover, the value of a business with separate assets may be greater and can be more readily transferred.

(g) Unique name and intangible assets

Compliance with mandatory registrations often requires an enterprise to operate under a sufficiently unique business name. This unique name translates into a market identity that can develop a value of its own and be traded to a subsequent owner. Other intangible assets that can add to the value of a business and be traded, particularly in the case of asset partitioning and a separate legal business identity, include client lists and commercial relationships.

(h) Opportunities for growth

In addition to the advantages of visibility set out above, compliance with mandatory registration requirements, including with the business registry, provides an enterprise with access to a much larger business network, which can permit it to grow the business and operate it on a much greater scale. Some States permit a business that has fulfilled its legal requirements to become a member of the Chamber of Commerce or other trade organization, which can greatly enhance an enterprise's opportunities for development.

(i) Opportunities for specialization of labour

Businesses that have complied with their mandatory registration requirements tend to be less constrained in their hiring practices and may be able to recruit employees outside of family and friends. This can facilitate access to a larger pool of talent and permit specialization among employees, enabling the MSME to make better use of employee talents and improving overall productivity.

(j) Access to government assistance programmes

Many States provide specific assistance programmes for MSMEs or for specific types of disadvantaged entrepreneurs. Operation in the legally regulated economy will usually permit an enterprise to access all forms of government assistance available to such businesses.

(k) Empowerment and emancipation effects

The operation in the legally regulated economy of businesses that are owned by women, youth, the disabled, the elderly and other less advantaged groups may have important empowerment and emancipation effects. This may be particularly so in respect of women entrepreneurs, many of whom are micro-entrepreneurs that are often exposed to greater risk as a result of corruption and abuse of authority.

(l) Longer term gains

The visibility of a business operating in the legally regulated economy can also be the main conduit for its growth into cross-border trading. It is also possible that, in the longer term, and particularly through the use of electronic commerce and Internet facilities, robust compliance of businesses with mandatory registration requirements may lead to an increase in cross-border trading and foreign investment – advantages not only for the enterprise, but for the State as well.

2. Communication and education

37. Communication of, and education on, the advantages of legal and policy reforms undertaken by the State to assist MSMEs will be key to the success of those reforms. While this might seem a relatively small detail, in the context of States and regions in transition or with remote areas, all potential entrepreneurs may not be well-served by mass media or have dependable and regular access to telecommunications or the Internet. In such contexts, the potential obstacles to communication and education, and thus to the success of the reforms, can be expected to be more numerous.

38. An additional consideration for a State in developing communication and education strategies should be the literacy challenges faced by many micro-entrepreneurs and the particular steps that may need to be taken to overcome this hurdle. For example, pictograms could be used in addition to text in order to inform potential businesses of the programmes and advantages offered to them. Additional options could include using other culturally significant means of communicating with such groups, including through songs and storytelling. One example demonstrates how,[40] in order to publicize its programmes aimed at fostering micro entrepreneurs, a State launched a national campaign illustrating the benefits of those programmes by way of radio and television broadcasts of a simple and interesting scenario using well-known national actors performing in the national languages of the State.

39. In designing its communication and education plan, a State must be cognizant of the potential impediments outlined above and think practically about how best to overcome such difficulties. Possible solutions could include:

(a) Providing mobile education and communication efforts, and for mobile registration and facilitation counters, so as to enable travel to the entrepreneur's location;

(b) Using trade organizations or informal workers' associations to assist in publicizing the programmes;

[40] See, for example, efforts of the Democratic Republic of Congo in publicizing its OHADA (Organisation pour l'Harmonisation en Afrique de Droit) "entreprenant" programme (www.ohada.com/actualite/2609/ohada-rdc-campagne-mediatique-de-sensibilisation-sur-l-entreprenant-communication-de-la-commission-nationale-ohada-de-rdc.html). A sample video may be viewed here: www.youtube.com/watch?v=lE1OIo1eNic.

(c) Using mass media that is broadly available, including radio, television and print media, as well as posters and billboards;

(d) Making blanket announcements via text on mobile phones; this may be particularly effective in areas where mobile payments are being used;

(e) Ensuring communication and education is in the local language;

(f) Making use of social media; while less practical in terms of States that face technological hurdles, social media may be an effective tool, particularly to disseminate information among younger entrepreneurs and family members;

(g) Developing courses for gender-specific trading or involving other disadvantaged groups; and

(h) Using educational techniques that may be particularly useful in the context.[41]

B. Making it desirable for MSMEs to operate in the legally regulated economy

40. Another component of the communication package that should be conveyed to prospective businesses is clear information on the incentives a State provides to MSMEs to encourage them to participate in the legally regulated economy. It is important that businesses are made aware of such incentives and that they outweigh the perceived advantages of operating in the extralegal economy.

41. The effectiveness of the incentives offered by the State will vary according to the specific economic, business and regulatory context. While it is not possible to specify precisely which incentives should be offered, States may wish to consider the incentives outlined in the following paragraph, each of which, often in combination with others, has been found to be an effective means of encouraging MSMEs to enter the legally regulated economy. In addition, in planning for the creation of these incentives, States may need to ensure coordination with international organizations active in this area (including, for example, the World Bank Group, UNCTAD, UNIDO, the Asian Development Bank, or OHADA), officials of public authorities with which businesses must register, local business incubators, the tax authority, and banks in order to maximize the impact of the incentives chosen.

42. A State may consider programmes along the following lines: [42]

(a) Simplification of the registration process for businesses;

(b) Assistance with the registration process for businesses;

(c) Free (or at least very low-cost) registration;

(d) Receipt of an official certificate indicating the registered status and legal form of the business;

(e) Organized access to and support with banking services (bank accounts and chequing accounts);

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[41] One such method may be “participatory learning and action”, which has been described as an approach traditionally used with rural communities in the developing world. It combines participatory and visual methods with natural interviewing techniques and is intended to facilitate a process of collective analysis and learning. The approach can be used in identifying needs, planning, monitoring or evaluating projects and programmes, and offers the opportunity to go beyond mere consultation and promote the active participation of communities in the issues and interventions that shape their lives. See, for example, “What is Participatory Learning and Action (PLA): An Introduction”, Sarah Thomas (http://idp-key-resources.org/documents/0000/d04267/000.pdf) or www.iied.org/participatory-learning-action.

[42] The Working Group may wish to note that each of these incentives, and any additional ones suggested for inclusion, could be described in a brief paragraph, if desired.

(f) Easier access to credit for businesses operating in the legally regulated economy;

(g) Accountancy training and services, and ensuring simplified accounting rules suitable for MSMEs;

(h) Assistance with the preparation of a business plan;

(i) Training (including managing inventory and finances);

(j) Tax and other credits for training costs;

(k) Protection against potential administrative abuse, possibly through access to mediation or other dispute resolution mechanisms;

(l) Simpler and more equitable taxation (lower, simplified taxation rates), including tax mediation services and simplified tax forms;

(m) Business counselling services;

(n) A transition period to give new businesses time to comply fully with applicable laws;

(o) A temporary "tax holiday" for small and microenterprises upon their initial registration with the necessary public authorities;

(p) Lump sum monetary compensation or government subsidies and programmes[43] to foster MSME growth;

(q) Public communication and promotion of the business, as well as networking opportunities and access to experienced businesses, for example through free memberships in industry organizations;

(r) Specific public procurement programmes to encourage small and micro-businesses or those owned by disadvantaged groups to have access to contracts;

(s) Low-cost technological infrastructure;

(t) Access to and support with obtaining health insurance; and

(u) The establishment of a business mentoring programme with experienced business owners to facilitate access to experience and information for MSMEs.

C. Making it easy for MSMEs to operate in the legally regulated economy

43. In addition to a lack of information, one of the most often-cited reasons given by MSMEs for their reluctance to operate in the legally regulated economy is the cost and administrative burden of doing so. Two areas of reform that States may undertake to assuage these concerns are to simplify and streamline the procedures necessary for a business to comply with the mandatory registrations with public authorities, focussing on the needs of the user, and to provide flexible and simplified legal business forms for MSMEs.

1. Simplified and streamlined registration for businesses

44. One aspect of making it simple and desirable for an MSME to operate its business in the legally regulated economy is to take a user-centric approach and to make the procedures for mandatory registrations with public authorities, including business registration, accessible, simple and clear. Improvements made by a State to its registration system may be expected to assist not only MSMEs, but businesses of all sizes, including those already operating in the legally regulated economy. Importantly, care must also be taken to effectively communicate these changes and their advantages to MSMEs and potential entrepreneurs throughout the jurisdiction.

[43] For example, some States have programmes to encourage young nationals who have been educated abroad to return to their State and start businesses.

45. The draft legislative guide on key principles of a business registry (A/CN.9/WG.I/WP.109) explores in detail the steps that can be taken by a State to simplify, streamline and adopt good practices in its system of business and other registration.

2. Flexible and simplified business forms for MSMEs

46. Another aspect of creating an enabling legal environment and an attractive business environment for MSMEs is for the State to permit them simple access to flexible, legally recognized business forms. Many micro and small businesses are either sole proprietorships or family enterprises that do not possess a legal identity or a business form distinct from that of the owner. An entrepreneur should be permitted to easily and inexpensively register a business with a legally recognized form in that jurisdiction. States may wish to permit registration of a range of different legal forms so as to provide entrepreneurs with sufficient flexibility to meet the needs of MSMEs, and to foster their growth.

47. For some businesses, operation as a simple sole proprietor may be sufficient for their purposes. However, some States and regional economic organizations have created a legal business form for individual entrepreneurs (defined as those whose business turnover is below a certain amount) which adds certain benefits to those otherwise available to the sole proprietor.[44] These benefits tend to include being subject to a simplified scheme for the calculation and payment of taxes and social security contributions, as well as fast, simplified and low (or no) cost registration requirements and formalities. In addition, States may also adopt a number of incentives available to such businesses which may include: assistance in opening a bank account and gaining access to banking services, access to mediation services (for example, in respect of taxation and legal services) and practical training and advisory services in key business areas (for example, in accounting, management and inventory, legal and tax obligations, financial education and awareness, business planning, and restructuring and growth strategies). Nonetheless, such schemes typically do not change the unlimited personal liability of a sole proprietor, whose personal and professional assets are all available to meet any business debt.

48. An important business right that should be offered to MSMEs is the opportunity for an enterprise to partition its business assets from the personal assets of its owner(s). The legal ability of an enterprise to partition its business assets from the personal assets of its owner(s) is an important building block for the encouragement of entrepreneurial activity since, even though a business may fail, the personal assets of the entrepreneur(s) will be protected.

49. Asset partitioning is seen as one of the defining features of a limited liability business entity, which is said to be among the most productivity enhancing legal institutions available. Offering entrepreneurs the opportunity to take on legal personality and limited liability through the adoption of a simplified business form is certainly a feature that States should consider in making policy decisions on legal forms to adopt in order to reduce the legal obstacles encountered by MSMEs. The key issues involved in adopting a legal regime for simplified business entities with these features, but adapted for MSMEs (including sole proprietors), is considered in detail in the draft legislative guide on an UNCITRAL limited liability organization (A/CN.9/WG.I/WP.99 and Add.1). However, it should be noted that the benefits of asset partitioning for MSMEs registering their businesses may also be available in a legal structure that stops short of full limited liability and legal personality, and is thus subject to fewer formal requirements.

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[44] See, for example, the “entrepreneur with limited liability” (EIRL) or the “auto-entrepreneur” in France (A/CN.9/WG.I/WP.94 and A/CN.9/WG.I/WP.87, paras. 22–23, and pp. 10 et seq., respectively), or the “entreprenant” in OHADA, Acte Uniforme Révisé Portant sur le Droit Commercial General, adopted 15 December 2011, entry into force 16 May 2011 (www.ohada.com/actes-uniformes/940/acte-uniforme-revise-portant-sur-le-droit-commercial-general.html).

50. One such model that has been adopted is that which permits an individual entrepreneur to officially allocate a certain share of personal assets to the entrepreneur's professional activity. This approach permits the entrepreneur to segregate professional assets from personal assets so that, in the event of financial difficulty of the business, creditors will have access only to the professional assets of the entrepreneur.[45]

51. Another model that has been used in this regard is the establishment of a separate capital fund that has been established for a specific purpose. Such a fund may be established by individuals (and their spouses), into which specific assets can be placed that are identified as necessary for the family requirements of the individuals. Such assets are then protected from seizure in the case of business insolvency. A variation on this model may also be created by a corporation, which can establish a separate capital fund devoted to a specific purpose or which can agree that the earnings of an activity be dedicated to the repayment of loans obtained for the execution of certain specified activities. The establishment of such a fund is subject to certain requirements, including that its existence be made public by way of the business registry, and that it be open to opposition by existing creditors of the corporation. Once the fund is constituted, it is segregated from the other funds of the company, and may only be used to satisfy the claims of creditors arising as a result of the relevant activities. Other variations on the creation of a segregated fund may include the declaration of the fund to a specific purpose to the benefit of a natural or legal person, a public administrative body, or other entity, provided that the fund is established by public deed and is registered.[46]

52. An additional example of asset partitioning that stops short of providing legal personality and limited liability is the concept of "business network contracts". This legal tool can be used by a group of entrepreneurs (of various types and sizes, including sole proprietors, companies, public entities, and non-commercial and not-for-profit entities) who undertake a joint venture as agreed in the business network contract, which may be in respect of certain services or common activities within the scope of their business, or even with respect to the exchange of information. The goal of such an approach is to strengthen the individual businesses involved in the contract, as well as the network itself, at the national and international levels, so as to enable access to business opportunities not available to an individual enterprise, and thus to improve competitiveness. The contract must meet the formal requirements established by the State (for example, be duly executed in writing, indicate the objectives of the venture, its duration, the rights and obligations of participants, etc.), and be registered with the business registry. In addition, the contract must establish a capital fund to carry out the programme of the business network; this fund is then segregated from the individual assets of the founding entrepreneurs, and is available only to satisfy claims deriving from the activities performed within the scope of the network, and not for creditors of the individual entrepreneurs that created the business network.[47]

[45] See A/CN.9/WG.I/WP.87, paras. 26–27.
[46] See A/CN.9/WG.I/WP.87, paras. 2–7.
[47] See A/CN.9/WG.I/WP.87, paras. 8–17.

G. Note by the Secretariat on a draft legislative guide on key principles of a business registry

(A/CN.9/940)

[Original: English]

Contents

Introduction

1. This introduction clarifies amendments and additions to the current revision of the draft legislative guide on key principles of a business registry based upon the deliberations and decisions of Working Group I at its thirtieth session (New York, 12 to 16 March 2018, see document A/CN.9/933 for the report of that meeting) as well as aspects of the final structure of the guide once published.

1. The current revision of the draft legislative guide on key principles of a business registry

2. The draft guide before the Commission not only reflects the decisions of the Working Group at its thirtieth session, but also incorporates editorial adjustments made by the Secretariat in order to facilitate the cohesion and consistency of the text. In order to be consistent with the final form in which the draft guide will be published, guidance to the changes arising from the thirtieth session of the Working Group is not reflected in footnotes to the text and the Commission might wish to refer to the report of that meeting (see para. 1 above).

3. The Commission may also wish to note that in a few instances the Secretariat has used some flexibility in implementing the changes agreed upon by the Working Group at its thirtieth session. For example, certain references have not been included in the form or in the paragraph(s) suggested by the Working Group, or certain sentences have been retained since they were thought to be still relevant for the commentary. In a few cases the Secretariat has adjusted the drafting suggestions of the Working Group for improved consistency with the text of the guide (e.g. recommendations 11, 14, 18 and 34).

4. In addition, the Secretariat has made a few other revisions, such as: (a) removing cross references to document A/CN.9/941 (previously A/CN.9/WG.I/WP.110) and to previous revisions of this draft guide; (b) replacing the list of resources used in the preparation of the working papers with reference to the organizations and institutions that have authored such resources (para. 10 of the draft guide); (c) adjusting the definition of "unique identifier" (para. 12 of the draft guide) in order to avoid redundancy with the text of the commentary; (d) revising the text of recommendation 33 and the relevant part of the commentary (para. 167 of the draft guide) for improved consistency with the language used in Core International Human Rights Treaties adopted by the United Nations; (e) eliminating redundancy in the draft guide and (f) revising the text of recommendation 58.

5. The Commission may wish to note that in accordance with the deliberations of the Working Group at its thirtieth session, the Secretariat has relocated the former Annex to the guide (see A/CN.9/WG.I/WP.109) as a new chapter, Part XI. Further to the requests of the Working Group, the Secretariat has also ensured that substance, drafting, and terminology of this new chapter are consistent with the remainder of the guide. Consequently, sections E (Electronic documents and electronic authentication methods) and F (Dispatch and receipt of electronic messages) of the Annex have been removed (and a few aspects relocated in the commentary to recommendations 4, 13 and 58). The Secretariat has also deleted the discussion on primary and secondary legislation (Section A of the Annex) in light of earlier deliberations of the Working Group that the guide should not distinguish between primary and secondary legislation (see para. 21, A/CN.9/900 and also the definition of "law" in para. 12 of the current revision of the draft guide) and in this regard has revised the text of recommendation 58.

6. Even with these adjustments, however, Part XI does not appear to be fully consistent with the focus of the guide, as it discusses aspects pertaining to general legal reform rather than to registration of a business. The Commission might thus wish to consider whether it would be more appropriate to relocate this part of the guide to the materials prepared for the other project discussed by the Working Group, i.e. the draft legislative guide on an UNCITRAL limited liability organization (UNLLO).

2. The final structure of the legislative guide on key principles of a business registry

7. The guide will be published in electronic and paper format. In order to ensure consistency with the approach adopted by other UNCITRAL legislative guides, the text of the guide will be preceded by a short "Preface" that will read along these lines:

> "*The legislative guide on key principles of a business registry was prepared by the United Nations Commission on International Trade Law (UNCITRAL). At its forty-sixth session, in 2013, the Commission agreed that work on reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle, in particular, in developing economies, should be added to the work programme of the Commission, and that such work should begin with a focus on the legal questions surrounding the simplification of incorporation (A/68/17, para. 321).*
>
> *Working Group I commenced its work in February 2014 according to the mandate received by the Commission and agreed that in addition to simplification of incorporation, simplification of business registration also contributed to reducing the legal obstacles faced by MSMEs throughout their life cycle. The Working Group thus added a second project on best practices for business registration (approved by the Commission) to the work on legal questions surrounding the simplification of incorporation.*
>
> *In 2015 and 2016, the Working Group discussed several documents which included portions of draft commentary and recommendations (see A/CN.9/860 and A/CN.9/866 for the reports of those meetings). A draft consolidated text of legislative guide was first discussed in 2017 (see A/CN.9/900 for the report of that meeting) and work was further developed through two one-week sessions,*

the last one being held in March 2018 (see A/CN.9/928 and A/CN.9/933 for the reports of those meetings). In addition to representatives of the member States of the Commission, representatives of observer States and a number of international organizations, both intergovernmental and non-governmental, participated actively in the preparatory work.

The final negotiations on the draft legislative guide on key principles of a business registry were held during the fifty-first session of UNCITRAL in New York from 26 to 27 June 2018 and the text was adopted by consensus on ___ ___ 2018. Subsequently, the General Assembly adopted resolution ___ of ____ in which it expressed its appreciation to UNCITRAL for completing and adopting the legislative guide".

8. The guide will also include Annexes, such as those that will contain a list of all recommendations of the guide, and reproduce the text of the Commission's decision adopting the guide and the resolution of the General Assembly, as well as an Index.

9. The text of the draft legislative guide is reproduced as an Annex to this introduction for consideration by the Commission.

Annex

Draft legislative guide on key principles of a business registry

Introduction

1. The legislative guide on key principles of a business registry has been prepared on the understanding that, in order to create a sound business environment, it is in the interests of States and of micro, small and medium-sized enterprises (MSMEs) that such businesses operate in the formal economy. This guide is also intended to reflect the idea that entrepreneurs that have not yet commenced a business may be persuaded to do so in the formal economy if the requirements for formally starting their business are not considered overly burdensome, and if the advantages for doing so outweigh their interest in operating in the informal economy.

2. This legislative guide recognizes that in certain States, MSMEs, especially micro and small businesses, are not required to register with the business registry in order to operate in the formal economy, but they may be required to register with other relevant authorities such as taxation and social security authorities. The operation of a business in the formal economy refers to a business that has complied with all mandatory registration and other requirements of the jurisdiction in which it is doing business.

3. Depending on the jurisdiction in which the business is operating and the legal form of the business, registration with the business registry may be one of the mandatory registration requirements for doing business in that jurisdiction. However, this guide recommends that even States that do not require mandatory business registration should consider permitting, but not necessarily requiring, businesses of all sizes and legal forms to register in the business registry. This permissive approach could significantly enhance the advantages for businesses operating in the formal economy.

4. In order to encourage entrepreneurs to operate their business in the formal economy – particularly when business registration is a requirement for them to do so – States may wish to take steps to rationalize and streamline their system of business registration. Faster and simpler procedures to register a business could be expected to assist in business formation of all sizes and types of businesses, not only MSMEs. For these reasons, simplification and streamlining of business registration has become one of the most pursued reforms by States in all regions and at all levels of development. This trend has generated several good practices, whose features are shared among the best performing economies. In order to assist States wishing to reform their business registration procedures so as to take into consideration the particular needs of MSMEs, or simply to adopt additional good practices to streamline existing procedures, this guide sets out key principles and good practices in respect of business registration, and how to achieve the necessary reforms.

A. Purpose of the present guide

5. Business registries (see para. 12 below) are systems established by law that facilitate the interaction of new and existing businesses that are operating in the jurisdiction of the registry with the State, other businesses and the public, both when those businesses are established and throughout the course of their lifespan (see para. 52(b) below). The business registry not only enables such businesses to comply with their obligations under the domestic law applicable to them, but it empowers them to participate fully in the formal economy when registration is required for that purpose, and otherwise enables them to benefit from legal, financial and policy support services that are more readily available to registered businesses. Moreover, when information is appropriately maintained and shared by the registry, it allows the public to access business information, and thus may facilitate the search for potential

business partners, clients or sources of finance and reducing risk when entering into business partnerships. In performing its functions, the registry can thus play a role in the economic development of a State. In addition, since businesses, including MSMEs, are increasingly expanding their activities beyond national borders, registries efficiently performing their functions can play an important role in a cross-border context by facilitating access to business information by interested users from foreign jurisdictions (see also paras. 195 and 196 below), which greatly reduces the risks of transacting and contracting.

6. Business registration systems vary greatly across States and regions, but a common thread to all is that the obligation to register can apply to businesses of all sizes depending on the legal requirements applicable to them under domestic law. Approaches to business registration reforms are most often "neutral" in that they aim at improving the functioning of the registries without differentiating between large-scale business activities and much smaller business entities. Evidence suggests, however, that when business registries are structured and function in accordance with certain features, they are likely to facilitate the registration of MSMEs, as well as operating more efficiently for businesses of all sizes. These features are reflected as recommendations in this legislative guide.

7. This legislative guide draws on the lessons learned through the wave of reforms of business registration systems implemented since 2000 by States in various geographic regions. Through this approach, the guide intends to facilitate not only efficient domestic business registration systems, but also cooperation among registries in different national jurisdictions, with a view to facilitating cross-border access to registries by all interested users. Promoting the cross-border dimension of business registration contributes to transparency and legal certainty in the economy and significantly reduces the cost of businesses operating beyond their national borders (see also paras. 195 and 196 and rec. 40 below).

8. The present guide supports the view that transitioning to an electronic or mixed (i.e. electronic and paper-based) registration system greatly contributes to promoting the registration of MSMEs. The guide recognizes that adoption of modern technology has not progressed equally among or within States, and it recommends that any reform towards an electronic business registration system should be tailored to the State's technological and socioeconomic capacity. This may include phasing in implementation, particularly if the technology that is adopted requires a complete reengineering of registration processes (see paras. 72 to 80 below). It should be noted that reference to electronic or online registration is not intended to recommend the use of any particular technology, but rather describes the performance of the business registry's functions through electronically operated devices. In keeping with that approach, this guide has been drafted with the aim of accommodating the use of existing information and communications technology (ICT) as well as any emerging technology, such as distributed ledger technology, that States may consider appropriate when reforming their registration systems.

9. Other features that encourage the registration of MSMEs include providing registration and post-registration services at no cost or at low cost, and collecting and maintaining good quality and reliable information on registered businesses. Importantly, establishing a one-stop shop for business registration and registration with other relevant authorities that are involved in establishing a business, such as taxation and social security authorities, greatly facilitates such registration, particularly in the case of MSMEs. A one-stop shop adopts a user-centric approach that is driven by the needs of the businesses, thus providing services that respond to their expectations in terms of cost efficiency, delivery time and engagement of the service providers. For this reason, the guide supports the view that one-stop shops are a key means to improve institutional interoperability among relevant public authorities and that States should use one-stop shops to establish integrated registration procedures for the establishment of a business (see paras. 94 and 95 and rec. 14 below). In this regard, it should be noted that the terms "business registry" and "one-stop shop" as used in this guide are not intended to be interchangeable (see para. 12 below).

10. These materials have benefited from various tools prepared by international organizations that have supported such reform processes in numerous regions around the world. Data made available through the activity of international networks of business registries that, among other activities, survey and compare the practices of their affiliates in various States around the world have also been referenced. The main sources used in the preparation of this draft legislative guide include publications and online resources from various institutions and organizations, including, but not limited to: the Association of Registers of Latin America and the Caribbean, the Corporate Registers Forum, the Companies House of the United Kingdom of Great Britain and Northern Ireland, the European Commerce Registers' Forum, the European Union, the International Anti-Corruption Academy, the Ministry of Service of Alberta (Canada), the Québec Registraire des enterprises (Canada), the World Bank Group and the United Nations Conference on Trade and Development. Moreover legislation enacted in several jurisdictions, of different legal traditions, around the world has provided guidance on all aspects of business registration.

11. This legislative guide is addressed to States interested in the reform or improvement of their business registration system, and to all stakeholders in the State that are interested in or actively involved in the design and implementation of business registries, as well as to those that may be affected by or interested in the establishment and operation of a business registry.

B. Terminology

12. The meaning and use of certain expressions that appear frequently in this draft legislative guide is explained in this paragraph. It is to be noted that whenever terms such as annual accounts, periodic returns, documents, forms (such as search forms, registration forms or other forms to request registry services), notices, notifications and written materials are used, reference is intended to include both their electronic and paper versions unless otherwise indicated in the text. Frequently used expressions include the following:

- *Annual accounts*: "Annual accounts" means financial information on the business' activities prepared at the end of a financial year of the business (cf. "periodic returns").
- *Branch*: "branch" means an establishment that depends on a main business and carries on the same commercial activity in a separate location (whether foreign or domestic). A branch is not a subsidiary and does not have a separate legal personality from the original or main business.
- *Business name*: "Business name" means a name registered on behalf of a business, or a name used or planned to be used by a business.
- *Business registration:* "Business registration" means the entry of certain information about a business, as required by the domestic law, into the business registry (cf. "business registry or business registration system").
- *Business registry* or *business registration system*: "Business registry" or "business registration system" means a State's system for receiving, storing and making accessible to the public certain information about businesses, as distinct from mandatory registration by the business with other relevant authorities (e.g. taxation and social security authorities).
- *Deregistration*: "Deregistration" means indicating in the registry that a business is no longer registered.
- *Electronic signature*: "Electronic signature" means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message.[1]

[1] See UNCITRAL Model Law on Electronic Signatures (2001), article 2.

- *Good quality and reliable*: A business registration system and the information it contains is of "good quality and reliable" when the registered information is kept as current and accurate as possible and the system may be considered positively in terms of performance and security. The term "good quality and reliable" does not refer to whether the information is legally binding on the registry, the registrant, the registered business, or third parties.

- *ICT*: "ICT" means information and communications technology.

- *Information products*: "Information products" means information that is processed or published by the business registry (in electronic or paper form) to convey data requested by users.

- *Information services*: "Information services" means the system established by the business registry through which it supplies information products to users.

- *Law*: "Law" means the applicable law in the enacting State and is intended to include both the specific rules adopted to establish the business registry (whether such rules are found in legislation or in administrative regulations or guidelines) and the broader body of domestic law that may be relevant to issues related to the business registry, but are found outside of the specific rules establishing the business registry.

- *Formal economy*: "Formal economy" means economic activity that takes place in a State within the context of the legal and regulatory regime that the State has established to govern such activity. Formal economy does not include commercial activity that takes place outside of that context (often referred to as the informal economy), nor does it include illicit trade in goods or services.

- *Micro, small and medium-sized enterprises (MSMEs)*: "MSMEs" means micro, small and medium-sized enterprises as they are defined according to the criteria established by the State undertaking the business registration reforms.

- *One-stop shop*: "One-stop shop" means a physical office, a single interface on an electronic platform or an organization that carries out more than one function relating to the registration of a business with at least the business registry, as well as taxation and social security authorities necessary for the business to operate in the formal economy. A one-stop shop should ensure the interoperability of all relevant authorities with which a business is required to register, and allow for the sharing of information on the business among those authorities, as well as the use of a single integrated application form for registration with, and payment to, those authorities.

- *Periodic returns*: "Periodic returns" means a statement provided annually or at other prescribed intervals which gives essential information about a business' composition, activities, and financial status, and which, subject to applicable law, registered businesses may be required to file with an appropriate authority (cf. "annual accounts").

- *Protected data*: "Protected data" means all information that must be kept confidential pursuant to the applicable law of the enacting State.

- *Registered business*: "Registered business" means a business that, further to filing an application for registration, has been officially registered in the business registry.

- *Registered information*: "Registered information" means information regarding a business that is registered in the business registry, including protected data and publicly available information.

- *Registrant*: "Registrant" means the natural or legal person that submits the prescribed application form and any additional documents to a business registry.

- *Registrar*: "Registrar" means the natural or legal person appointed pursuant to domestic law to supervise and administer the operation of the business registry.

- *Unique identifier*: "Unique identifier" means a single unique business identification number that is allocated only once to a business, or a non-business entity, and that is used consistently by the public authorities of a State.

C. Legislative drafting considerations

13. States implementing the principles contained in this legislative guide should consider how to include them in their legislation and ensure consistency with it. This draft legislative guide does not recommend the choice of any particular legislative methods and uses neutral legal terminology so that its recommendations can be adapted easily to the diverse legal traditions and drafting styles of different States. The present guide also takes a flexible approach, which will allow its recommendations to be implemented in accordance with local drafting conventions and legislative policies of the States.

D. The reform process

14. Streamlining business registration to meet the key objective of simplifying the registration process and making it time and cost efficient, as well as user friendly (both for registrants and users searching the registry), usually requires undertaking reforms that address the enacting State's legal and institutional framework. It may also be necessary to reform the business processes that support the registration system. Sometimes reforms are needed in all of these areas. The approach taken in these reforms may vary considerably among States as the design and features of a registration system are influenced by the State's level of development, priorities and laws. There are, however, several common issues that States should consider and several similar recommended steps for reform regardless of jurisdictional differences that may exist. These issues are examined below.

1. The reform catalysts

15. Business registration reform is a multifaceted reform process that addresses various aspects of the State apparatus; its implementation requires the participation of a broad range of stakeholders and a thorough understanding of the State's legal and economic conditions, as well as of the practical needs of registry personnel and the intended users of the registry. To be successful, the reform must be driven by the need to improve private sector development and, for this reason, it is advisable that the reform be part of a larger private sector development or public sector modernization programme. It is thus essential to gain an understanding of the importance of business registration in relation to other business environment challenges and of its relationship to other potential reforms. This analysis will require, as crucial preliminary steps, ensuring that domestic circumstances are amenable to a business registration reform programme, that incentives for such a reform exist and that there is support for such initiatives in the government and in the private sector prior to embarking on any reform effort.

(a) Relevance of a reform advocate

16. Support or even leadership from the highest levels of the State's government is of key importance for the success of the reform process. The engagement of relevant government ministries and political leadership in the reform effort facilitate the achievement of consensus on the steps required. This can be particularly important to facilitate access to financial resources, to make and implement decisions, or when it is necessary to move business registry functions from one branch of government to another or to outsource them.

(b) The steering committee

17. In order to oversee the day-to-day progress of the reform and to manage difficulties as they may arise, it is advisable that a steering committee be established

to assist the State representative or body leading the reform. In addition to experts with technological, legal and administrative expertise, this committee should be composed of representatives of the public and private sector and should include a wide range of stakeholders, including those who can represent the perspectives of intended users. It may not always be necessary to create such a committee, since it may be possible to use existing mechanisms; in any event, a proliferation of committees is to be avoided, as their overall impact will be weakened.

18. The steering committee should have clearly defined functions and accountability; it is advisable that its initial setup be small and that it should grow progressively as momentum and stakeholder support increase. Although linked to the high-level government body spearheading and advocating for the reform, the committee should operate transparently and independently from the executive branch. In certain jurisdictions, regulatory reform bodies have later been transformed into more permanent institutions that drive ongoing work on regulatory governance and regulatory impact analysis.

19. The steering committee must nurture the reform process and consider how to address concerns raised in respect of it. Concerns could include those arising from bureaucratic inertia, or fears that registry employees may lose their jobs if their ICT skills are weak or if technology replaces human capital. Thus, it is likely to be important for the body overseeing the reform to be able to consider diverse interests and fully inform potential beneficiaries and political supporters.

(c) The project team

20. In collaboration with the steering committee, it is advisable that a project team be assigned the task of designing a reform programme tailored to an enacting State's circumstances and providing technical expertise to implement the reforms. A successful reform will require a team of international and local specialists, with expertise and experience in business registration reform, in legal and institutional reform, and in a variety of technology matters (for example, software design, hardware, database and web specialists).

(d) Awareness-raising strategies

21. States embarking on a reform process should consider appropriate communication strategies aimed at familiarizing businesses and other potential registry users with the operation of the registry and of the legal and economic significance of business registration. This effort should include informing businesses of the benefits of registration with the business registry and mandatory registration with other relevant authorities (e.g. taxation and social security), and of participation in the formal economy (e.g. visibility to the public, the market and improved access to the banking system). Awareness should also be increased of the incentives that the State may offer businesses to operate in the formal economy (see para. 23 below), including the opportunity to participate in public procurement; legal validation of the business; access to flexible legal business forms and asset partitioning; the possibility of protecting the business' unique name and other intangible assets; opportunities for the business to grow and to have access to a specialized labour force and access to government assistance programmes. The awareness-raising strategy should also ensure that clear information is readily accessible on compliance with the law, fulfilment of the obligations taken on by registering (e.g. the payment of taxes) and potential penalties for non-compliance.

22. Effective communication may also be expected to encourage the development of new businesses and to encourage existing businesses to comply with mandatory registrations, as well as to provide signals to potential investors about the enacting State's efforts to improve the business environment. Awareness-raising strategies should commence early in the reform process and should be maintained throughout it, including after the enactment of the legal infrastructure and implementation of the new business registration system. In coordination with the steering committee, the project team should determine which cost-effective media can best be used: these can

include private-public dialogues, press conferences, seminars and workshops, television and radio programmes, newspapers, advertisements, and the preparation of detailed instructions on submitting registration information and obtaining information from the business registry. In order to raise MSME awareness of the reforms to the business registration system, it may be advisable to consider communication strategies tailored specifically to that audience.

(e) Incentives for businesses to register

23. In addition to an efficient awareness-raising campaign, States should consider adding incentives for MSMEs and other businesses to comply with mandatory registration with the relevant authorities through the provision of ancillary services for businesses that are in compliance. The types of incentives will vary according to the specific economic, business and regulatory context, and may include: promoting access to credit for registered businesses; offering accountancy training and services as well as assistance in the preparation of a business plan; providing credits for training costs; establishing lower and simplified taxation rates and tax mediation services; providing business counselling services; providing monetary compensation, government subsidies or programmes to foster MSME growth and providing low-cost technological infrastructure.

2. Phased reform process

24. The duration of a reform process can vary considerably, depending on the types of reforms implemented and on other circumstances relevant to the particular economy. While the most comprehensive approach may entail a complete reform of the business registry and the law establishing it, this may not be realistic in all cases and enacting States may wish to consider a phased implementation of their reform. In States with a large number of unregistered businesses, a reform process that adopts a "think small" approach at the outset might be more effective than a reform with a broader focus, which could be introduced at a later stage. For example, if the main objective is initially to promote the registration of MSMEs, simple solutions addressing their needs at the local level may be more successful than introducing sophisticated automated systems that require high-level technological infrastructure, and changes in the legal and institutional framework, and that may be more appropriate to larger businesses or businesses operating in the international market. Even when the reform is carried out in jurisdictions with more advanced business registration systems, it may be advisable to "start small" and pilot the reforms at a local level (for example, in a district or the capital) before extending them throughout the State. Success in a pilot stage can have a strong demonstration effect, and is likely to build support for continued reform.

I. Objectives of a business registry

25. The focus of the present legislative guide is primarily the business registry of a State and the adoption of best practices in order to optimise the operation of the business registration system for its users so that it is simple, efficient and cost-effective. However, in most States, in order for a business to participate in the formal economy, it must usually register not only with the business registry but also with various additional authorities (see also para. 57 below). In addition to the business registry, these authorities often include taxation and social security authorities. States wishing to facilitate the entry of businesses into the formal economy should thus assess the multiple authorities with which a business must register and consider ways to reduce the burden on businesses by streamlining those requirements. A desirable approach would be to implement a registration system that is designed around the perspective of the business and tailored to its needs (see also para. 9 above), that is: the system should be accessible through a single entry point, either physical or electronic and allow for simultaneous registration with all relevant public authorities; the services (e.g. registration of businesses, provision of information) should be offered at a fee that is not burdensome for the users (see

paras. 199 to 201 and 202 below) and should be delivered in the shortest time possible and user procedures should be simple and easy to follow. As examined in greater detail in this legislative guide (see paras. 86 to 97 and rec. 14 below), a best practice to accomplish that goal would be for a State to establish a one-stop shop for business registration and for registration, at a minimum, with taxation and social security authorities, subject to the legal and institutional organization of the enacting State. Simultaneous registration with all such authorities and the use of a single integrated application form for registration and payment would further improve the efficiency of the one-stop shop.

Recommendation 1: Objectives of the business registry

The law should ensure the establishment of a business registry that facilitates the operation of businesses in the formal economy as part of the system of all registrations that may be required of a business and may include registration with business registry, taxation and social security authorities, as well as with other authorities.

A. Purposes of the business registry

26. The law should set out explicitly the purpose of a system for the registration of businesses (see also paras. 51 to 59 with regard to the core functions of the business registry). In addition, it should determine which business forms are required to register with the business registry and which additional conditions those businesses may have to fulfil as part of that requirement. Currently, many States require only businesses of a certain legal form to register, often focusing on those that have limited liability status. Requiring such businesses to register puts third parties dealing with them on notice of their limited liability status, as well as providing additional information in respect of the business. However, since business registration may be viewed as a conduit through which businesses of all sizes and legal forms interact with the State and operate in the formal economy (see paras. 123 to 126 below and rec. 20), States may wish to permit (but not necessarily to require) all such businesses to register in the business registry, provided that fees are low. Through registration, a business receives a commercial identity, recognized by the State, that enables the business to interact with its business partners, the public and the State (see also para. 52 (h) below). Moreover, registered businesses may become more visible not only in the marketplace, but also to States, who may then be able to more easily identify MSMEs in need of support, and design appropriate programmes for those purposes. Permitting voluntary registration of a range of different legal forms of business may encourage the registration of MSMEs, assisting them in their growth in addition to facilitating their operation in the formal economy.

27. The following overarching principles should govern an effective system of business registration: (a) enabling businesses of all sizes and legal forms to be visible in the marketplace and to operate effectively in the formal economy; and (b) enabling MSMEs to increase their business opportunities and to improve the profitability of their businesses.

Recommendation 2: Purposes of the business registry

The law should provide that the business registry is established for the purposes of:

(a) Providing to a business an identity that is recognized by the enacting State; and

(b) Receiving, storing and making information in respect of registered businesses accessible to the public.

B. Simple and predictable system of laws permitting registration

28. In order to foster a transparent and reliable business registration system, with clear accountability of the registrar (see also paras. 41 and 43 below), the law setting

the foundations of the business registry should be simple and straightforward. Care should be taken to limit or avoid any unnecessary use of discretionary power, and to provide appropriate safeguards against its arbitrary use. However, some discretion should be permitted to the registrar in order to ensure the smooth functioning of the system (see paras. 147 and 230 below).

29. The law governing registration with the business registry and other relevant authorities (including taxation and social security authorities) should also provide for simplified registration and post-registration procedures in order to promote registration of MSMEs. The goal should be for States to establish procedures with only the minimum necessary requirements for MSMEs and other businesses to register in order to operate in the formal economy. Of course, businesses with more complex legal forms would be subject to additional information requirements under the law of the enacting State as a consequence of their particular legal form or type of business.

30. Further, regardless of the approach chosen to maintain updated information in the business registry, it would be advisable to make updating the records of MSMEs as simple as possible. This could involve a number of different approaches examined in greater detail below, such as extending the period of time for such businesses to declare a change; harmonizing the information needed when the same information is repeatedly required; or exempting MSMEs from certain obligations in specific cases (see also paras. 157 to 161 and rec. 30 below).

Recommendation 3: Simple and predictable system of laws permitting registration

The law should:

(a) Adopt a simple structure for laws governing the business registry and avoid the unnecessary use of exceptions or granting of discretionary power; and

(b) Ensure that micro, small and medium-sized enterprises (MSMEs) that are required or permitted to register are subject to the minimum procedures necessary pursuant to the law.

C. Key features of a business registry

31. To be effective in registering businesses of all sizes, a business registration system should ensure that, to the extent possible, the registration process is simple, time and cost efficient, user-friendly and publicly accessible. Moreover, care should be taken to ensure that the publicly available registered information on businesses is easily searchable and retrievable, and that the process through which the registered information is collected and maintained as well as the registry system are kept as current, reliable and secure as possible.

32. The good quality and reliability of the business registration system and the information contained in the registry is a recurring theme in the present guide. In keeping with the definition in paragraph 12 above, it should be noted that the phrase “good quality and reliable” does not refer to the method that a State uses to ensure that reliability, and this legislative guide leaves it to each enacting State to determine how best to ensure the good quality and reliability of its business registration system and the information it contains in light of its own context and legal tradition. “Good quality and reliable” in this guide does not refer to whether or not the information in the business registry is legally binding on the registry, the registrant, the registered business or on third parties, nor to whether the enacting State uses a declaratory approach or an approval approach in respect of its business registration system. However, the extent to which information in the registry is legally binding and whether the State adopts a declaratory system or an approval system (see paras. 115 to 117 below) are aspects that should be made clear by the enacting State in its law and made available in the business registry.

33. Regardless of which registration system is adopted, maintaining good quality, and reliable information is imperative for the business registry in order to make the information useful for the registry users and to establish confidence in business registry services. This applies not only to the information provided when applying to register a business, but also to the information that is submitted to the registry during the lifetime of the business. It is thus important that the information meets certain requirements in the way it is submitted to the registry and then made available to the public (see, for example, paras. 34 and 35 below). For these reasons, States should devise provisions that allow the registry to operate according to principles of transparency and efficiency in the way information is collected, maintained and disclosed.

34. The registry can implement certain procedures in order to ensure that the information maintained in the registry is of good quality and reliable. Those procedures, which will be further discussed below, can be grouped into two broad categories. One group comprises those measures aimed at protecting the identity and integrity of a business through the prevention of corporate identity theft[2] or the adoption of identity verification methods for those who provide information to the business registry. A wide range of measures can be implemented in this regard, such as the use of monitoring systems or establishing access through the use of user names and passwords or biometric verifications (e.g. fingerprints) to prevent corporate identity theft; or the use of electronic signatures and electronic certificates to verify the identity of those who submit information to the registry; or the adoption of notification systems that notify the registered business about changes of whenever documents are filed on their business record. Business registries usually adopt more than one type of measure.

35. Another group of measures that registries can implement to ensure the good quality and reliability of the registered information pertains to the way information is collected and maintained in the registry and the frequency with which it is updated (see paras. 155 to 161 and recs. 29 and 30 below). Ensuring that the registry record is regularly updated is of key importance. In electronic registry systems, the software will usually provide for automated periodic updating as amendments are submitted by businesses. However, when registries use paper-based or mixed systems, or when certain information submitted electronically must nonetheless be entered into the business registry record (see paras. 186 and 212 below), the registrar must ensure that updates to the registry record are entered as soon as practicable, and if possible, in real time or at least once daily. To underpin these measures, it is important for States to establish effective enforcement mechanisms upon which registries can rely when a business fails to provide accurate and complete information (see paras. 207 to 210 and recs. 45 and 46 below).

36. Moreover, in order to enhance the good quality and reliability of the information deposited in the registry, enacting States should preserve the integrity and security of the registry record itself. Steps to achieve those goals include: (a) requiring the registry to request and maintain the identity of the registrant; (b) obligating the registry to notify promptly the business about the registration and any changes made to the registered information; and (c) eliminating any discretion on the part of the registrar to modify information that has been submitted to the registry.

Recommendation 4: Key features of a business registry

The law should ensure that the business registration system contains the following key features:

[2] Corporate identity theft can occur through the theft or misuse of key business identifiers and credentials, manipulation or falsification of business filings and records, and other related criminal activities. Despite the use of the term “corporate”, corporations are not the only business entities that are victimized by this crime. Any type of business or organization of any size or legal structure, including sole proprietorships, partnerships and limited liability companies can be targets of business identity theft.

(a) Registration is publicly accessible, simple, user-friendly and time- and cost-efficient;

(b) The registration procedures are suited to the needs of MSMEs;

(c) The publicly available registered information on businesses is easily searchable and retrievable; and

(d) The registry system and the registered information are of good quality and reliable, and are maintained that way through periodic updates and system verification.

II. Establishment and functions of the business registry

37. Several different approaches may be taken in establishing an effective business registration system, but there is broad agreement on certain key objectives of such systems. Regardless of differences in the way business registries may operate, efficient business registries have a similar structure and perform similar functions when carrying out the registration of a new business or in recording the changes that may occur in respect of an existing business.

A. Responsible authority

38. In establishing or reforming a business registry, enacting States will have to decide how the business registry will be organized and operated. Different approaches can be taken regarding its form, the most common of which is based on oversight by the government. In such States, a government department or agency, staffed by civil servants, and usually established under the authority of a particular government department or ministry, operates the registration system. Another type of organization of a business registry is one that is subject to administrative oversight by the judiciary. In such contexts, the registration body might be a court or a judicial registry whose function, usually specified in the applicable commercial code, is concerned with verifying the business requisites for registration but does not require prior judicial approval of a business seeking to register.

39. States may also decide to outsource some or all of the registry operations through a contractual or other legal arrangement that may involve public-private partnerships or the private sector. When registration is outsourced to the private sector, it remains a function of the government, but the day-to-day operation of the system is entrusted to privately owned companies. In one jurisdiction, for example, such an outsourcing was accomplished by way of appointing a private company, in accordance with the law, as the assistant registrar with full authority to run the registration function. However, operating the registry through public-private partnerships or private sector companies does not yet appear to be as common as the operation of the registry by a government agency.[3] States may also decide to form entities with a separate legal personality, such as chambers of commerce, with the object of managing and developing the business registry, or to establish by law registries as autonomous or quasi-autonomous agencies, which can have their own business accounts and operate in accordance with the applicable regulations governing public authorities. In one State, for example, the business registry is a separate legal person that acts under the supervision of the Ministry of Justice, while in another State the registry is an administratively separate executive agency of a government department, but does not have separate legal status. In deciding which form of organization to adopt, States will have to consider their specific domestic circumstances, evaluate the challenges and trade-offs of the various forms of organization and then determine

[3] Arrangements involving contracting with the private sector to provide business registration services require careful consideration of several legal and policy issues, such as the responsibilities of the government and the private provider, the form of the arrangements, the allocation of risk, and dispute resolution.

which one best meets the State's priorities and can be achieved within the limits of its human, technological and financial resources.

40. While the day-to-day operation of the registry may be delegated to a private sector firm, the enacting State should always retain the liability for ensuring that the registry is operated in accordance with the applicable law. For the purposes of establishing public trust in the business registry and preventing the unauthorized commercialization or fraudulent use of information in the registry record, the enacting State should retain its competence over the registry record. Furthermore, the State should also ensure that, regardless of the daily operation or the structure of the business registry, the State retains the right to control the access to and use of the registered information.

Recommendation 5: Responsible authority

The law should provide that:

(a) The business registry should be operated by the State or by an entity appointed by that State; and

(b) The State retains its competence over the business registry.

B. Appointment and accountability of the registrar

41. The law of the State should set out the procedure to appoint and dismiss the registrar, as well as the duties of the registrar, and the authority empowered to supervise the registrar in the performance of those duties.

42. In keeping with the practice of some States, it should be noted that the appointment of a registrar is intended to include all methods by which a registrar can be selected, including through election. Further, States may permit the registrar to delegate its powers to persons appointed to assist the registrar in the performance of its duties.

43. In addition, the laws of the enacting State should clearly set out the functions of the registrar in order to ensure the registrar's accountability in the operation of the registry and the minimization of any potential for abuse of authority. In this regard, the applicable law of the enacting State should establish principles for the liability of the registrar and the registry staff to ensure their appropriate conduct in administering the business registry (the potential liability of the registrar and the registry staff are addressed in paras. 213 to 218 and rec. 47 below).

Recommendation 6: Appointment and accountability of the registrar

The law should:

(a) Provide that the person or entity authorized by the enacting State or by the law of the enacting State has the authority to appoint and dismiss the registrar and to monitor the registrar's performance; and

(b) Determine the registrar's powers and duties and if and to what extent those powers and duties may be delegated.

C. Transparency in the operation of the business registration system

44. Laws that foster the transparent and reliable operation of the system for business registration have a number of features. They should allow registration to occur as a simplified process with a limited number of steps, and they should limit interaction with registry authorities, as well as provide short and specified turn-around times, be inexpensive, result in registration of a long-term or unlimited duration, apply throughout the jurisdiction and make registration easily accessible for registrants.

45. Registries should also establish "service standards" that would define the services to which users are entitled and may expect to receive, while at the same time

providing the registry with performance goals that the registry should aim to achieve. Such service standards could include, for example, rules on the correction of errors (see paras. 28 above, and 147 and 230 below), rules governing the maximum length of time for which a registry may be unavailable (such as for electronic servicing) and providing advance notice of any expected down time. Service standards contribute to ensuring further transparency and accountability in the administration of the registry, as such standards provide benchmarks to monitor the quality of the services provided and the performance of the registry staff.

Recommendation 7: Transparency in the operation of the business registration system

The law should ensure that the rules, procedures and service standards that are developed for the operation of the business registration system are made public to ensure transparency of the registration procedures.

D. Use of standard registration forms

46. Another approach that is often used to promote transparency and reliability in the operation of the business registry is the use of simple standard registration forms paired with clear guidance to the registrant on how to complete them. Such forms can easily be completed by businesses without the need to seek the assistance of an intermediary, thus reducing the cost and de facto contributing to the promotion of business registration among MSMEs. These forms also help prevent errors in data entry by business registry staff, thus speeding up the overall process. In some jurisdictions, the adoption of standardized registration forms has been instrumental in streamlining the registration requirements and disposing of unnecessary documents. Moreover, in jurisdictions with enhanced interoperability between the authorities involved in the establishment of a business (e.g. the business registry, taxation and social security authorities), the adoption of a single standardized registration form that consolidates all of the information required of a business by such authorities has reduced duplication of information requests and has enabled the streamlining of registration procedures with multiple authorities. It should be noted that the use of standard registration forms should not preclude a business from submitting to the registrar additional materials and documents required or allowed by applicable law for the creation of the business.

Recommendation 8: Use of standard registration forms

The law should provide that simple standard registration forms are introduced to enable the registration of a business and the registrar should ensure that guidance is available to registrants on how to complete those forms.

E. Capacity-building for registry staff

47. Once a reform of the business registration system has been initiated, developing the capacity of the personnel entrusted with business registration functions is an important aspect of the process. Poor service often affects the efficiency of the system and can result in errors or necessitate multiple visits to the registry by users. Capacity development of registry staff could not only focus on enhancing their performance and improving their knowledge of the new registration processes, ICT solutions and client orientation, but staff could also be trained in new ways of improving business registration.

48. Different approaches to capacity-building can be followed, from the more traditional training methods based on lectures and classroom activities, to more innovative ways that can be driven by the introduction of new business registration systems. In some jurisdictions, team-building activities and role-playing have been used with some success, since reforms often break barriers between various government departments and require the improvement of the flow of information

among them, as well as an understanding of different aspects of the procedures with which specific registry staff may not be familiar. In other cases, States have also opted for developing action plans with annual targets in order to meet standards of performance consistent with global best practices and trends, and they have linked promotions and bonuses for staff to the achievement of the action plan's goals. In other cases, States have decided to introduce new corporate values in order to enhance the public service system, including business registration. Although the relevant governmental authority will usually take the lead in organizing capacity development programmes for the registry staff, the expertise of local legal and business communities could also be enlisted to assist.

49. Peer-to-peer learning and the establishment of national and international networks are also effective approaches to build capacity to operate the registry. These tools enable registry staff to visit other jurisdictions and States with efficient and effective business registration systems. In order to maximize the impact of such visits, it is important that they occur in jurisdictions familiar to the jurisdiction undergoing the reform. This approach has been followed with success in several jurisdictions engaging in business registration reform. International forums and networks also provide platforms for sharing knowledge and exchanging ideas for implementing business registration reform among registry personnel from around the world.

50. In order to facilitate business registration, it may be equally important to build capacity on the part of intermediaries in States where the services of those professionals are required to register a business (see paras. 116 and 117 below).

Recommendation 9: Capacity-building for registry staff

The law should ensure that appropriate programmes are established to develop and strengthen the knowledge and skills of the registry staff on business registration procedures, service standards and the operation of electronic registries, as well as the ability of registry staff to deliver requested services.

F. Core functions of business registries

51. There is no standard approach to establishing a business registry or to streamlining an existing one: models of organization and levels of complexity can vary greatly depending on a State's level of development, its priorities and its legislation. However, regardless of the structure and organization of the registry, certain core functions can be said to be common to all registries.

52. Subject to the enacting State's legal and institutional organization, core functions in addition to those listed below may be added to the business registry. But, in keeping with the overarching principles governing an effective business registration system (see para. 27 above), the core functions and intended goals of business registries are, at a minimum, to:

(a) Register a business when it fulfils the necessary conditions established by the law of the enacting State, which may include conferring legal existence on the business and recording that status;

(b) Publish and make accessible good quality and reliable information on the business to be registered so as to facilitate trade and interactions between business partners, the public and the State, including when such interactions take place in a cross-border context;

(c) Assign a unique identifier to the business to facilitate information exchange between the business and the State (see also paras. 100 to 107 below);

(d) Share information on the registered business among relevant authorities to promote and facilitate coordination among such authorities;

(e) Ensure the information on a registered business is as current and accurate as possible, so that such information is of value for all users of the registry (see also paras. 32 and 35 and rec. 4);

(f) Protect the integrity of the registry record to protect the identity and integrity of the businesses that are registered (see also paras. 232 and 233 and rec. 54);

(g) Provide information concerning the establishment of a business, including any associated obligations and responsibilities of the registered business, as well as the legal effects of information maintained in the business registry; and

(h) Provide assistance to the business in searching and reserving a business name when required by the law so that the business can establish its commercial identity.

53. In a standard registration process, the entry point for entrepreneurs to the business registry may be the support provided to them in choosing a unique name for the new business that they wish to establish. When registering, a business is usually required to have a name that must be sufficiently distinguishable from other business names within that jurisdiction so that the business will be recognized and identifiable under that name. Enacting States are likely to establish their own criteria for determining how to decide whether a business name is sufficiently distinguishable from other business names, and in any event, the assignment of a unique identifier will assist in ensuring the unique identity of the business within and across jurisdictions (see also paras. 98 to 105 below). Business registries usually assist entrepreneurs at this stage with a procedure that can be optional or mandatory, or they may provide business name searches as an information service. Registries may also offer a name reservation service prior to registering a new business, so that no other business can use that name. Such a name reservation service may be provided either as a separate procedure (again, which can be optional or mandatory), or as a service integrated into the overall business registration procedure.

54. Business registries also provide forms and various types of guidance to entrepreneurs preparing the application and other necessary documents for registration. Once the application is submitted, the registry performs a series of checks and control procedures to ensure that all the necessary information and documents are included in the application. In particular, the registry verifies any requirements for registration that have been established in the State's applicable law, such as the legal capacity of the entrepreneur to operate the business. Some legal traditions may require the registry to perform simple control procedures (such as establishing that the name of the business is sufficiently unique), which means that if all of the basic administrative requirements are met, the registry must accept the information as filed and record it. Other legal traditions may require more thorough verification of the information filed.

55. Payment of a registration fee (if any, see paras. 199 to 201 and rec. 41 below) must usually be made before the registration is complete. Once a business registration is complete, the registry issues a certificate that confirms the registration and contains information about the business. Since much of the registered information should be disclosed to interested parties, registries make their public components available through various means, including through publication on a website, or in publications such as the National Gazette or newspapers. Where the infrastructure permits, registries may offer, as an additional non-mandatory service, subscriptions to announcements of specific types of new registrations.

56. In accordance with the applicable law of the enacting State (see also rec. 35), registered information that is made available to the public can include specific information on the business structure, such as who is authorized to sign on behalf of the business or who serves as the business's legal representative. Basic information about the business, such as the name of the business, its telephone number, email and postal addresses (in addition to the addresses at which the businesses deemed to receive correspondence) can also be made public, but the publication of such details may be subject to the agreement of the business. When business registries collect disaggregated information submitted on a voluntary basis on the registrant or the persons associated with the business according to gender or other indicators that could raise privacy issues (e.g. association with an ethnic or language group), the law should

establish whether and subject to which conditions that information can be made available to the public (see para. 189 below). In some States, public access to certain information in the business registry is provided free of charge (in respect of fees for information, see para. 202 and rec. 42 below).

57. A new business must usually register with many government authorities, such as taxation and social security authorities, which often require the same information as that gathered by the business registry. In certain States, the business registry provides to entrepreneurs information on the necessary requirements of other relevant authorities and refers them to such authorities. In States with more developed registration systems, businesses may be assigned a registration number that also functions as a unique identifier across public authorities (see paras. 100 to 107 below) and can then be used in all of the interactions that the business has with those authorities, other businesses and banks. This greatly simplifies the establishment of a business since it allows the business registry to exchange information more easily with the other authorities involved in the establishment of a business. In several States that have reformed their registration systems, business registries function as one-stop shops to support registration with other authorities. The services operated by such outlets may include providing any necessary licensing, or they may simply provide information on the procedures to obtain such licences and refer the entrepreneur to the relevant agency. As noted above (see paras. 9 and 25), this legislative guide takes the view that establishing such one-stop shops for registration with at least the business registry, taxation and social security authorities, and enhancement of the integration of the registration procedures of all such authorities is the best approach for States wishing to optimize their business registration system (see paras. 86 to 97 and rec. 14 below).

58. One important aspect that States should take into account when establishing a business registration system is whether the registry should also be required to record certain procedures that affect the status of the business, for example insolvency, merger or winding-up. The approach to such changes in status appears to vary from State to State. For example, in some States, registries are often also entrusted with the registration of insolvency cases, while in other States, they tend not to perform this function. In certain jurisdictions, registries are also given the task of registering mergers as well as the winding-up and liquidation of businesses. In any event, business registries naturally also record the end of the life span of any business that has permanently ceased to do business by deregistering it (see paras. 217 to 224 and recs. 48, 49 and 50 below).

59. The opening provisions of the law governing business registration may include a list of the various functions of the registry, with cross references to the relevant provisions of the law in which those functions are addressed in detail. The advantage of this approach is clarity and transparency as to the nature and scope of the issues that are dealt with in detail later in the law. The possible disadvantage is that the list may not be comprehensive or may be read as placing unintended limitations on the detailed provisions of the law to which cross reference is made. Accordingly, implementation of this approach requires special care to avoid any omissions or inconsistencies as well as to allow for the registry's interoperability with other relevant authorities in the jurisdiction, and for access to the information maintained in the registry.

Recommendation 10: Core functions of business registries

The law should establish the core functions of the business registry, including:

(a) Registering the business when it fulfils the necessary conditions established by the law;

(b) Providing access to publicly available registered information;

(c) Assigning a unique identifier to the registered business;

(d) Sharing information among the requisite public authorities;

(e) Keeping the information in the business registry as current as possible;

(f) Protecting the integrity of the information in the registry record;

(g) Providing information on the establishment of the business, including the obligations and responsibilities of the business and the legal effects of the information publicly available on the business registry; and

(h) Assisting businesses in searching and reserving a business name when required by the law.

G. Storage of information and access to it throughout the registry

60. When organizing the storage of the information contained in the business registry, States should be guided by the goals of efficiency, transparency and accessibility. Regardless of how a State decides to store and ensure the availability of the information throughout its registry system, its goal should be to achieve consistency in the identification and classification of registered businesses, as well as the efficient, non-duplicative collection of information on those businesses.

61. To achieve these goals, it is important that all business registration offices, sub-offices and repositories of registry information in a State be interconnected regardless of their physical location. In order to function efficiently, such interconnection should be established through an electronic interface linking all such outlets and allowing their technical interoperability (see para. 70(c) below). Through these means, all information collected or stored anywhere in the system can be processed or accessed in a timely fashion regardless of how (whether in electronic or paper format) or where it is collected, stored by or submitted to the registry. Ensuring the electronic interconnection of the entire business registry system would permit all information contained in it to be stored and made accessible in digital format and would permit the sharing of such information, possibly in real time, throughout the entire registry system, providing it simultaneously to multiple access points without regard to their geographic location (including business registry sub-offices, terminals, or using online technology). Further, access to the entirety of the information stored in the business registry should facilitate its integration with other public authorities in order to permit information exchange with those authorities as well (see para. 93 below and rec. 14). This approach will strengthen the institutional interoperability among such public authorities in order not only to simplify the process of registration with the business registry, but also to streamline all registrations that may be required of a business at its establishment (see rec. 1 above).

Recommendation 11: Storage of information and access to it throughout the registry

The law should establish the interconnection of business registry offices with regard to storage of and access to information received from registrants and registered businesses or entered by registry staff.

III. Operation of the business registry

62. As noted above, business registration can be implemented through many different organizational tools that vary according to jurisdiction. States embarking on a reform process to simplify registration will have to identify the most appropriate and efficient solutions to deliver the service, given the prevailing domestic conditions. Regardless of the approach chosen by the State, aspects such as the general legal and institutional framework affecting business registration, the legal foundation and accountability of the entities mandated to operate the system and the budget needed by such entities should be carefully taken into account. Reform efforts rely to different extents on a core set of tools, including: the use of technology; the establishment of a one-stop shop; and interconnectivity between the different authorities involved in the registration process (with the possible adoption of a unique identifier). States should

also ensure that their reform efforts do not inadvertently exclude the adoption of emerging technologies that might further improve the operation of the business registry (e.g. the use of distributed ledger technology).

A. Electronic, paper-based or mixed registry

63. An important aspect to consider when reforming a business registration system is the form in which the application for registration should be filed and the form in which information contained in the registry should be stored. Paper-based registration requires sending documents (usually completed in handwritten form) by mail or delivering them by hand to the registry for manual processing. Hand delivery and manual processing are not unusual in many jurisdictions due to the lack of an advanced technological infrastructure. In such States, entrepreneurs may have to attend business registry offices in person and these offices may be located in municipal areas that may not be easily reachable for many MSME entrepreneurs, particularly for those in rural areas. In addition, any copies of the documents required must usually be provided on paper. Paper-based registry systems can facilitate in-person communication between the registrant and the registry, and thus may offer an opportunity to clarify aspects of the requirements for registration. However, the labour-intensive nature of this procedure normally results in a time-consuming and expensive process (for example, it may require more than one visit to the business registry), both for the registry and for users, and it can easily lead to data entry errors. Furthermore, paper-based registry systems require considerable storage space as the documents with the registered information may have to be stored as hard copies (although some States using a mixed system may also scan documents and then destroy the paper versions after the expiry of any minimum legal period for their preservation; see paras. 226 to 229 and rec. 52 below). Finally, registration requests transmitted by paper or fax also give rise to delays, since registrants must wait until registry staff manually carry out and certify the business registration.

64. In comparison, online registration systems facilitate improved efficiency of the registry and more user-friendly services. This approach requires, at a minimum, that the information provided by the registrant be stored in electronic form in a computer database; the most advanced electronic registration systems, however, permit the direct electronic submission of business registration applications and relevant information (as well as searches of the registry) over the Internet or via direct networking systems as an alternative to paper-based submissions. The adoption of such systems enhances data integrity, information security, registration system transparency, and verification of business compliance registration requirements, which helps avoid unnecessary or redundant information storage. Furthermore, when electronic submission of applications is allowed, business registries can produce standard forms that are easier to understand and therefore easier to complete correctly. Although the use of ICT solutions can carry with them risks of software errors, electronic systems do more to reduce those risks by providing automated error checks and other appropriate solutions. Such technology is also instrumental in the development of integrated registration systems and the implementation of unique identification numbers.

65. In addition to these features, electronic business registration and access to the business registry also offer the following advantages:

(a) Improved access for smaller businesses that operate at a distance from the registry offices;

(b) A very significant reduction in the time and cost required of the entrepreneur to perform the various registration steps, and consequently in the time and cost required before successful registration of a business, as well as in the day-to-day cost of operating the registry;

(c) Improved handling of increasing demands for company information from other government authorities;

(d) A reduction in the opportunity for fraudulent or improper conduct on the part of registry staff;

(e) A reduction in the potential liability of the registry to users who otherwise might suffer loss due to the failure of registry staff to enter accurately registration information (see also paras. 186 and 212 below);

(f) User access to registration and information services outside of normal business hours; and

(g) Possible revenue opportunities for the registry from other businesses and financial institutions that seek company information on potential trading counterparties and borrowers.

66. Introducing electronic registration processes, however, often requires an in-depth re-engineering of the way in which the service is delivered, which may involve several core aspects of the State's governance systems in addition to its level of technological infrastructure, including: financial capability, organization and human resources capacity, legislative framework (e.g. commercial code and company law) and institutional setting. Therefore, States launching a reform process aiming at the automation of the business registry would be advised to carry out a careful assessment of the legal, institutional and procedural dimensions (such as legislation authorizing electronic signatures or information security laws, or establishing complex e-government platforms or other ICT infrastructure) in order to identify those areas where reforms are needed and to adopt those technology solutions that are most appropriate to their current needs and capabilities (see also paras. 244 and 245 and rec. 58 below). In several States, only information about registering a business is currently available online, and a functioning electronic registry has not yet been implemented. Making information electronically available is certainly less expensive and less difficult to achieve than the establishment of an electronic registry, and does not require any legislative reform or specialized technology. While the adoption of a mixed registration system that combines electronic processing and paper-based manual submission and processing might thus be an appropriate interim solution, it does involve higher maintenance costs, and the ultimate goal of a State should remain the progressive development of fully electronic registration systems (see paras. 72 to 80 and rec. 12 below).

B. Features of an electronic registry

67. When the business registry record is computerized, the hardware and software specifications should be robust and should employ features that minimize the risk of data corruption, technical error and security breaches. Even in a paper-based registry, measures should be taken to ensure the security and integrity of the registry record, but this is more efficiently and easily accomplished if the registry record is electronic. (Regardless of its method of operation, it is important for the registry to have risk-mitigation measures in place: see paras. 232 and 233 and rec. 54 below.) In addition to database control programs, software must also be developed to manage such aspects as user communications, user accounts, payment of any required fees, financial accounting, computer-to-computer communication, internal workflow and the gathering of statistical data. Software applications enabling data collection would also assist the registry in making evidence-based decisions which would facilitate efficient administration of the system (for example, the collection of data on more frequent requests by registry users would enable evidence-based decisions on how best to allocate registry resources).[4] When the State's technological infrastructure is not sufficiently advanced to allow the features mentioned above to be implemented, it is nevertheless important that the software put in place be flexible enough to

[4] For example, "application programming interfaces" (APIs) may be adopted. APIs have a wide variety of possible uses, such as enabling the submission of applications to the registry through simplified procedures, for example by pre-filling certain fields by default, or allowing users, and equipping systems with the proper software to connect directly to the registry and retrieve information automatically.

accommodate additional and more sophisticated features as they become more feasible in the future.

68. Implementing an online business registration system will require defining the technical standards of the online system, carefully evaluating the hardware and software needs of the business registry to make those standards operational in the context of the national technological infrastructure, and deciding whether it is feasible to develop the necessary hardware and software in-house or whether it must be purchased from private suppliers. In making that determination, it will be key to investigate whether a ready-made product is available that can easily be adapted to the needs of the State. If different suppliers are used for the hardware and the software, it is important that the software developer or provider is aware of the specifications of the hardware to be supplied, and vice versa.

69. Following more recent technological advances, one option States may want to consider is whether to rely on traditional software or to move to more sophisticated applications such as cloud computing, which is an Internet-based system that allows the delivery of different services (such as storing and processing of data) to an organization's computers through the Internet. The use of cloud computing allows for a considerable reduction in the resources needed to operate an electronic registration system, since the registry does not have to maintain its own technological infrastructure. However, data and information security can represent an issue when introducing such a system and it would be advisable for States to conduct a careful risk analysis before establishing a system exclusively based on cloud applications.

70. Additional aspects that States should consider when adopting an online registry include:

(a) Scalability: the ICT infrastructure should be capable of handling an increasing volume of users over time, as well as traffic peaks that may occasionally arise;

(b) Flexibility: the ICT infrastructure of the registry should be easily adaptable to new user and system requirements, and the migration of data from one technology to another may require data-cleansing aspects;

(c) Interoperability: the registry should be designed to allow (even at a later stage) integration with other automated systems, such as other governmental authorities operating in the jurisdiction and online or mobile payment portals;

(d) Costs: the ICT infrastructure should be financially sustainable both in terms of initial and operating costs; and

(e) Intellectual property rights: in order to avoid risks deriving from adverse circumstances that might affect an owner of intellectual property rights in the technology used (for example, if the owner ceases to operate or is prohibited from doing business with the government), the State should always either be granted ownership of the system or an unrestricted licence to the source code.

71. In terms of the cost of the ICT infrastructure, the level of security needed by an electronic registration system and its cost must be carefully addressed. In particular, it is important to align the risk attached to a specific interaction (between the registry and the business or the registry and other public authorities) with the costs and administration required to make that interaction secure. Low security may deter parties from using electronic services (unless it is mandatory), but costly high security measures could have the same effect.

C. Phased approach to the implementation of an electronic registry

72. The methods used to establish the online system should be consistent with the reforms required as they can determine the success or the failure of the initiative. Moving directly to a full online solution before re-engineering registry business processes would be a mistake in many cases, as the solutions designed would not be able to capture the technology's full benefits. Moreover, subject to the level of

development of the implementing State, factors such as the existence and quality of the infrastructure and literacy rates (including computer literacy) of the intended users should be carefully considered before the adoption of an online system. For example, States may have to deal with a non-existent or weak ICT infrastructure, lack of dependable electricity supplies and Internet connectivity, and low literacy rates, which may have a disproportionate effect on women and businesses in rural areas. In these instances, technical and capacity-building assistance programmes coordinated by international organizations might be necessary in order to progress towards the goal of a fully automated electronic registry.

73. In locations where digital access is not extensive, a phased approach may be an appropriate way forward. Automation would start with the use of simple databases and workflow applications for basic operations, such as name searches or the sharing of information with other government authorities, and then would progress to more sophisticated web-based systems that would enable customers to conduct business with the registry entirely online. These web-based systems could be quite convenient for smaller businesses operating at a distance from the registry, provided that those entrepreneurs were able to access the system. The final phase of the approach would be to accommodate ICT interoperability between those authorities involved in business registration.

74. The simplest approach for States beginning their activity in this area would be to develop a content-rich website that consolidates registration information, provides downloadable forms, and enables users to submit feedback. This simple resource would allow users to obtain information and forms in one place and would make registries more efficient by enabling users to submit email inquiries before going to registry offices with the completed forms. Since this solution does not require a stable Internet connection, it may appeal to States with limited Internet access.

75. If only limited Internet bandwidth is available, then automating front-counter and back-office operations prior to moving online would be a suitable approach. If the registry has sub-offices outside its main location (for example, in rural areas), it would be important to establish a dedicated Internet connection with them. This approach would still require entrepreneurs to visit the registry, but at least it would establish a foundation on which the registry could later develop a more sophisticated web platform. A key factor even at this basic stage would be for the system to be able to digitize historical records and capture key information in the registry, such as the names of members or owners and directors of the business.

76. Platforms that enable businesses to apply and pay for registration online as well as to file annual accounts and update registration details as operations change can be developed once the State's technological capacity and rate of digital access allows for it. With regard to online payment of a registration fee, it should be noted that ICT-supported solutions would depend on a State's available modes of payment and on the regulatory framework that establishes the modes of payment that a public authority can accept. When the jurisdiction has enacted laws that allow for online payment, the most efficient option is to combine the filing of the electronic application and the fee payment into one step. Error checks should be included in ICT systems that incorporate this facility, so that applications are not submitted before payments are completed and registry officials can see payment information along with the application. When fee payment is required before registration of the business, this constitutes a separate procedural step and the use of ICT solutions in order to be user-friendly would require streamlining the procedures for filing the application and for payment (see also para. 70(c) above). In some States, the use of mobile payment systems might permit easier and more effective methods of payment for registration and other related fees. In such cases, the same considerations involved in establishing online payments (e.g. enacting appropriate laws, as well as designing efficient options to combine mobile payments and the filing of registration documents) should be applied in order to develop efficient solutions appropriate to the use of mobile technology.

77. As noted above (see para. 66) when introducing electronic registration systems, States should adopt legislation that facilitates the implementation of these electronic

solutions, although the obligation to use such solutions should be considered only when the various stakeholders concerned with the registration process (including the registrant, government authorities, and other relevant authorities) are prepared to comply. Furthermore, when developing such laws, States should take into account that while certain legal requirements can be checked electronically, the most complex aspects of the process may need to be addressed by a registry official.

78. Enacting States should also be aware that establishing an electronic registration system requires a well-designed body of law that promotes simplicity and flexibility and avoids, to the greatest extent possible, discretionary power and the making of exceptions (see paras. 28 above and 147 and 230 below). For example, provisions requiring the interpretation of the content of documents and the collection of various pieces of information are difficult to adapt to electronic processing; the same applies to granting authority to the registrar to establish fees for the services of the registry and establishing a complex structure of rules and exceptions.

79. When a State has developed the ICT infrastructure necessary to achieve full business registry automation, it could be integrated with other online registration processes for taxation, social security and other purposes (for sharing of protected data between public authorities, see para. 114 below). Even if no integration with registrations required by other public authorities is built into the system, it would nevertheless be advisable that States implement data interchange capabilities so that the relevant business information could be shared across government authorities (see paras. 70(c) above and 93 below). A final improvement would be the development of mechanisms for disseminating value-added business information products to interested parties; such products could substantially contribute to the financial sustainability of the registry (see paras. 189, 190 and 194 below).

80. One issue that would likely arise when the online registry is able to offer fully-fledged electronic services would be whether to abolish any paper-based submission of information or to maintain both online and paper-based registration. In many jurisdictions, registries choose to have mixed solutions with a combination of electronic and paper documents or electronic and manual processing during case handling. This approach may result in considerable cost for registries, since the two systems require different tools and procedures. Moreover, if this option is chosen, it is important to establish rules to determine the time of registration as between electronic and paper-based submissions. Finally, paper applications must be processed in any case, so that the information included in a paper document can be transformed into data that can be processed electronically; this can be done by scanning the paper-based application for registration (possibly using optical character recognition technology so as to make the scanned document electronically searchable). However, in order to ensure that the record made by scanning correctly represents the paper application, the registry will likely have to employ staff to check that record, thus adding a step that increases costs and reduces the benefits of using an online system.

D. Other registration-related services supported by ICT solutions

81. Automation should enable the registry to perform other functions in addition to the processing of applications. Where States require user-friendly electronic filing and pre-populated forms,[5] for example, it can assist businesses in the mandatory filing of periodic returns and annual accounts. Electronic filing and automated checks also help reduce processing time by the registry.

[5] Pre-populated forms allow selected fields to be automatically filled based on information previously provided by the registrant or maintained in their user account. When changes in the registrant's information occur, the registrant is not required to fill out the entire form again, but only to enter the relevant changes. Information included in the pre-populated form is stored and may be made accessible to and exchangeable with other relevant authorities.

82. Electronically supported registration could also assist the registry with deregistration procedures (see paras. 222 to 224 and rec. 50 below). Such procedures usually require an official announcement that a business will be deregistered. The use of ICT can provide for the automation of such announcements, from initiating the process to producing a standard notice, thus helping registries to ensure that businesses are not deregistered before any time limit has elapsed and to reduce processing time. In order to be fully effective, however, adoption of an electronic registration system needs to be supported by streamlined procedures that enable the deregistration of businesses in a simplified and quick way.

83. Further, ICT solutions could be applied to assist in the filing of financial information in machine-readable format (such as extensible Business Reporting Language, or XBRL). For example, a platform could be provided to assist in the conversion of paper-based financial statements to XBRL format. Machine-readable financial data facilitates the aggregation and analysis of financial information, which could be of significant value to users of the registry.

84. Solutions using ICT could also support follow-up and enforcement procedures of business registries when businesses fail to comply with registration requirements. In one jurisdiction, for example, the back-office system of the registry monitors the records of businesses and detects whether certain circumstances suggest that the business is not in compliance with statutory requirements. An automatic notice to the business is then produced in order for it to remedy the situation. Should the business fail to do so within the statutory deadline, the ICT solution starts a new procedure to forward the case to the district court, which may make a decision on the compulsory liquidation of the business. Upon issuing an order for compulsory liquidation, the court notifies the registry, which then deregisters the business.

Recommendation 12: Electronic, paper-based or mixed registry

The law should provide that the optimal medium to operate an efficient business registry is electronic. Should full adoption of electronic services not yet be possible, such an approach should nonetheless be implemented to as great an extent as permitted by the current technological infrastructure of the enacting State, as well as its institutional framework and laws, and expanded as that infrastructure improves.

E. Electronic documents and electronic authentication methods

85. As noted above (see, for example, paras. 66 and 76), an efficient electronic business registry system should allow users to submit and receive documents in electronic format, to sign electronically when transmitting information or requests to the registry and to pay online for business registry services (see also para. 204 below and rec. 44). Therefore, as a preliminary step, appropriate domestic law should be in place to regulate all such matters (see also paras. 77 and 78 above). States that enact legal regimes on electronic communications and electronic signatures may wish to consider the legislative texts prepared by UNCITRAL to govern electronic transactions.[6] Such texts establish the principles of technological neutrality and functional equivalence (see also paras. 244 and 245 below) that are needed to ensure equal treatment between electronic and paper-based communications; they also deal extensively with provisions covering the issues of legal validity of electronic documents and signatures,[7] authentication, and the time and place of dispatch and

[6] Such texts include: the UNCITRAL Model Law on Electronic Commerce (1996); the UNCITRAL Model Law on Electronic Signatures (2001) and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005). For further information, see http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce.html.

[7] The principle of "technological neutrality" means that the provisions of the law are 'neutral' and do not depend on or presuppose the use of particular types of technology and can be applied to generation, transmission or storage of all types of information. The principle of "functional equivalence" establishes the criteria under which electronic communications and electronic signatures may be considered equivalent to paper-based communications and hand-written

receipt of electronic messages.[8] Because of the way these texts, and other UNCITRAL legislative texts, are negotiated and adopted, they offer solutions appropriate to different legal traditions and to States at different stages of economic development. Furthermore, domestic legislation based on the UNCITRAL texts on electronic commerce will greatly facilitate cross-border recognition of electronic documents and signatures.

Recommendation 13: Electronic documents and electronic authentication methods

The law should:

(a) Permit and encourage the use of electronic documents as well as of electronic signatures and other equivalent identification methods; and

(b) Regulate such use pursuant to principles whereby electronic documents and signatures are functionally equivalent to their paper-based counterparts and cannot be denied legal validity or enforceability for the sole reason that they are in electronic form.

F. A one-stop shop for business registration and registration with other authorities

86. As discussed above (see paras. 2, 3 and 57), before a business may operate in the formal economy, it is often required to register with several different government authorities in addition to the business registry. These additional authorities often require the same information that has already been gathered by the business registry. Entrepreneurs must often personally visit each authority and fill out multiple forms. Taxation, social security, justice and employment authorities are usually involved in this process; other administrative offices and institutions, specific to each jurisdiction, may also be involved. This often results in multiple procedures governed by different laws, duplication of information and lack of ownership or full control of the process by the authorities involved. Moreover, the entire process can require weeks, if not months.

87. The establishment of one-stop shops has thus become one of the most popular reforms to streamline business registration in recent years. One-stop shops enable entrepreneurs to receive all of the information and forms (possibly integrated forms for registration and payment with all of the authorities in the one-stop shop) they need in order to complete the necessary procedures to establish their business through single outlets rather than having to visit several different government authorities.

88. Beyond this general description, the scope of one-stop shops can vary according to the services offered. Some one-stop shops only provide business registration services, which may still be an improvement if the registration process previously involved a number of separate visits to the relevant authorities; others carry out other functions related to the establishment of a business. A common additional function is registration with taxation authorities, although there are also examples of one-stop shops dealing with registration for social security and statistical purposes and with obtaining the required licences from municipal and other authorities. In some cases, one-stop shops assist entrepreneurs not only with business licences and permits but also with investment, privatization procedures, official diaries and journals, intellectual property and import-export registries, tourism-related issues and State-owned property management, and may provide access to utilities and banking services.

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signatures. According to the principle of "legal validity" communications and signatures cannot be denied legal effect, validity or enforceability on the sole ground that they are in electronic form.

[8] This is an aspect that may be relevant due to the time sensitivity of certain submissions, such as establishing the exact time and place at which a business has been registered.

89. The functions of one-stop shops can be carried out through physical offices or an electronic platform. Physical premises, when located in rural areas, are particularly appropriate for businesses with limited access to municipal centres; so, too, are mobile offices, particularly in places that are too remote for States to have physical premises. In addition to physical premises, online business registration can be offered as an option available for registering a business. Online one-stop shops take advantage of solutions supported by ICT, which allow for the rapid completion of several formalities due to the use of dedicated software. Such online portals may provide a fully interconnected system or may still entail separate registration in respect of some requirements, for example, for taxation services.

90. When establishing one-stop shops, in particular those performing functions in addition to business registration, States can choose among different approaches. One form of one-stop shop is the so-called “one window” or “one table” version, which offers a high level of integration of the different authorities involved in the establishment of a business. In this case, the one-stop shop combines the process for obtaining business and other registrations with public authorities, such as for taxation and social security, with other arrangements, like publishing the registration in a National Gazette or newspapers, when required. All relevant documents are submitted to the one-stop shop administrator who is authorized, and properly trained, to accept them on behalf of the various government authorities involved. Documents are then dispatched, electronically or by hand or courier, to the competent authority for processing. This type of one-stop shop requires detailed coordination between the different government authorities, which must modify their procedures to ensure an effective flow of information. A memorandum of understanding between the key authorities involved may be needed in order to establish the terms in respect of the sharing of business information. In some cases, taking such an approach may also require a change in legislation.

91. Another form of one-stop shop is the “one door” approach, in which representatives of different government authorities involved in registration are brought together in one physical place, but the registrant must deal separately with each representative (for example, the business registry official dealing with the approval of the business name, the clerks checking the documents, and the taxation official), although the different authorities liaise among themselves. As may be apparent, this solution is relatively uncomplicated and would normally not require any change in law or ministerial responsibilities, but it would involve establishing effective cooperation between the different government ministries. One issue States should consider when opting for this approach would be how much authority the representatives of each government authority should have; for example, should they have the discretion to process the registration forms on site or would they simply be acting on behalf of the authority they represent and be required to take the documents to their home authority for further processing? Similarly, it is also important to consider clarifying the lines of accountability of the various representatives from the different authorities to the administrator of the one-stop shop.

92. A third approach, which is less common, is based upon the establishment of a separate entity to coordinate the business registration function and to deal with other requirements that entrepreneurs must meet, such as making tax declarations, obtaining the requisite licences, and registering with social security authorities. Pursuant to this model, the entrepreneur would apply to the coordinating entity after having registered with the business registry in order to fulfil the various additional aspects of the procedures necessary prior to commencing business operations. Although this approach results in adding a step, it could be useful in some States since it avoids having to restructure the bodies with the main liability for business registration. On the other hand, the adoption of such a structure could involve an increase in the cost of the administrative functions and may only reduce time frames to the extent that it allows the various functions to take place successively or enables participants in the one-stop shop to network with the other authorities to speed up their operations. From the user’s perspective, however, the advantage of being able to deal with a single organization remains.

93. Regardless of the approach chosen in the implementation of a one-stop shop, it is important to emphasize that such an arrangement does not require the establishment of a single government authority with authority over all of the other authorities related to the one-stop shop. Instead, it involves designating which government authority has authority over the single integrated interface, while all of the government authorities participating in the one-stop shop retain their functional autonomy. In order to enhance the benefits deriving from the establishment of a one-stop shop, it would be desirable that States facilitate improved technical and institutional interoperability among the public authorities participating in the one-stop shop. It may thus be necessary to streamline technical standards and specifications so that the information collected and shared is of similar quality and of a standardized nature. This will include: establishing appropriate procedures to handle the exchange of information and communication of errors between the various collection points for and repositories of the information, regardless of their location within the State; providing minimum information technology security standards to ensure, at least, secure channels for data exchange (for example, the use of "https" protocols); and ensuring the integrity of data while it is being exchanged.

94. The adoption of a unique identifier for each business (see paras. 98 to 105 and rec. 15 below) and a single form for registration with, and payment of fees to, each authority (see also paras. 9 and 25 above) will also contribute to interoperability among the authorities participating in the one-stop shop. In recent years, for example, several jurisdictions have adopted integrated online registration systems in which an application submitted for business registration includes all of the information required by business registry, taxation, social security and possibly other authorities. Once completed, the information in the integrated application is transmitted by the business registry to all relevant authorities. Information and any necessary approvals from the other authorities are then communicated back to the registry, which immediately forwards the information and approvals to the business. While this is beneficial for all businesses, regardless of their size, it is particularly valuable for MSMEs, which may not have the resources necessary to cope with the compliance requirements of multiple government authorities in order to establish their business.

95. In States with developed ICT infrastructures, the functions of the authorities concerned with registration may be fully integrated through the use of a common electronic platform which is operated by one of the authorities involved and provides simultaneous registration for various purposes, i.e. business registration, taxation, and social security, etc. In some jurisdictions, an authority (such as the tax administration) is responsible for the registration of businesses, or ad hoc entities have been set up to perform simultaneous registration with all relevant authorities. In other jurisdictions, advanced interoperability among the different authorities involved in the registration process has resulted in a consolidated electronic registration form that can be pre-populated [9] with information from the different authorities concerned. In jurisdictions where this approach has been developed, authorities perform regular file transfers to update the electronic platform as well as their own records; they have direct access to the common platform and use the same back-office systems to update it; and the information registered is regularly verified by trusted staff of the authorities. Such strong coordination among the relevant authorities is often based on regulatory provisions that allocate roles and responsibilities among those authorities. Moreover, in certain jurisdictions such integrated delivery and governance of the registration process with the relevant authorities takes the form of an electronic platform that allows other authorities involved in the establishment of a business to connect to the platform and share information on the business.

96. One issue that States should consider when establishing a one-stop shop is its location. It is usually advisable for the one-stop shop to be directly connected to the business registry office, either because it is hosted there or because the registry is part of the one-stop shop. The organization responsible for the one-stop shop could thus be the same as that which oversees the business registration process. This approach

[9] For details on pre-populated forms, see footnote 5, supra.

should take into account whether such organizations are equipped to administer the one-stop shop. Examples from various jurisdictions indicate that where authorities such as executive agencies are responsible for business registration, they possess the skills to perform one-stop shop functions as well. The same can be said of chambers of commerce, government commissions, and regulatory authorities. There are examples of adoption of a one-stop shop approach also in those States where business registration is under the administrative oversight of the judiciary.

97. Although one-stop shops do not necessarily require changes to domestic legislation, it is important that the operation of such mechanisms be legally valid, which may involve adapting existing law to the new structure and method of proceeding. For example, effective functioning of the one-stop shop may require provisions governing the collection of information by public authorities as well as the exchange of information among such authorities. The extent of the changes required will thus vary according to the different needs of the State and the structure of its system of registration with public authorities mandatorily involved in the establishment of a business. For example, in several States, enhanced interoperability between the business registry, taxation and social security authorities through the one-stop shop may have to take into consideration the fact that while registration with taxation and social security authorities is usually mandatory, registration with the business registry may be on a voluntary basis. In addition, States should determine how to finance the one-stop shop: the goal should be to ensure wide user accessibility, while providing for low maintenance cost and financial sustainability of the one-stop shop. Finally, one-stop shops should be staffed with well-trained personnel, and they should have their performance regularly monitored by the supervising authority in accordance with user feedback.

Recommendation 14: A one-stop shop for business registration and registration with other authorities

The law should establish a one-stop shop for business registration and registration with other public authorities, including designating which public authority should oversee the functioning of the single interface. Such an interface:

(a) May consist of an electronic platform or physical offices;

(b) Should ensure interconnected services of as many authorities as possible, including, but not limited to, business registry, taxation and social security authorities; and

(c) Should provide for the sharing of information on the business among the interconnected authorities and the use of a single, integrated application form for registration with, and payment to, those authorities and a unique identifier.

G. Use of unique identifiers

98. In those jurisdictions where the government authorities with which businesses are required to register operate in isolation from each other, it is not unusual for this procedure to result in duplication of systems, processes and efforts. This approach is not only expensive but may cause errors. Moreover, if each authority assigns a registration number to the business when it registers with that authority, and the use and uniqueness of that number is restricted to the authority assigning it, information exchange among the authorities requires each authority to map the different identification numbers applied by the other authorities. When ICT solutions are used, they can facilitate such mapping, but even they cannot exclude the possibility that different entities will have the same identifier, thus reducing the benefits (in terms of cost and usefulness) obtained from the use of such tools.

99. States wishing to foster advanced integration among different authorities, in order to minimize duplication of procedures and facilitate exchange of information among relevant public authorities, may wish to consider that in recent years, tools have been developed to facilitate inter-agency cooperation. For example, one

international organization has developed an online system that allows for the interoperability of the various public authorities involved in business registration with minimal or no change at all in the internal processes of the participating authorities nor in their computer systems.

100. Some States have introduced a more sophisticated approach, which considerably improves information exchange throughout the life cycle of a business. This approach, which is based on enhanced technical and institutional interoperability of the authorities involved (such as the ability of different ITC infrastructures to exchange and interpret data; or semantic interoperability – see paras. 110 and 111 below), requires the use of a unique identifier, which ties information to a given business and allows the business to be uniquely identified in its interactions with the business registry, taxation and social security authorities as well as other public authorities and possibly private agencies.

101. A unique identifier is structured as a set of characters (numeric or alphanumeric) which distinguish registered entities from each other. When designing a unique identifier, it may be advisable to build some flexibility in the structure of the identifier (for example, by allowing the addition of new characters to the identifier at a later stage) so that the identifier can be easily adaptable to new system requirements in a national or international context, or both. The unique identifier is usually allocated upon establishment of the business (in some States unique identifiers may be allocated to non-business entities as well) and does not change during the existence of that business,[10] nor after its deregistration. The same unique identifier is used for that business by all public authorities (and possibly private agencies), which permits information about that particular registered entity to be shared. Moreover, the unique identifier is intended to replace all other registration or identification numbers that any such authorities (and private agencies) may use in reference to a business.[11]

102. The experience of States that have adopted unique identifiers has demonstrated the usefulness of such tools. As noted above, they permit all government authorities to identify easily new and existing businesses, and to verify information in respect of them. In addition, the use of unique identifiers improves the quality of the information contained in the business registry, and in the records of the other interconnected authorities, since the identifiers ensure that information is linked to the correct entity even if its identifying attributes (for example name, address, and type of business) change. Moreover, unique identifiers prevent the situation where, intentionally or unintentionally, businesses are assigned the same identification; this can be especially significant where financial benefits are granted to legal entities or where liability to third parties is concerned. Unique identifiers have been found to produce benefits for businesses as well, in that they considerably simplify business administration procedures: entrepreneurs do not have to manage different identifiers from different authorities, nor are they required to provide the same or similar information to different authorities. Introducing unique identifiers can also contribute to improving the visibility of businesses, in particular of MSMEs, with possible partners as well as with potential sources of finance, since it would assist in creating a safe and dependable connection between a business and all of the information that relates to it. This access to relevant information could facilitate the establishment of business relationships, including in the cross-border context.

103. One issue a State may have to consider when introducing unique identifiers is that of individual businesses that do not possess a separate legal status from their owners. In such cases, taxation, social security or other authorities may often prefer to rely on the identifier for the individual, who may be a natural person, rather than

[10] While the unique identifier does not change throughout the lifetime of a business, if the business changes its legal form, a new unique identifier may be allocated.

[11] In certain cases, authorities may keep their own numbering system in addition to using the unique identifier because of “legacy data”, i.e. an obsolete format of identifying a business that cannot be converted into unique identifiers. In order to access such information, the registry must maintain the old identification number for internal purposes. In dealing with the public, however, the government authority should use for all purposes the unique identifier assigned to the business.

on the business identifier. However, States may also opt to assign a separate identifier to a sole proprietor in a business capacity and in a personal capacity.

104. Situations may arise in which different authorities in the same jurisdiction allocate identifiers to businesses, or non-business entities, based on the particular legal form of the business, or the non-business entity. States should thus consider adopting a verification system to avoid multiple unique identifiers being allocated to the same business by different public authorities. If the identifier is assigned through a single jurisdictional database the risk of several identifiers being allocated to one business or of several businesses receiving the same identifier is considerably reduced.

105. The effective use of unique identifiers is enhanced by the complete adoption of electronic solutions that do not require manual intervention. However, electronic solutions are not a mandatory prerequisite to introducing unique identifiers, as they can also be effective in a paper-based environment. When unique identifiers are connected to an online registration system, it is important that the solution adopted fits the existing technology infrastructure.

1. Allocation of unique identifiers

106. The use of unique identifiers requires sustained cooperation and coordination among the authorities involved, and a clear definition of their roles and responsibilities, as well as trust and collaboration between the public and business sectors. Since the introduction of a unique identifier does not of itself prevent government authorities from asking a business for information that has already been collected by other authorities, States should ensure that any reform process in this respect starts with a clear and common understanding of the reform objectives among all the stakeholders involved. Moreover, States should ensure that there is strong political commitment to the reform. Potential partners ideally include the business registry, taxation and social security authorities, at a minimum, and if possible, the statistics office, the pension fund, and any other relevant authorities. If agreement among these stakeholders is elusive, at least the business registry, taxation and social security authorities should be involved. Information on the identifiers in use by the other authorities and within the business sector is also a prerequisite for reform, as is a comprehensive assessment to identify the needs of all stakeholders.

107. In order to permit the introduction of a unique identifier, the law should include provisions on a number of issues including:

(a) Identification of the authority charged with allocating the unique identifier;

(b) Allocation of the unique identifier before or immediately after registration with the authorities involved in the establishment of a business;

(c) Listing of the information that will be related to the identifier, including at least the name, address and type of business;

(d) The legal mandate of the public authorities to use the unique identifier and related information, as well as any restrictions on requesting information from businesses;

(e) Access to registered information by public authorities and the private sector;

(f) Communication of business registration and amendments among the public authorities involved; and

(g) Communication of deregistration of businesses that cease to operate.

2. Implementation of a unique identifier

108. Adoption of a unique identifier normally requires a centralized database linking the business to all relevant government authorities whose information and communication systems must be interoperable. This requirement can be a major obstacle to implementation if the technological infrastructure of the State is not sufficiently advanced.

109. States can introduce the unique identifier in one of two ways. In the first approach, business registration is the first step and includes the allocation of a unique identifier, which is made available (together with the identifying information) to the other authorities involved in the registration process (for example, taxation and social security authorities), and which is re-used by those authorities. In the second approach, the allocation of a unique identifier represents the beginning of the process. The unique identifier and all relevant information are then made available to the government authorities involved in business registration, including the business registry, and is then re-used by all authorities. Either of these two approaches can be followed by the authority entrusted with allocating unique identifiers, regardless of whether the authority is the business registry, a facility shared by public authorities or the taxation authority. The enacting State should determine the format of the unique identifier and which authority would have the authority to assign it.

110. Introducing a unique identifier usually requires adaptation both by public authorities in processing and filing information and by businesses in communicating with public authorities or other businesses. A unique identifier requires the conversion of existing identifiers, which can be accomplished in various ways. Taxation identifiers are often used as a starting point in designing a new identifier, since the records of the taxation authorities cover most types of businesses and are often the most current. Examples also exist in which, rather than introducing a completely new number, the taxation number itself is retained as the unique business number. New identification numbers can also be created using other techniques according to a State's registration procedures. In such a situation, it is important that each business, once assigned a new number, verify the related identifying information, such as its name, address, and type of activity.

111. The interoperability of the ICT systems of different authorities could be a major obstacle when implementing unique identifiers. The ability of different information technology infrastructures to exchange and interpret data, however, is only one aspect of interoperability that States should consider. Another issue is that of semantic interoperability, which can also pose a serious threat to a successful exchange of information among the authorities involved as well as between relevant authorities and users in the private sector. For this reason, it is important to ensure that the precise meaning of the information exchanged is understood and preserved throughout the process and that semantic descriptions are available to all of the stakeholders involved. Measures to ensure interoperability would thus require State action on a dual level: agreement on common definitions and terminology on the one hand, and the development of appropriate technology standards and formats on the other. This approach should be based on a mutual understanding of the legal foundation, responsibilities and procedures among all those involved in the process.

3. Cross-border exchange of information among business registries

112. States are increasingly aware of the importance of improving the cross-border exchange of data and information between registries,[12] and sustained progress in respect of ICT development now allows this aspect to be addressed. Introducing unique identifiers that enable different public authorities to exchange information about a business could thus be relevant not only at the national level, but also in an international context. Unique identifiers can allow more efficient cross-border cooperation among business registries located in different States, as well as between business registries and public authorities in different States. Implementation of cross-border exchange of data and information can result in more dependable information for consumers and existing or potential business partners, including small businesses that provide cross-border services, as well as for potential sources of finance for the business (see paras. 195 and 196 and rec. 40 below).

[12] For example, there are some regional examples of cross-border information-sharing on businesses between States, but these are cases where the information-sharing was a component of a broader project involving significant economic integration of the relevant States.

113. Accordingly, States implementing reforms to streamline their business registration system may wish to consider adopting solutions that will, in future, facilitate such information exchanges between registries from different jurisdictions and to consult with States that have already implemented approaches that allow for such interoperability.[13] One such reform could include developing a system of business prefixes that would make the legal form of the business immediately recognizable across international and other borders.

Recommendation 15: Use of unique identifiers

The law should provide that a unique identifier should be allocated to each registered business and should:

(a) Be structured as a set of numeric or alphanumeric characters;

(b) Be unique to the business to which it has been allocated; and

(c) Remain unchanged and not be reallocated following any deregistration of the business.

Recommendation 16: Allocation of unique identifiers

The law should specify that the allocation of a unique identifier should be carried out either by the business registry upon registration of the business, or before registration by the designated authority. In either case, the unique identifier should then be made available to all other public authorities involved in the registration of a business and in the sharing of the information associated with that identifier, and should be used in all official communications in respect of that business.

Recommendation 17: Implementation of a unique identifier

The law should ensure that, when adopting a system for the use of a unique identifier:

(a) There is interoperability between the technological infrastructure of the business registry and of the other public authorities sharing the information associated with the identifier; and

(b) That existing identifiers are linked to, or replaced by, the unique identifier.

H. Sharing of protected data between public authorities

114. Although the adoption of a system of unique identifiers facilitates information sharing between public authorities, it is important that sensitive data and privacy be protected. For this reason, when a State introduces interoperability among different authorities, it should address how public authorities may share protected data relating to individuals and businesses so that there is no infringement of the rights of data owners. States should thus ensure that all information sharing among public authorities occurs in accordance with the applicable law, which should establish the conditions under which such sharing is permitted. Moreover, the law should clearly identify which public authorities are involved, the information shared and the purpose for sharing, and establish that the owners of the data should be informed of the purposes for which their protected data may be shared among public authorities. Information-sharing should be based on the principle that only the minimum information necessary to achieve the public authority's purpose may be shared and that appropriate measures are in place to protect the rights to privacy of the business. When devising appropriate law or policy on the sharing of protected data between public authorities, it is important for States to consider the interoperability of those public authorities.

[13] Some States with more integrated economies have developed an application that allows users to carry out simultaneous searches of the registries in both States by using their smartphones or mobile devices.

Recommendation 18: Sharing of protected data between public authorities

The law should establish the conditions on which protected data can be shared between public authorities pursuant to a unique identifier system.

IV. Registration of a business

A. Scope of examination by the registry

115. The method through which a business is registered varies from State to State, ranging from those that tend to regulate less and rely on the law that governs business behaviour, to States that opt for ex ante screening of a business before it may be registered (see also para. 54 above). In this regard, a State aiming at reforming the registration system must first decide which approach it will take to determine the scope of the examination that will have to be carried out by the registry. The State may thus choose to have a system where the registry only records information submitted to it by the registrant or a system where the registry is required to perform legal verifications and decide whether the business meets the criteria to register.

116. States opting for ex ante verification of legal requirements and authorization before businesses can register (referred to as an "approval system") often have registration systems under the oversight of the judiciary in which intermediaries such as notaries and lawyers perform a key role. Other States structure their business registration as a declaratory system, in which no ex ante approval is required before the establishment of a business and where registration is an administrative process. In such declaratory systems, registration is under the oversight of a government department or authority, which can choose whether to operate the business registration system itself or to adopt other arrangements. There are also States that do not fall neatly within either category and in which there is a certain variation in the level and type of verification carried out as well as in the level of judiciary oversight.

117. Both the approval and the declaratory system have their advantages. Approval systems intend to protect third parties by preventing errors or omissions prior to registration. Courts and intermediaries exercise a formal review and, when appropriate, a substantive review of the prerequisites for the registration of a business. On the other hand, declaratory systems are said to reduce the inappropriate exercise of discretion; furthermore, they may reduce costs for registrants by negating the need to hire an intermediary and appear to have lower operational costs. Some systems have been said to merge advantages of both the declaratory system and the approval system by combining ex ante verification of the requirements for establishing a business with a reduced role for the courts and other intermediaries, thus simplifying procedures and shortening processing times.

B. Accessibility of information on how to register

118. In order for the business registry to facilitate trade and interactions between business partners, the public and the State, easy access to business registry services should be provided both to businesses that want to register and to interested users who want to search the information on the business registry.

119. For businesses wanting or required to register, many microbusinesses may not be aware of the process of registration nor of its costs: they often overestimate time and cost, even after the registration process has been simplified. Easily retrievable information on the registration process should be made available (e.g. a list of the steps needed to achieve the registration; the necessary contacts; the data and documents required; the results to be expected; how long the process will take; methods of lodging complaints; and possible legal recourse), including on the advantages offered by a one-stop shop (where available) (see also paras. 86 to 97 and rec. 14 above) as well as on the relevant fees. This approach can reduce compliance costs, and make the outcome of the application more predictable, thus encouraging

entrepreneurs to register. Restricted access to such information, on the other hand, might require meetings with registry officials in order to be apprised of the registration requirements or the involvement of intermediaries to facilitate the registration process.

120. In jurisdictions with developed ICT infrastructures, information on the registration process and documentation requirements should be available on the registry website or the website of the government authority overseeing the process. Moreover, the possibility of establishing direct contact with registry personnel through a dedicated email account of the registry, electronic contact forms or client service telephone numbers should also be provided. As discussed below (see para. 135 below), States should consider whether the information included on the website should be offered in a foreign language in addition to official and local languages. States with more than one official language should make the information available in all such languages in accordance with the language laws of the State, if any (see also paras. 133 to 135 below).

121. A lack of advanced technology, however, should not prevent access to information that could be ensured through other means, such as through the posting of communication notes at the premises of the relevant agency or dissemination through public notices. In some jurisdictions, for example, it is a requirement to have large signs in front of business registry offices advising of their procedures, time requirements and fees. In any event, information for businesses to register should be made available at no cost.

122. It is equally important that potential registry users are given clear information on the logistics of registration and on the public availability of information on the business registry. This may be achieved, for example, through the dissemination of guidelines and tutorials (ideally in both printed and electronic form) and through the availability of in-person information and training sessions. In some States, for example, prospective users of the system are referred to classroom-based or eLearning opportunities available through local educational institutions or professional associations.

Recommendation 19: Accessibility of information on how to register

The law should require the registrar to ensure that information on the business registration process and any applicable fees is widely publicized, readily retrievable, and available free of charge.

C. Businesses permitted or required to register

123. One of the key objectives of business registration is to permit businesses of all sizes and legal form to improve their visibility in the marketplace and to the public. This objective is of particular importance in assisting MSMEs to participate effectively in the economy and to take advantage of State programmes available to assist them. States should enable businesses of all sizes and legal form to register in an appropriate business registry, or create a single business registry that is tailored to accommodate registration by a range of different sizes and different legal forms of business.

124. States must also define which businesses are required to register under the applicable law. Laws requiring the registration of businesses vary greatly from State to State, but one common aspect is that they all require registration of particular legal forms of business. The nature of the legal forms of business that are required to register in a given jurisdiction is, of course, determined by the applicable law. In some legal traditions, it is common to require registration of all businesses, including sole proprietorships, professionals, and government bodies; in others, certain businesses, usually the smallest, are not required to register due to their size and legal form; in yet other legal traditions, only corporations and similar entities (with legal personality and limited liability) are required to register. This latter approach can exclude businesses like partnerships and sole proprietorships from mandatory registration. However, variations on these regimes also exist, and some jurisdictions permit

voluntary registration for businesses that would not otherwise be required to register, such as sole traders and professional associations.

125. Enabling the registration of businesses that would not otherwise be required to register with the business registry (but may be subject to mandatory registration with other public authorities, such as taxation and social security) allows such businesses to benefit from a number of services offered by the State, by the registry and other entities, including the protection of a business or a trade name, facilitating access to credit, accessing additional opportunities for growth, improving visibility to the public and to markets and, subject to the legal form chosen for the business which may require it to be registered, the separation of personal assets from assets devoted to business or limiting the liability of the owner of the business. The law should establish registration obligations (e.g. timely filing of periodic returns, updating of registered information, accuracy of information submitted) also for businesses that voluntarily register with the business registry as well as appropriate sanctions for non-compliance with those obligations, in order to ensure a consistent approach with the regime established for those businesses that are required to register.

126. Even when business registration is voluntary, it may still prove burdensome for MSMEs and outweigh the benefits the business could gain as a registered business, thus discouraging registration. Some jurisdictions have carried out reforms to simplify the registration process by decreasing its cost (see paras. 198 to 201 and rec. 41 below) and by removing administrative obstacles. In any event, States should encourage micro and small businesses to register by adopting policies especially tailored to the needs of such businesses in order to convey to them the advantages of registration, including specific incentives available for MSMEs.

Recommendation 20: Businesses permitted or required to register

The law should specify:

(a) Which legal forms of businesses are required to register; and

(b) That businesses of all sizes and legal forms are permitted to register.

D. Minimum information required for registration

127. Businesses must meet certain information requirements in order to be registered; those requirements are determined by the State based on its laws and economic framework. The information required usually varies depending on the legal form of business being registered – for example, sole proprietorships and simplified business entities may be required to submit relatively simple details (if at all) in respect of their business, while businesses such as public and private limited liability companies will be required to provide more complex and detailed information depending on the requirements established by the law in respect of those types of business. Although the requirements for registration of each legal form of business will vary according to the applicable law, there are, however, some requirements that can be said to be common for many businesses in most States, both during the initial registration process and throughout the lifecycle of the business.

128. General requirements for the registration of all legal forms of business are likely to include information in respect of the business and its registrant(s), such as:

(a) The name of the business;

(b) The address at which the business can be deemed to receive correspondence (such an address can be a “service address” and need not be the residential address of the registrants or the managers of the business);

(c) The name(s) and contact details of the registrant(s);

(d) The identity of the person or persons who are authorized to sign on behalf of the business or who serve as the business’s legal representative(s); and

(e) The legal form of the business that is being registered and its unique identifier, if such an identifier has already been assigned (see paras. 106 and 107 above).

129. Other information that may be required for registration, depending on the jurisdiction of the registry and the legal form of the business being registered, can include:

(a) The names and addresses of the persons associated with the business, which may include managers, directors and officers of the business;

(b) The rules governing the organization or management of the business; and

(c) Information relating to the capitalization of the business.

130. Business registries may request information on the gender identification, ethnicity or language group of the registrant and other persons associated with the business, but the provision of such information should not be a requirement for registration. It should be noted, however, that while such information can be important for statistical purposes, particularly in light of State programmes that may exist to support under-represented groups, its collection could raise privacy issues. Such information should thus be requested only on a voluntary basis, should be treated as protected data and made available, if at all, only on a statistical basis.

131. Depending on the legal form of the business being registered, other details may be required in order to finalize the registration process. In some jurisdictions, proof of the share capital, information on the type of commercial activities engaged in by the business (see however paras. 240 to 243 below), and agreements in respect of non-cash property constitute information that may also be required in respect of certain legal forms of business. In addition, in several jurisdictions, registration of shareholder details and any changes therein may be required; in a few cases, registration of shareholder details is carried out by a different authority. States should, however, be mindful that requesting a prospective business to submit complex and extensive information may result in making registration more difficult and expensive and thus may discourage MSMEs from registering.

132. It should also be noted that in some jurisdictions, registration of the identity of the business owner(s) is considered a key requirement; other jurisdictions now make it a practice to register beneficial ownership details and changes in those details, although the business registry is not always the authority entrusted with this task.[14] Transparency in the beneficial ownership of businesses can help prevent the misuse of corporate vehicles, including MSMEs, for illicit purposes.[15]

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[14] A “beneficial owner” is the natural person(s) who ultimately owns or controls a legal person or arrangement even when the ownership or control is exercised through a chain of ownership or by means of control other than direct control. These vehicles may include not only corporations, trusts, foundations, and limited partnerships, but also simplified business forms, and may involve the creation of a chain of cross-border company law vehicles created in order to conceal their ownership.

[15] It should be noted that the Financial Action Task Force (FATF) Recommendation 24 in respect of transparency and beneficial ownership of legal persons encourages States to conduct comprehensive risk assessments of legal persons and to ensure that all companies are registered in a publicly available company registry. The basic information required is: (a) the company name; (b) proof of incorporation; (c) legal form and status; (d) the address of the registered office; (e) its basic regulating powers; and (f) a list of directors. In addition, companies are required to keep a record of their shareholders or members. (See International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, Part E on Transparency and Beneficial Ownership of Legal Persons and Arrangements, Recommendation 24 (www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf).)

Recommendation 21: Minimum information required for registration

The law should establish the required information and supporting documents for the registration of a business, including at least:

(a) The name of the business;

(b) The address at which the business can be deemed to receive correspondence or, in cases where the business does not have a standard form address, the precise description of the geographical location of the business;

(c) The identity of the registrant(s);

(d) The identity of the person or persons who are authorized to sign on behalf of the business or who serve as the business's legal representative(s); and

(e) The legal form of the business being registered and its unique identifier, if such an identifier has already been assigned.

E. Language in which information is to be submitted

133. When requiring the submission of information for business registration, one important issue for the State to consider is the language in which the required information must be submitted. Language can be a barrier and can cause delays in registration if documents need to be translated into the language of the registry. On the other hand, a business can be registered only if the content of the information is legible to the registry staff. For this reason, it is not common for jurisdictions to allow documents or electronic records to be submitted in a non-official language. States, however, may consider whether such documents can be accepted. There are some States that allow all or some of the information relating to the business registration to be submitted in a non-official language. Should States opt for this approach, they may wish to require that the documents or electronic records must be accompanied by an official translation into the registry's national language(s) or any other form of authenticating the documents that is used in the State.

134. Another issue is whether the documents submitted to the business registry include information, such as names and addresses, that uses a set of characters different from the characters used in the language of the registry. In such a situation, the State should provide guidance on how the characters are to be adjusted or transliterated to conform to the language of the registry.

135. A number of States have more than one official language or no official language. In these States, the language in which the information is to be submitted to the business registry is usually determined by the language laws of the State, if any (see also para. 120 above). When States decide to accommodate registration in more than one language, different approaches can be adopted. For example, States may require parties to make their registration in all official languages; or they may permit filing in one language only, but then require the registry to prepare and register duplicate copies in all official languages. Both these approaches, however, may be costly and invite error. A more efficient method to deal with multiple official languages, any one of which may be used to register, would be to allow registrants to carry out registration in only one of those official languages. This approach would also take into account the financial constraints of MSMEs and additional circumstances, such as possible literacy issues, when entrepreneurs may not be equally fluent in all official languages spoken in a State. Whichever approach is taken, States will have to consider ways to address this matter so as to ensure that the registration and any subsequent change can be carried out in a cost effective way for both the registrant and the registry and, at the same time, ensure that information can be understood by the registry's users.

Recommendation 22: Language in which information is to be submitted

The law should provide that the information and documents submitted to the business registry must be expressed in the language or languages specified, and in the character set as determined and publicized by the business registry.

F. Notice of registration

136. The business registry should notify the registrant whether or not the registration of the business was effective as soon as practicable, and, in any event, without undue delay. Requiring the registry to inform promptly the registrant of the registration helps to ensure the integrity and security of the registry record. In States where online registration is used, the registrant should receive an online notification of the registration of the business.

Recommendation 23: Notice of registration

The law should require the business registry to notify the registrant whether or not the registration of its business is effective as soon as practicable, and, in any event, without undue delay. In an online registration system, the business registry should send an online notification to the registrant immediately after all of the requirements for the registration of the business have been successfully fulfilled.

G. Content of notice of registration

137. The notice of registration should include the minimum information in respect of the registered business necessary to provide conclusive evidence that all requirements for registration have been complied with and that the business is duly registered according to the law of the enacting State.

Recommendation 24: Content of notice of registration

The law should provide that the notice of registration may be in the form of a certificate, notice or card, and that it should contain at least the following information:

(a) The unique identifier of the business;

(b) The date and time of its registration;

(c) The name of the business;

(d) The legal form of the business; and

(e) The law under which the business has been registered.

H. Period of effectiveness of registration

138. States may adopt one of two approaches to determine the period of effectiveness of the registration of a business. In some States, the registration of the business is subject to a maximum period of duration established by law. It follows that unless the registration is renewed, the registration of the business will expire on the date stated in the notice of registration or upon the termination of the business.[16] This approach imposes a burden on the registered business, which could be particularly problematic for MSMEs, as they often operate with minimal staff and limited knowledge of the applicable rules. Further, if additional information is required and not furnished by the business, renewal of its registration could also be refused.

[16] It should be noted that the general law of the enacting State for calculating time periods would apply to the calculation of the period of effectiveness, unless specific legal provisions applicable to registration provides otherwise. For example, if the general law of the enacting State provides that, if the applicable period is expressed in whole years from the day of registration, the year runs from the beginning of that day.

139. Under the second approach, no maximum period of validity is established for the registered business and the registration is effective until the business ceases to operate and is deregistered. This approach simplifies the intake process and both encourages registration and reduces its burden on all businesses. However, States that opt for this approach should ensure the adoption of appropriate methods (e.g. sending regular prompts to businesses, establishing advertising campaigns as reminders, or, as a last resort, enforcement procedures) to encourage businesses to keep their registered information current (see paras. 157 to 161 and rec. 30 below).

140. In some cases, both approaches have been adopted: a maximum period of registration, subject to renewal, may apply to registered businesses that are of a legal form that does not have legal personality, while an unlimited period of registration may apply to businesses that have legal personality. This duality of approach reflects the fact that the consequences of the expiry of registration of a business that possesses legal personality are likely to be more serious and may affect the very existence of the business and the limited liability protection afforded to its owners.

141. Although some jurisdictions require registered businesses to renew their registration periodically, the practice of establishing registration without a maximum period of validity is a more desirable approach as it meets the needs of businesses for simplified and fast procedures, while relieving them, in particular MSMEs, of a potential burden.

Recommendation 25: Period of effectiveness of registration

The law should establish that the registration is valid until the business is deregistered.

I. Time and effectiveness of registration

142. In the interests of transparency and predictability of a business registration system, States should determine the moment at which the registration of a business or any later change made to the registered information is effective. States usually determine that a business registration or any subsequent change made to it is effective either at the time of the entry of that information into the registry record or when the application for registration (or a change to that information) is received by the registry. Whichever approach is chosen, the most important factor is that the State makes it clear at which moment the registration or change is effective. In addition, the effective time of registration of the business or any later change to the registered information should be indicated in the registry record relating to the relevant business.

143. In some jurisdictions, businesses may also apply for the protection of certain rights in the period prior to registration. For example, the provisional registration of the trade name of the business to be registered may protect that name from being used by any other entity until the registration of the business is effective. In such cases, States should be equally clear to establish the moment at which such pre-registration rights are effective and the period of their effectiveness.

144. If the registry is designed to enable users to submit or amend registered information electronically without the intervention of registry staff and to use online payment methods for the registration, the registry software should ensure that the information becomes effective immediately or nearly immediately after it is transmitted. As a result, any delay between the time of the electronic transmission of the information and the effective time of registration of the business will be eliminated.

145. In registry systems in which the registry staff must enter the information into the registry record (whether it is received electronically or in paper form), there will inevitably be some delay between the time when the information is received in the registry office and the time when the information is entered into the registry record. In these cases, the law should provide that the registry must enter the information received into the registry record as soon as practicable and possibly set a deadline by

which that entry should be completed. In a mixed registry system which allows information to be submitted in both electronic and paper form, registrants who elect to use the paper form should be alerted that this method may result in some delay in the time of effectiveness of the registration. Finally, a business registry usually processes applications for registration in the order in which they have been received, although some jurisdictions may permit expedited processing of applications, subject to the payment of an additional fee.

Recommendation 26: Time and effectiveness of registration

The law should:

(a) Require the business registry to record the date and time that applications for registration are received and to process them in that order as soon as practicable and, in any event, without undue delay;

(b) Establish clearly the moment at which the registration of the business is effective; and

(c) Specify that the registration of the business must be entered into the business registry as soon as practicable thereafter, and in any event without undue delay.

J. Rejection of an application for registration

1. Rejection due to errors in the application for registration

146. A series of checks and control procedures are required to ensure that the necessary information is provided in order to register the business, however, the extent of such controls varies according to the jurisdiction. In those legal regimes where the registry performs simple control procedures, if all of the basic legal and administrative requirements established by applicable law are met, the registrar must accept the information as filed, record it, and register the business. When the legal regime requires a more thorough verification of the information filed, registries may have to check whether mandatory provisions of the law are met by the content of the application and information submitted, or by any amendments thereto. Whichever approach is chosen, States should define in their law which requirements the information to be submitted to the registry must meet. In certain jurisdictions, the registrar is given the authority to impose requirements as to the form, authentication and manner of delivery of information to be submitted to the registry. When an MSME is seeking to register, such requirements should be kept to a minimum in order to facilitate the registration process for MSMEs. This will reduce administrative hurdles and help in promoting business registration among such businesses.

147. Registration of MSMEs may also be facilitated if the registrar is granted the power to accept and register documents that do not fully comply with the requirements for the form of the submission, and to rectify clerical errors, including its own incidental errors, in order to bring the entry in the business registry into conformity with the documents submitted by the registrant. This will avoid imposing the potentially costly and time-consuming burden of requiring the registrant to resubmit its application for registration. Entrusting the registrar with these responsibilities may be particularly important if registrants do not have direct access to electronic submission of documents and where such submission, or the entry of data, requires the intervention of the registry staff. In States where it is possible for registrants to submit applications for registration directly online, the electronic registration system usually provides automated scrutiny of the data entered in the application. When the registrar is granted the authority to correct its own errors as well as any incidental errors that may appear in the information submitted in support of the registration of the business, the law of the enacting State should strictly determine under which conditions those responsibilities may be discharged (see also paras. 230 and 231 and rec. 53 below). Clear rules in this regard will ensure the integrity and security of the registry record and minimize any risk of abuse from or

corruption by the registry staff (see also paras. 211 to 216 and rec. 47 below). The law of the enacting State should thus establish that the registry may only exercise its discretion to correct errors upon having provided prior notification of the intended corrections to the registrant and having received the consent of the registrant in return, although this approach could create a delay in the registration of the business while the registrar seeks such consent. When the information provided by the business is not sufficient to comply with the requirements for registration, the registrar should be granted the authority to request from the business additional information in order to finalize the registration process. The law of the enacting State should specify an appropriate length of time within which the registrar should make such a request.

148. The rejection of an application for registration is likely to be processed differently depending on whether the registration system is electronic, paper-based, or mixed. In a registry system that allows registrants to submit applications and relevant information directly to the registry electronically, the system should be designed, when permitted by the State's technological infrastructure, so as to automatically require correction of the application if it is submitted with an error, and to automatically reject the submission of incomplete or illegible applications, displaying the reasons for the rejection on the registrant's screen. In cases where the application for registration of a business is submitted in paper form and the reason for its rejection is that the application was incomplete or illegible, there might be some delay between the time of receipt of the application by the registry and the time of communication of its rejection, and the reasons therefor, to the registrant. In mixed registry systems which allow applications to be submitted using both paper and electronic means, the design of the electronic medium should include the technical specifications that allow for automatic requests for correction or automatic rejection of an application. Moreover, registrants who elect to use the paper form when such a choice is possible should be alerted that this method may result in some delay between the time of receipt of the application by the registry and the time of communication of any rejection, and the reasons therefor.

2. Rejection of an application for failure to meet the requirements prescribed by law

149. States should provide that registries may reject the registration of a business if its application does not meet the requirements prescribed by the applicable law of the State.[17] This approach is implemented in several jurisdictions regardless of their legal tradition. In order to prevent any arbitrary use of such power, however, the registrar must provide, in writing, a notice of the rejection of an application for registration and the reasons for which it was rejected, and the registrant must be allowed time to appeal against that decision as well as to resubmit its application. Moreover, it should be noted that the authority of the registrar to reject an application should be limited to situations where the application for registration does not meet the conditions for registration as required by law.

Recommendation 27: Rejection of an application for registration

The law should provide that the registrar:

(a) Must reject an application for the registration of a business only if the application does not meet the requirements specified in the law;

(b) Is required to provide to the registrant in written form the reason for any such rejection; and

(c) Is granted the authority to correct its own errors as well as any incidental errors that may appear in the information submitted in support of the registration of

[17] Instances in which the registry improperly accepts an application and registers a business that does not meet the requirements prescribed by law should be governed by the provisions establishing liability of the business registry, if any (see paras. 211 to 216 below). Moreover, the law of the State should establish how rectification of business registration should be carried out in such instances.

the business, provided that the conditions under which the registrar may exercise this authority are clearly established.

K. Registration of branches

150. Registration of branches of a business is a common practice, although there are jurisdictions in which such registration is not required. Most States require the registration of national branches of a foreign business in order to permit those branches to operate in their jurisdiction and to ensure the protection of domestic creditors, businesses and other interested parties that deal with those branches. In several States, registration of a national branch of a national company is also required or permitted. Registration of a business branch might not appear to be immediately relevant for MSMEs, whose main concern is more likely to be to consolidate their business without exceeding their human and financial capacity. However, this issue is relevant for those slightly larger businesses that, being of a certain size and having progressed to a certain volume of business, look to expand beyond their local or domestic market.

151. States have their own rules for governing the operation of foreign businesses, and there may be considerable differences among those States that permit the registration of branches of foreign businesses in terms of what triggers the obligation to register them. Some approaches are based on a broad interpretation of the concept of foreign establishment, for example, those that include not only a branch, but also any establishments with a certain degree of permanence or recognizability, such as a place of business in the foreign State. Other approaches define more precisely the elements that constitute a branch which needs to be registered, possibly including the presence of some sort of management, the maintenance of an independent bank account, the relation between the branch and the original or main business, or the requirement that the original or main business has its main office registered abroad. Not all States define a branch in their laws, or state under which circumstances a foreign establishment in the State must be registered: laws may simply refer to the existence of a foreign branch. In these cases, registries may fill the gap by issuing guidelines that clarify the conditions under which such a registration should be carried out. When this occurs, the registration guidelines should not be seen as an attempt to legislate by providing a discrete definition of what constitutes a branch, but rather as a tool to explain the features required by a branch of a business in order to be registered.

152. When simplifying or establishing their business registration system, States should consider enacting provisions governing the registration of branches of businesses from other jurisdictions. Those provisions should address, at minimum, issues such as timing of registration, disclosure requirements, information on the persons who can legally represent the branch and the language in which the registration documents should be submitted. Duplication of names could represent a major issue when registering foreign company branches, and it is important to ensure that the identity of a business is consistent in different jurisdictions. In this regard, an optimal approach could be for a business registry to use unique identifiers to ensure that the identity of a business remains consistent and clear within and across jurisdictions (see paras. 98 to 105 above).

Recommendation 28: Registration of branches

The law should establish:

(a) Whether the registration of a branch of a business is required or permitted;

(b) A definition of “branch” for registration purposes that is consistent with the definition provided elsewhere in the law; and

(c) Provisions regarding the registration of a branch to address the following issues:

(i) Disclosure requirements, including: the name and address of the registrants; the name and address of the branch; the legal form of the original or

main business seeking to register a branch; and current proof of the existence of the original or main business issued by a competent authority of the State or other jurisdiction in which that business is registered; and

(ii) Information on the person or persons who can legally represent the branch.

V. Post-registration

153. While a key function of a business registry is, of course, the registration of a business, registries typically support businesses throughout their life cycle. Once a business's registered information is collected and properly recorded in the business registry, it is imperative that it be kept current in order for it to continue to be of value to users of the registry. Both the registered business and the registry play roles in meeting these goals.

154. In order for a business to remain registered, it must submit certain information during the course of its life, either periodically or when changes in its registered information occur, so that the registry is able to maintain the information on that business in as current a state as possible. The registry also plays a role in ensuring that its information is kept as current as possible, and may use various means to do so, such as those explored in greater detail below. Both of these functions permit the registry to provide accurate business information to its users, thus ensuring transparency and supplying interested parties, including potential business partners and sources of finance, the public and the State, with a trustworthy source of information.

A. Information required after registration

155. In many jurisdictions, entrepreneurs have a legal obligation to inform the registry of any changes occurring in the business, whether these are factual changes (for example, address or telephone number) or whether they pertain to the structure of the business (for example, a change in the legal form of business). Information exchange between business registries and different government authorities operating in the same jurisdiction serves the same purpose. In some cases, business registries publish annual accounts, financial statements or periodic returns of businesses that are useful sources of information in that jurisdiction for investors, business clients, potential creditors and government authorities. Although the submission and publication of detailed financial statements might be appropriate for public companies, depending on their legal form, MSMEs should be required to submit far less detailed financial information, if any at all, and such information should only be submitted to the business registry and made public if desired by the MSME. However, to promote accountability and transparency and to improve their access to credit or attract investment, MSMEs may wish to submit and make public their financial information.[18] In order to encourage MSMEs to do so, States should allow MSMEs to decide on an annual basis whether to opt for disclosure of such information or not.

156. The submission of information that a business is required to provide in order to remain registered may be prompted by periodic returns that are required by the registry at regular intervals in order to keep the information in the registry current or it may be submitted by the business as changes to its registered information occur. Information required in this regard may include:

[18] While MSMEs are not generally required to provide the same flow and rate of information as publicly held firms generally, they may have strong incentives for doing so, particularly as they develop and progress. Businesses wishing to improve their access to credit or to attract investment may wish to signal their accountability by supplying information on: (1) the business' objectives; (2) principal changes; (3) balance sheet and off-balance sheet items; (4) its financial position and capital needs; (5) the composition of any management board and its policy for appointments and remuneration; (6) forward-looking expectations; and (7) profits and dividends. Such considerations are not likely to trouble MSMEs while they remain small, but could be important for such businesses as they grow.

(a) Amendments to any of the information that was initially or subsequently required for the registration of the business as set out in recommendation 21;

(b) Changes in the name(s) and address(es) of the person(s) associated with the business;

(c) Financial information in respect of the business, depending on its legal form; and

(d) Information concerning insolvency proceedings, mergers or winding-up (see para. 58 above).

Recommendation 29: Information required after registration

The law should specify that after registration, the registered business must at least file with the business registry information on any changes or amendments to the information that was initially required for the registration of the business pursuant to recommendation 21.

B. Maintaining a current registry

157. States should enact provisions that enable the business registry to keep its information as current as possible. A common approach through which that may be accomplished is for the State to require registered businesses to file at regular intervals, for example once a year, a declaration stating that certain core information contained in the register concerning the business is accurate or stating what changes should be made. Although this approach may be valuable as a means of identifying businesses that have permanently ceased to operate and may be deregistered, and may not be burdensome for larger business with sufficient human resources, such a requirement could be quite demanding for MSMEs, in particular if there is an associated cost.

158. Another approach, which seems preferable in the case of MSMEs, is to require the business to update its information in the registry whenever a change in any of the registered information occurs. The risk of this approach, which is largely dependent on the business complying with the rules, may be that the filing of changes is delayed or does not occur. To prevent this, States could adopt a system pursuant to which regular prompts are sent, usually electronically, to businesses to request them to ensure that their registered information is current. In order to minimize the burden for registries and to help them make the most effective use of their resources, prompts that registries regularly send out to remind businesses to submit their periodic returns could also include generic reminders to update registered information. If the registry is operated in a paper-based or mixed format, the registry should identify the best means of performing this task, since sending paper-based prompts to individual businesses would be time and resource consuming and may not be a sustainable approach. In one State, where the registry is not operated electronically, reminders to businesses to update their registered information are routinely published in newspapers.

159. Regardless of the approach chosen to prompt businesses to inform the registry of any changes in their registered information, States may adopt enforcement measures for businesses that fail to meet their obligations to file amendments. For example, a State could adopt provisions establishing the liability of the registered business to a fine on conviction if changes are not filed with the business registry within the time prescribed by law (see paras. 209 and 210 and rec. 46 below).

160. A more general method that may help mitigate any potential deterioration of the information collected in the business registry would include enhancing the interconnectivity and the exchange of information between business registries and taxation and social security authorities as well as other public authorities. The adoption of integrated electronic interfaces among the authorities involved in the business registration process allowing for their technical interoperability and the use of unique identifiers could play a key role (see paras. 93, 94 and 98 to 105 above).

Moreover, the registrar could identify sources of information on the registered business that would assist in maintaining a current registry record.

161. Once the registry has received the updated information, it should ensure that all amendments are entered in the registry record without undue delay. Again, the form in which the registry is operated is likely to dictate what might constitute an undue delay. If the registry allows users to submit information electronically without the intervention of the registry staff, the registry software should permit the amendments to become immediately or nearly immediately effective. Where the registry system (whether electronic, paper-based or mixed) requires the registry staff to enter the information on behalf of the business, all amendments should be reflected in the registry as soon as possible, and a maximum time period in which that should be accomplished could be stipulated.

Recommendation 30: Maintaining a current registry

The law should require the registrar to ensure that the information in the business registry is kept current, including through:

(a) Sending an automated request to registered businesses to prompt them to report whether the information maintained in the registry continues to be accurate or to state what changes should be made;

(b) Displaying notices of the required updates in the registry office and sub-offices and routinely publishing reminders on the registry website and social media and in national and local electronic and print media;

(c) Identification of sources of information on the registered businesses that would assist in maintaining the currency of the registry; and

(d) Updating the registry as soon as practicable following the receipt of amendments to registered information and, in any event, without undue delay thereafter.

C. Making amendments to registered information

162. States should also determine the time at which changes to the registered information are effective in order to promote transparency and predictability of the business registration system. Changes should become effective when the information contained in the notification of amendments is entered into the registry record rather than when the information is received by the registry, and the time of the change should be indicated in the registry record of the relevant business. In order to preserve information on the history of the business, amendments to previously registered information should be added to the registry record without deleting previously entered information.

163. As in the case of business registration, if the registry allows users to submit amendments electronically without the intervention of the registry staff, the amendments should become effective immediately or nearly immediately after they are transmitted. If the registry staff must enter the amendments into the registry on behalf of the business, amendments received should be entered into the registry record as soon as practicable, possibly within a maximum time. In a mixed registry system that allows amendments to be submitted using both paper and electronic means, registrants who elect to use the paper form should be alerted that this method may result in some delay in the effectiveness of the amendments.

Recommendation 31: Making amendments to registered information

The law should:

(a) Require the business registry to: (i) process amendments to the registered information in the order in which they are received; (ii) record the date and time when the amendments are entered into the registry record; and (iii) notify the registered

business as soon as practicable and in any event, without undue delay, that its registered information has been amended; and

(b) Establish when an amendment to the registered information is effective.

VI. Accessibility and information-sharing

A. Hours of operation of the business registry

164. Establishing the operating days and hours of the business registry depends on whether the registry is designed to allow direct electronic registration and information access by users or whether it requires their physical presence at an office of the registry. In the former case, electronic access should be available continuously except for brief periods to undertake scheduled maintenance; in the latter case, registry offices should operate during dependable and consistent hours that are compatible with the needs of potential registry users. In view of the importance of ensuring ease of access to the business registry for all users, the above criteria should be incorporated in the law of the enacting State or in administrative guidelines published by the registry, and the registry should ensure that its operating days and hours are widely publicized.

165. If the registry provides services (e.g. registration of a business, provision of information services) through a physical office, the minimum hours and days of operation should be the normal business days and hours of public offices in the State. To the extent that the registry requires or permits paper-based submissions, the registry should aim to ensure that the paper-based information is entered into the registry record and made available as soon as practicable, but preferably on the same business day that the information is received by the registry. Information requests submitted in paper form should likewise be processed on the same day they are received. To achieve this goal, the deadline for submitting paper-based information requests may be set independently from the business hours of the registry office.[19] Alternatively, the business registry could continue to receive paper submissions and information requests throughout its business hours, but set a "cut off" time after which information received may not be entered into the registry record, or information searches performed, until the next business day. A third approach would be for the registry to undertake that information will be entered into the registry record and searches for information will be performed within a stated number of business hours after receipt of the application or information request.

166. The law could also enumerate, in either an exhaustive or an indicative way, the circumstances under which access to the business registry may temporarily be suspended. An exhaustive list would provide more certainty, but there is a risk that it might not cover all possible circumstances. An indicative list would provide more flexibility but less certainty. Circumstances justifying a suspension of registry services would include any event that makes it impossible or impractical to provide those services (for example, due to force majeure such as fire, flood, earthquake or war, or to a breakdown in the Internet or network connection).

Recommendation 32: Hours of operation of the business registry

The law should ensure that:

(a) If access to the services of the business registry is provided electronically, access is available at all times;

[19] For example, the law or administrative guidelines of the registry could stipulate that, while the registry office is open between 9 a.m. and 5 p.m., all applications, changes and search requests must be received by an earlier time (for example, by 4 p.m.) to ensure that the registry staff has sufficient time to enter the information included in the application into the registry record or conduct the searches.

(b) If access to the services of the business registry is provided through a physical office:

(i) Each office of the registry is open to the public during the days and hours to be specified by the enacting State; and

(ii) Information about any registry office locations and their opening days and hours is publicized on the registry's website, if any, or otherwise widely publicized, and the opening days and hours of registry offices are posted at each office; and

(c) Notwithstanding subparagraphs (a) and (b) of this recommendation, the business registry may suspend access to the services of the registry in whole or in part in order to perform maintenance or provide repair services to the registry, provided that:

(i) The period of suspension of the registration services is as short as practicable;

(ii) Notification of the suspension and its expected duration is widely publicized; and

(iii) Such notice should be provided in advance and, if not feasible, as soon after the suspension as is reasonably practicable.

B. Access to registration services of the business registry

167. The law should permit all potential registrants to access the registration services of the business registry without discrimination based on grounds such as race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status. In the interest of promoting domestic economic growth, an increasing number of States allow registrants who are neither citizens of, nor residents in, the State to register a business, provided that such registrants meet certain requirements and comply with certain procedures established by the law concerning foreign registrants.

168. Access of potential registrants to the registration services of the business registry should only be subject to compliance with minimum age requirements, and with procedural requirements for the use of the registration services of the registry, such as: that the request for registration be submitted via an authorized medium of communication and on the prescribed form; and that the registrant provide identification in the form requested by the registry (see paras. 128 and 129 above and rec. 21) and pay any fee required for registration (see paras. 197 and 199 to 201 and rec. 41 below).

169. The registry should maintain a record of the identity of the registrant. In order to ensure a simple and straightforward registration process, the evidence of identity required of a registrant should be that which is generally accepted as sufficient in day-to-day commercial transactions in the enacting State. When registries are operated electronically and allow for direct access by users, potential registrants should be given the option of setting up a protected user account with the registry in order to transmit information to the registry. This would facilitate access by frequent users of the registration services of the business registry (such as business registration intermediaries or agents), since they would need to provide the required evidence of their identity only when initially setting up the account.

170. Once the registrant has complied with the requirements mentioned in paragraph 168 above (and any others established by the law of the State) for accessing the registry, the registry cannot deny access to the registration services of the registry. The only scrutiny that the registry may conduct at this stage (which is carried out automatically in an electronic registry) is to ensure that legible information (even if incomplete or incorrect) is entered in the form for business registration. If the registrant did not meet the objective conditions for access to the registration services of the business registry, the registry should provide the reasons for denying access

(e.g. the registrant failed to provide valid identification) in order to enable the registrant to address the problem. The registry should provide such reasons as soon as practicable (in this respect see paras. 146 to 149 and rec. 27 above).

171. Certain rules relating to access to the registration services of the business registry may also be addressed in the "terms and conditions of use" established by the registry. These may include offering the user the opportunity to open an account to facilitate quick access to the registration services of the registry and any necessary payment of fees for those services. The terms and conditions of access may also address the concerns of registrants regarding the security and confidentiality of their financial and other information or the risk of changes being made to registered information without the authority of the business. Assigning a unique user name and a password to the registrant, or employing other modern security techniques would help reduce such risks, as would requiring the registry to notify the business of any changes made by others in the user account information.

Recommendation 33: Access to registration services of the business registry

The law should permit all potential registrants to access the registration services of the business registry without discrimination based on any ground such as race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status.

C. Equal rights of women to access the registration services of the business registry

172. While the non-discrimination principle set out in recommendation 33 clearly encompasses all types of discrimination, including that based on gender, this guide supports the view, consistent with goals and resolutions of the United Nations,[20] that empowerment of women should be a main concern for States and international organizations in light of the key role women play in promoting sustainable development and the persistent social, economic and political inequalities they experience. In this respect, it should be noted that in many regions around the world, businesses owned by women, in particular micro and small businesses, represent a significant percentage of all MSMEs and in certain States such businesses have an average growth rate higher than businesses owned by men. Across all regions, however, MSMEs owned by women are often over-represented in the informal economy and in many regions, such businesses experience high barriers in their commercial activities. These barriers may range from lower access to finance (e.g. women are less likely to take out a loan, or the terms of borrowing can be less favourable for them) to the legal and regulatory environment (e.g. weak property rights or legal capacity); to education gaps (e.g. lower access to education, lower financial literacy) and to social and cultural norms (e.g. restrictions on mobility or on engagement with people outside the home or on the types of activities women can engage in).

173. In certain States, gender inequality may even result in different formal requirements or restrictions for women who want to start a business, including requirements for registration of a business. In those States, for example, women may have to submit additional documents in order to register a business or may not be permitted to register a business without spousal consent. In other States, even when the principle of economic equality of women is incorporated in fundamental laws (e.g. the Constitution), its practical effect may be limited by practical impediments, customary practices, or parallel legal systems that infringe the rights of some women.

174. States aiming to improve their business environment should take an inclusive approach in promoting entrepreneurship and address the legal, social and regulatory barriers that prevent equal and effective economic participation of all businesses, with particular emphasis on MSMEs owned by women.[21] This responds to the commitment

[20] See for example A/RES/70/1.

[21] See for example A/RES/67/202.

undertaken by all States under internationally agreed goals and targets to achieve gender equality and empowerment of women and girls, including economic empowerment, at the global, regional and national levels. Such steps are also in compliance with the obligations undertaken by many States with the ratification of the United Nations Conventions on the Elimination of All Forms of Discrimination against Women (CEDAW) and other treaties adopted by the United Nations for elimination of discrimination based on gender.

Recommendation 34: Equal rights of women to access the registration services of the business registry

The law should:

(a) Provide that women have equal and enforceable rights of access to the registration services of the business registry in order to start a business; and

(b) Ensure that requirements for business registration do not discriminate against potential registrants because of their gender.

D. Public availability of information

175. In keeping with its functions as a collector and disseminator of business-related information (see also para. 52 (b) above), the registry should make available all public information on a registered business. This may allow interested users to make more informed decisions about who they wish to do business with, and for organizations and other stakeholders to gather business intelligence. Moreover, since access to the publicly available registered information by general users also enhances certainty of and transparency in the way the registry operates, the principle of public access to the information deposited in the registry should be stated in the law of the enacting State. In most States, public access to the information in the registry is generally unqualified, and allowing full public access does not compromise the confidentiality of certain registered information, which can be protected by allowing users to access only certain types of information. For these reasons, it is recommended that the registry should be fully accessible to the public, subject only to necessary confidentiality restrictions in respect of certain registered information.

176. While providing disclosure of the publicly available registered information is an approach followed in most States, the way in which users access information, the format in which the information is presented and the type of information available varies greatly from State to State. This variation is not only a function of the technological development of a State, but of the framework for accessing such information, for example, in respect of different criteria that may be used to search the registry.

177. It is not recommended that States restrict access to search the information on the business registry or that users be required to demonstrate a reason to request access. Such a policy could seriously compromise the core function of the registry to publish and disseminate information on registered businesses. Moreover, if a discretionary element is injected into the granting of an information request, equal public access to the information in the registry could be impaired, and some potential users might not have access to information that was available to others.

178. Access to the business registry can be made subject to certain procedural requirements, such as requiring users to submit their information request in a prescribed form and to pay any prescribed fee. If a user does not use the prescribed registry form or pay the necessary fee, the user may be refused access to search the registry. As in the case of refusing access to registration of a business, the registry should be obliged to give the specific reason for refusing access to information services as soon as practicable so that the user can remedy the problem.

179. Unlike the approach adopted for registrants, the registry should not request and maintain evidence of the identity of a user as a precondition to obtaining access to the information on the business registry, since a user is merely retrieving information

contained in the public registry record. Identification should be requested of users only if it is necessary for the purposes of collecting any fees applicable to the retrieval of such information.

180. The registry may also reject an information request if the user does not enter a search criterion in a legible manner in the designated field but the registry should provide the grounds for any rejection as soon as practicable, as in the case of non-compliance with the objective conditions for registration by registrants (see paras. 170 and 171 above). In registry systems that allow users to submit information requests electronically to the registry, the software should be designed to prevent automatically the submission of information requests that do not include a legible search criterion in the designated field and to display the reasons for refusal on the user's screen.

181. Further, in order to facilitate dissemination of the information, States should be encouraged to abolish or keep to a minimum fees charged to access basic information on registered businesses (see para. 202 below). This approach may be greatly facilitated by the development of electronic registries that allow users to submit requests or make searches electronically without the need to rely on intermediation by registry personnel. Such an approach is also much cheaper for the registry. Where registration systems are paper-based, users may be required to either visit the registry office and conduct the search on site (whether manually or using ICT facilities that are available) or have information sent to them on paper. In both cases, registry staff may need to assist the user to locate the information and prepare it for disclosure. Again, paper-based information access is associated with delay, higher costs, the potential for error, and the possibility that the information obtained is less current.

182. Finally, States should devise effective means to encourage the use of information services provided by the registry. The adoption of electronic registries that allow direct and continuous access for users (except for periods of scheduled maintenance) will promote the actual use of the information. Communication campaigns on the services available from the business registry will also contribute to the active take-up of information services.

Recommendation 35: Public availability of information

The law should specify that all registered information is fully and readily available to the public unless it is protected under the applicable law.

E. Where information is not made public

183. Access to the business registry should be granted to all interested entities and to the public at large. In order to maintain the integrity and reputation of the registry as a trusted collector of information that has public relevance, access to sensitive information should be controlled to avoid any breach of confidentiality. States should thus put in place proper disclosure procedures. They may do so by adopting provisions that list which information is not available for public disclosure or they may follow the opposite approach and adopt provisions that list the information that is publicly accessible, indicating that information that is not listed cannot be disclosed.

184. Legislation in each State often includes provisions on data protection and privacy. When establishing a registry, in particular an electronic registry, States must consider issues concerning the treatment of protected data that is included in the application for registration and its protection, storage and use. Appropriate legislation should be in place to ensure that such data are protected, including rules on how data may be shared between different public authorities (see para. 114 and rec. 18 above). States should also be mindful that a major trend towards increased transparency in order to avoid the misuse of corporate vehicles for illicit purposes has resulted from international efforts to fight money-laundering, terrorist, and other illicit activities.[22]

[22] See supra, footnote 15 for additional information in respect of FATF Recommendation 24.

States should thus adopt a balanced approach that achieves both transparency and the need to protect access to sensitive information maintained in the registry.

Recommendation 36: Where information is not made public

In cases where information in the business registry is not made public, the law should:

(a) Establish which information concerning the registered business is subject to the applicable law on public disclosure of protected data and which types of information cannot be publicly disclosed; and

(b) Specify the circumstances in which the registrar may use or disclose information that is subject to confidentiality restrictions.

F. Direct electronic access to submit registration, to request amendments and to search the registry

185. If the State opts to implement an electronic registration system, the registry should be designed, if possible, to allow registry users to submit directly and to conduct searches from any electronic device, as well as from computer facilities made available to the public at offices of the registry or other locations. To further facilitate access to business registry services, the registry conditions of use may allow intermediaries (for example, lawyers, notaries or private sector third-party service providers) to carry out registration and information searches on behalf of their clients when the applicable law allows or requires the involvement of such intermediaries. If accommodated by the technological infrastructure of the State, or at a later stage of the reform, States should also consider adopting systems that allow registration, the filing of amendments and searches of the registry to be carried out through the use of mobile technology. This solution may be particularly appropriate for MSMEs in those economies where mobile services are often easier to access than electronic services.

186. When the registry allows for direct electronic access, the registry user (including an intermediary) bears the burden of ensuring the accuracy of any request for registration or amendment, or of any search of the registry. Since the required digital forms are completed by registry users without assistance from the registry staff, the potential for alteration of those forms by the registry staff is greatly minimized, as their duties are essentially limited to managing and facilitating electronic access by users, processing any fees, overseeing the operation and maintenance of the registry system and gathering statistical data. Even when direct electronic access is allowed, however, the possibility of error or misconduct on the part of the registry staff may exist if the registry staff is still required to intervene and enter information submitted to it electronically into the business registry record (see also para. 212 below).

187. Direct electronic access significantly reduces the costs of operation and maintenance of the system, increases accessibility to the registry (including when registration or searches are carried out through intermediaries) and enhances the efficiency of the registration process by eliminating any time lag between the submission of information to the registry and the actual entry of that information into the record. In some States, electronic access (from the premises of a registrant or a business, or from an office of the registry) is the only available mode of access to business registry services. In fact, in many States, where the registration system is both electronic and paper-based, by far the most prevalent mode of accessing the registry services is electronically.

188. It is thus recommended that, to the extent possible, States should establish a business registration system that is computerized and that permits direct electronic access by registry users. Given the practical considerations involved in establishing an electronic registry, multiple modes of access should be made available to registry users at least in the early stages of implementation in order to reassure those who are unfamiliar with the system. To facilitate its use, the registry should be organized to provide for multiple points of access for both electronic and paper submissions and

information requests. However, even where States continue to use paper-based registries, the overall objective is the same: that is, to make the registration and information retrieval process as simple, transparent, efficient, inexpensive and publicly accessible as possible.

Recommendation 37: Direct electronic access to submit registration and to request amendments

The law should establish that, in keeping with other applicable law of the enacting State, where information and communications technology is available, the submission of applications for the registration of a business and requests for amendment of the registered information of a business may be done remotely through electronic means.

Recommendation 38: Direct electronic access to search the registry

The law should establish that, where information and communications technology is available, searches of the registry may be done remotely through electronic means.

G. Facilitating access to information

1. Type of information provided

189. Information can be of particular value to users if it is available to the public, although the type of registered information that is available will depend on the legal form of the business being searched and on the applicable law regarding what registered information is protected and what may be made available to the public. Valuable information on a business that may be available on the registry: the profile of the business and its officers (directors, auditors); annual accounts; a list of the business's divisions or places of business; the notice of registration or incorporation; the publication of the business's memoranda, articles of association, or other rules governing the operation or management of the business; existing names and history of the business; insolvency-related information; any share capital; certified copies of registry documents; and notifications of events (late filing of annual accounts, newly submitted documents, etc.). Other valuable information relating to the business registry may include the identification of relevant additional laws and regulations, or information on the expected turnaround time in the provision of registry information services and fees for such services. In addition, some registries prepare reports relating to the operation of the business registry that may provide registry designers, policymakers and academic researchers with useful data (for example, on the volume of registrations and searches, operating costs, or registration and search fees collected over a given period). Information on business data, annual accounts and periodic returns, as well as information about fees for registry services, are usually the most popular pieces of information and the most requested by the public. When registration procedures permit, and subject to the law of the enacting State, business registries may also make available to users disaggregated statistical information that has voluntarily been submitted in respect of the gender, ethnicity, or language group of persons associated with the business. Such information can be of particular importance for States wishing to develop policies and programmes to support under-represented societal groups (see paras. 56 and 130 above).

190. If the State is one in which member or shareholder details must be registered, the public may also be granted access to such information. A similar approach may be taken with respect to information on the beneficial ownership of a business, which may be made available to the public in order to allay concerns over the potential misuse of business entities. However, the sensitive nature of the information on beneficial ownership may require the State to exercise caution before opting for disclosure of beneficial ownership without any limitation.[23]

[23] See supra, footnote 15 for further information in respect of FATF Recommendation 24.

2. Removing unnecessary barriers to accessibility

191. The registry needs to ensure that searchable information is easily accessible; even though the information is available, it does not always mean that it is easy for users to access. There are often different barriers to accessing the information, such as the format in which the information is presented: if special software is required to read the information, or if it is only available in one particular format, it cannot be said to be broadly accessible. In several States, some information is made available in paper and electronic formats; however, information made available only on paper likely entails reduced public accessibility. Other barriers that may make information less accessible are: limiting search criteria to unique business identifiers (as opposed to also allowing searches by business names); charging fees for the provision of information services (see para. 202 below); requiring users to register prior to providing access to the information, and charging a fee for user registration. States should find the most appropriate solutions according to their needs, their conditions and their laws.

192. Some States not only provide for electronic information searches but also distribute the information through other channels that can complement the use of the Internet or that may even represent the main method of distribution if an online registration system is not yet fully developed. The following additional means of sharing information are used in some States:

(a) Telephone services to provide information on registered businesses and product ordering;

(b) Subscription services to inform subscribers about events pertaining to specified businesses or for announcements of certain kinds of business registrations;

(c) Ordering services to enable access to various products, most often using an Internet browser; and

(d) Delivery services to convey various products, such as transcripts of publicly available registered information on a business, paper lists, or electronic files with selected data.

193. One often overlooked barrier to accessing business registry services, whether to register a business or to review information in the registry, is a lack of knowledge of the official language(s). Providing forms and instructions in other languages is likely to make the registry more accessible to users. However, business registries seldom offer such services in languages additional to the official language(s). Since making all information available in additional languages may incur additional expense for the registry, a more modest approach may be to consider making information on only core aspects of registration, for example in respect of instructions or forms, available in a non-official language. In deciding which non-official language would be most appropriate, the registry may wish to base its decision on historical ties, the economic interests of the jurisdiction and the geographic area in which the jurisdiction is situated (see paras. 133 to 135 and rec. 22 above), as well as consider the use of a widely used language that facilitates cross-border communication.

3. Bulk information

194. In addition to making information on individual businesses available, business registries in some jurisdictions also offer the possibility of obtaining “bulk” information, i.e. a compilation of information on selected, or all, registered businesses. Such information can be requested for commercial or non-commercial purposes and is often used by public authorities as well as private organizations (such as banks) that deal with businesses and perform frequent data processing on them. Distribution of bulk information varies according to the needs and capability of the receiving entity. In performing this function, one approach would be for the registry to ensure the electronic transfer of selected data on all registered entities, combined with the transfer of data on all new registrations, amendments, and deregistration during a specified period. Another option for the registry would be to make use of web-based or similar services for system-to-system integration that provide both name searches

and direct access to selected data on specific entities. Direct access avoids unnecessary and redundant storage of information by the receiving organization, and States where such services are not yet available should consider it as a viable option when streamlining their business registration system. Distribution of bulk information can represent a practical approach for the registry to derive self-generated funds (see para. 202 below).

Recommendation 39: Facilitating access to information

The law should ensure the facilitation of access to public information on registered businesses by avoiding the creation of unnecessary barriers such as: requirements for the installation of specific software; charging expensive access fees; or requiring users of information services to register or otherwise provide information on their identity.

H. Cross-border access to publicly available registered information

195. The internationalization of businesses of all sizes creates an increasing demand for access to information on businesses operating outside their national borders. However, official information on registered businesses is not always readily available on a cross-border basis due to technical or language barriers. Making such cross-border access as simple and fast as possible is thus of key importance in order to ensure the traceability of businesses, the transparency of their operations and to create a more business-friendly environment.

196. A range of measures can be adopted to facilitate access by foreign users of the business registry. Certain measures can be implemented to ensure the easy retrieval of information stored in the business registry by such users. In addition to allowing for registration and search requests in at least one non-official language (see para. 193 above), adopting easy-to-use search criteria and a simply understood information structure would further simplify access by users from foreign jurisdictions. States may wish to consider coordinating with other States (at least with those from the same geographic region) in order to adopt approaches that would allow for cross-border standardization and comparability of the information transmitted. Another group of measures that could be adopted pertain to providing information in a non-official but widely understood language on how foreign users can access the services of the business registry. As in the case of domestic users, users from foreign jurisdictions should be advised of the possibility of establishing direct contact with registry personnel through a dedicated email account of the registry, electronic contact forms or client service telephone numbers (see para. 120 above).

Recommendation 40: Cross-border access to publicly available registered information

The law should ensure that systems for the registration of businesses adopt solutions that facilitate cross-border access to the public information in the registry.

VII. Fees

197. It is standard practice in many States to require the payment of a fee for registration services. In return for that fee, registered businesses receive access to business registry services and to the many advantages that registration offers them. The most common types of fees are those payable for registration of a business and for the provision of information products and services, while to a lesser extent, fines may also generate funds. In some jurisdictions, registries may also charge an annual fee to keep a business in the registry (these fees are unrelated to any particular activity), as well as fees to register annual accounts or financial statements.

198. Although they generate revenue for the registries, fees can affect a business's decision whether to register, since such payments may impose a burden, in particular on MSMEs (see also paras. 9 and 25 above). Fees for new registration, for example,

can prevent businesses from registering, while annual fees to keep a company in the registry or to register annual accounts could discourage businesses from maintaining their registered status. States should take these and other indirect effects into consideration when establishing fees for registration services. States seeking to increase the business registration of MSMEs and to support such businesses throughout their lifecycle should consider offering registration and post-registration services free of charge. In several States that consider business registration as a public service intended to encourage businesses of all sizes and legal forms to register rather than as a revenue-generating mechanism, registration fees are often set at a level that is not prohibitive for MSMEs. In such States, the use of flat fee schedules for registration, regardless of the size of the business, is the most common approach. There are also examples of States that provide business registration free of charge. In States with enhanced interoperability among the business registry, taxation and social security authorities that results in the adoption of integrated registration and payment forms, a uniform approach should be taken to fees charged for registration by all relevant authorities.

A. Fees charged for business registry services

199. Striking a balance between the sustainability of the registry operations and the promotion of business registration is a key consideration when setting fees, regardless of the type of fee. One recommended approach followed in many States is to apply the principle of cost-recovery, according to which there should be no profit generated from fees in excess of costs. When applying such a principle, States should first assess the level of revenue needed from registry fees to achieve cost-recovery, taking into account not only the initial costs related to the establishment of the registry but also the costs necessary to fund its operation. These costs may include: (a) the salaries of registry staff; (b) upgrading and replacing hardware and software; (c) ongoing staff training; and (d) promotional activities and training for registry users. In the case of online registries, if the registry is developed in partnership with a private entity, it may be possible for the private entity to make the initial capital investment in the registry infrastructure and recoup its investment by taking a percentage of the service fees charged to registry users once the registry is operational.

200. Even when the cost-recovery approach is followed, there is considerable variation in its application by States, as it requires a determination of which costs should be included. In one State, fees for new registrations are calculated according to costs incurred by an average business for registration activities over the life cycle of the business. In this manner, potential amendments, apart from those requiring official announcements, are already covered by the fee that companies pay for new registration. That approach is said to result in several benefits, such as: (a) rendering most amendments free of charge, which encourages compliance among registered businesses; (b) saving resources related to fee payment for amendments for both the registry and the businesses; and (c) using the temporary surplus produced by advance payment for amendments to improve registry operations and functions. In other cases, States have decided to charge fees below the actual cost that the business registry incurs in order to promote business registration. In such cases, however, the services provided to businesses would likely be subsidized with public funds.

201. In setting fees in a mixed registry system, it may be reasonable for the State to charge higher fees to process applications and information requests submitted in paper form because they must be processed by registry staff, whereas electronic applications and information requests are directly submitted to the registry and are less likely to require attention from registry staff. Charging higher fees for paper-based registration applications and information requests will also encourage the user community to eventually transition to using the direct electronic registration and information request services. However, in making that decision, States may wish to consider whether charging such fees may have a disproportionate effect on MSMEs that may not have ready access to electronic services.

Recommendation 41: Fees charged for business registry services

The law should establish fees, if any, for business registration and post-registration services at a level that is low enough to encourage business registration, in particular of MSMEs, and that, in any event, does not exceed a level that enables the business registry to cover the cost of providing those services.

B. Fees charged for information

202. In various States, fees charged for the provision of information services are a more viable option for registries to derive self-generated funding. Such fees also motivate registries to provide valuable information products to their users, to maintain the currency of their records and to offer more advanced information services. A recommended good practice for States aiming to improve this type of revenue generation would be to avoid charging fees for basic information services such as simple name or address searches (see also para. 178 above), but to charge for more advanced information services that require greater processing by the business registry or that are more expensive to provide (e.g. direct downloading, subscription services or bulk information services; see also paras. 194 and 197 above). Since fees charged for information services are likely to influence users, such fees should be set at a level low enough to make the use of such services attractive. Again, the level of any such fee should be established according to the principle of cost-recovery, so as not to generate a profit in addition to covering the cost of the service. Moreover, when fees for information services are charged, States might consider establishing different fee regimes for different categories of user, such as private users, corporate or public entities, occasional users and users with an established user account. This approach would take account of the frequency with which or the purpose for which users request information services, their need for expedited or regular service, or the type of information products requested (e.g. on individual businesses or bulk information).

Recommendation 42: Fees charged for information

The law should establish that:

(a) Information contained in the business registry should be available to the public free of charge; and

(b) Information services that require greater processing by the business registry could be provided for a fee that reflects the cost of providing the information products requested.

C. Publication of fee amounts and methods of payment

203. Regardless of the approach taken in determining applicable fees, States should clearly establish the amount of any registration and information fees charged to registry users, as well as the acceptable methods of payment. Such methods of payment should include allowing users to enter into an agreement with the business registry to establish a user account for the payment of fees. States in which businesses can register directly online should also consider developing an electronic platform that enables businesses to pay online when filing their application with the registry (see paras. 76 above and 204 below). When publicizing the amount of registration and information fees, one approach would be for the State to set out the fees in either a formal regulation or more informal administrative guidelines, which the registry can revise according to its needs. If administrative guidelines are used, this approach would provide greater flexibility to adjust the fees in response to subsequent events, such as the need to reduce the fees once the capital cost of establishing the registry has been recouped. The disadvantage of this approach, however, is that this greater flexibility could be abused by the registry to adjust the fees upwards unjustifiably. Alternatively, a State may choose not to specify the level of the fees payable, but rather to designate the authority that is authorized to establish the fees payable. The

State may also wish to consider specifying in the law the types of service that the registry may or must provide free of charge.

Recommendation 43: Publication of fee amounts and methods of payment

The law should ensure that fees payable, if any, for registration and information services are widely publicized, as are the acceptable methods of payment.

D. Electronic payments

204. States should consider developing an electronic platform that enables businesses to pay online (including the use of mobile payment systems and other modern forms of technology) to access registry services for which a fee is charged (see para. 76 above). This will require enacting appropriate laws concerning electronic payments in order to enable the registry to accept online payments. Such laws should address issues such as who should be allowed to provide the service and under which conditions; access by users to online payment systems; the liability of the institution providing the service; customer liability and error resolution. Finally, such laws should also be consistent with the general policy of the State on financial services.

Recommendation 44: Electronic payments

The law should enable and facilitate electronic payments.

VIII. Liability and sanctions

205. While each business must ensure that its registered information is kept as accurate as possible by submitting amendments in a timely fashion, the State should have the ability to enforce proper compliance with initial and ongoing registration requirements. Compliance with those requirements is usually encouraged through the availability of enforcement mechanisms such as the imposition of sanctions on businesses that fail to provide timely and accurate information to the registry (see paras. 155 and 156 and rec. 29 above).

206. In addition, a system of notices and warnings could be set up in order to alert businesses of the consequences of failure to comply with specific requirements of business registration (for example, late filing of periodic returns). When the registry is operated electronically, automated warnings and notices could be periodically sent out to registered businesses. In addition, notices and warnings could be visibly displayed on the premises of the registration offices and routinely published electronically and in print media. To better assist businesses, in particular MSMEs, States could also consider designing training programmes to raise the awareness of businesses regarding their liability to comply with registration requirements and to advise them on how to discharge that liability.

A. Liability for misleading, false or deceptive information

207. States should adopt provisions that establish liability for any misleading, false or deceptive information that is submitted to the registry upon registration or amendment of the registered information of a business, and for failure to submit information required by the business registry when it ought to have been submitted. Care should be taken, however, to distinguish inadvertent failure to submit the required information from intentional submission of misleading, false or deceptive information, as well as from the intentional failure to submit information that could amount to submitting misleading, false or deceptive information. While wilful actions or omissions should be sanctioned with appropriate measures, inadvertent failure to submit the required information should result in less punitive measures, in particular if the inadvertent failure is rectified in a timely fashion.

Recommendation 45: Liability for misleading, false or deceptive information

The law should establish appropriate liability for any misleading, false or deceptive information that is provided to the business registry or for failure to provide the required information.

B. Sanctions

208. The establishment of fines for the breach of obligations related to business registration, such as late filing of periodic returns or failure to record changes in the registered information (see para. 157 above) are measures often adopted by States to enforce compliance. Fines can also represent a means of revenue generation, but their imposition again requires a balanced approach. Several States use fines as disincentives for businesses that are required to register to operate outside of the formal economy. In some cases, legislative provisions link the company's enjoyment of certain benefits to the timely filing of required submissions; in others, a series of increasing fines for late filing is enforced that can ultimately result in compulsory liquidation. However, if fines are used as the main source of funding for the business registry, it can have a detrimental effect on the efficiency of the registry. Since registries in such States lose revenue generated by fines when compliance improves, there is little motivation for such registries to improve the level of compliance. States should, therefore, not rely upon fines as the main source of revenue of a business registry; instead, fines should be established and imposed at a level that encourages business registration without negatively affecting the funding of registries once compliance improves.

209. The recurrent use of fines to sanction the breach of initial and ongoing registration obligations might discourage businesses, in particular MSMEs, from registering or properly maintaining their registration. States should consider establishing a range of possible sanctions that would apply depending on the seriousness of the violation or, in the case of MSMEs failing to meet certain conditions established by the law, to forego any sanction for businesses defaulting for the first time.

210. In order to further clarify potential liability, States should also ensure that a notice on the business registry clearly specifies whether the information it contains has legal effect and is opposable to third parties in the form in which it is deposited in the registry (see also para. 52(g) and rec. 10 (g) above).

Recommendation 46: Sanctions

The law should:

(a) Establish appropriate sanctions that may be imposed on a business for a breach of its obligations regarding information to be submitted to the registry in an accurate and timely fashion;

(b) Include provisions pursuant to which a breach of obligation may be forgiven provided it is rectified within a specified time; and

(c) Require the registrar to ensure broad publication of those rules.

C. Liability of the business registry

211. The law of the State should provide for the allocation of liability for loss or damage caused by error or through negligence in the administration or operation of the business registration and information system.

212. As noted above, users of the registry bear the liability for any errors or omissions in the information contained in an application for registration or a request for an amendment submitted to the registry, and bear the burden of making the necessary corrections. If applications for registration and amendment are directly submitted by users electronically without the intervention of registry staff, the potential liability of

the enacting State would be limited to system malfunctions, since any other error would be attributable to users. However, if paper-based application forms or amendment requests are submitted, the State must address the extent of its potential liability for the refusal or failure of the registry to enter such information correctly. A similar approach should be taken in States with electronic business registration systems that require certain information submitted electronically to nonetheless be entered by registry staff into the registry record and where such entry might also be subject to error (see also para. 186 above).

213. Further, it should be made clear to registry staff and registry users that registry staff may not provide legal advice on requirements for effective registration and amendment, or on their legal effects, unless specifically authorized to do so, nor should staff make recommendations on which intermediary (if any) the business should choose to assist in the registration or amendment process. However, registry staff should be permitted to give practical guidance with respect to the registration and amendment processes. In States that opt for an approval system, this measure on the provision of legal advice should, of course, not be applicable to the judges, notaries and lawyers entrusted with the administration of registration procedures.

214. While it should be made clear that registry staff may not provide legal advice (subject to the type of registration system of the State), the State must also address whether and to what extent it should be liable if registry staff nonetheless provide incorrect or misleading information on the requirements for effective registration and amendment or on the legal effects of registration.

215. In addition, in order to minimize the potential for misconduct by registry staff, the registry should consider establishing certain practices such as instituting financial controls that strictly monitor staff access to cash payments of fees and to the financial information submitted by users who use other modes of payment. Such practices may include the institution of audit mechanisms that regularly assess the efficiency and the financial and administrative effectiveness of the registry.

216. If States accept liability for loss or damage caused by system malfunction or error or misconduct by registry staff, they may consider whether to allocate part of the registration and information fees collected by the registry to a compensation fund to cover possible claims, or whether the claims should be paid out of general revenue. States might also decide to set a maximum limit on the monetary compensation payable in respect of each claim.

Recommendation 47: Liability of the business registry

The law should establish whether and to what extent the State is liable for loss or damage caused by error or negligence of the business registry in the registration of businesses or the administration or operation of the registry.

IX. Deregistration

A. Deregistration

217. Deregistration occurs once the business, for whatever reason, has permanently ceased to operate, including as a result of a merger, or forced liquidation due to insolvency, or in cases where applicable law requires the registrar to deregister the business for failing to fulfil certain legal requirements. When a business is deregistered, the public details in respect of the business usually remain visible on the register, but the status of the business is changed to indicate that it has been removed or that the business is no longer registered.

218. States should consider the role of the registry in deregistering a business. In most jurisdictions, deregistration of a business is included as one of the core functions of the registry. It appears to be less common, however, to entrust the registry with the decision whether or not a business should be deregistered as a result of insolvency proceedings or winding-up. In States where this function is included, statutory

provisions determine the conditions that result in deregistration and the procedures to follow in carrying it out.

219. Because deregistration pursuant to winding-up or insolvency proceedings of a business are matters regulated by laws other than those governing the registration of a business, and since such laws vary greatly from State to State, this legislative guide refers only to deregistration of those solvent businesses that the enacting State has deemed dormant or no longer in operation pursuant to the legal regime governing the business registry. In such cases, most States allow for deregistration to be carried out either upon the request of the business (often referred to as "voluntary deregistration") or at the initiative of the registry (frequently referred to as "striking-off"). In order to avoid difficulties for the registrar in determining when an exercise of the power to deregister is warranted because a business is a dormant solvent business or when it is no longer in operation, the law should clearly establish the conditions that must be fulfilled. This approach will also avoid a situation where that power may be exercised in an arbitrary fashion. Permitting a registrar to carry out deregistration pursuant to clear rules permits the maintenance of a current registry and avoids cluttering the record with businesses that do not carry on any activity. When deregistration is initiated by the registrar, there must be reasonable cause to believe that a registered business has not carried on business or that it has not been in operation for a certain period of time. Such a situation may arise, for example, when the State requires the business to submit periodic reports or annual accounts and a business has failed to comply within a certain period of time following the filing deadline. In any case, the ability of the registrar to deregister a business should be limited to ensuring compliance with clear and objective legal requirements for the continued registration of a business. In several States, before commencing deregistration procedures, the registrar must inform the business in writing of its pending deregistration and allow sufficient time for the business to reply and to oppose that decision. Only if the registrar receives a reply that the business is no longer active or if no reply is received within the time prescribed by law will the business be deregistered.

220. Deregistration may also be carried out upon the request of the business, which most often occurs if the business ceases to operate or has never operated. States should specify in which circumstances businesses can apply for deregistration and which persons associated with the business are authorized to request deregistration on behalf of the business. Voluntary deregistration is not an alternative to more formal proceedings, such as winding-up or insolvency, when those proceedings are prescribed by the law of the State in order to liquidate a business.

221. Deregistration should in principle be free of charge regardless of whether it is carried out at the initiative of the registrar or upon the request of the business. Further, States should consider adopting simplified procedures for the deregistration of MSMEs.

Recommendation 48: Voluntary deregistration

The law should:

(a) Specify the conditions under which a business can request deregistration;

(b) Require the registrar to deregister a business that fulfils those conditions; and

(c) Permit the State to adopt simplified procedures for deregistration of MSMEs.

Recommendation 49: Involuntary deregistration

The law should specify the conditions pursuant to which a registrar can deregister a business.

B. Process of deregistration and time of effectiveness of deregistration

222. Regardless of whether deregistration is requested by the business or initiated by the registrar, where the business is registered as a separate entity, the registry must issue a public notice of the proposed deregistration and when that deregistration will become effective. Such an announcement is usually published on the website of the registry or in official publications such as the National Gazette or in both. This procedure ensures that businesses are not deregistered without providing interested third parties (e.g. creditors, members of the business) the opportunity to protect their rights (the usual practice is to submit a written complaint corroborated by any required evidence to the registry). After the period indicated in the announcement has passed, a notation is made in the registry that the business is deregistered. Prior to the deregistration becoming effective, the applicable law may require that a further notice be published. Pending completion of the deregistration procedure, the business remains in operation and will continue to carry on its activities.

223. The law should establish the time of effectiveness of the deregistration, and the status of the business in the registry should indicate the time and date of its effect, in addition to the reasons for the deregistration. The registrar should enter such information in the registry as soon as practicable so that users of the registry are apprised without undue delay of the changed status of the business.

224. Registries should retain historical information on businesses that have been deregistered, leaving it to the State to decide the appropriate length of time for which such information should be preserved (see paras. 226 to 229 and rec. 52 below). When the State has adopted a unique identifier system, the information related to the business should remain linked to that identifier even if the business is deregistered.

Recommendation 50: Process of deregistration and time and effectiveness of deregistration

The law should:

(a) Provide that a written notice of the deregistration is sent to the registered business;

(b) Establish that the deregistration is publicized in accordance with the legal requirements of the enacting State;

(c) Specify when the deregistration of a business is effective; and

(d) Specify the legal effects of deregistration.

C. Reinstatement of registration

225. In several States, it is possible to reinstate the registration of a business that has been deregistered at the initiative of the registrar or upon the request of the business, provided that the request to the registrar for reinstatement meets certain conditions (in some States, this latter procedure is called “administrative restoration”) or is made by court order. In certain States, both procedures are available and choosing either of them usually depends on the reason for which the business was deregistered or the purpose of restoring the business. The two procedures usually differ in some key aspects, such as who can apply to have the business restored, which business entities are eligible for restoration and the time limit for filing an application for restoration. The requirements for “administrative restoration” in States that provide for both procedures are often stricter than those for restoration by court order. For example, in such States, only an aggrieved person, which may include a former director or member, can submit an application for reinstatement to the registrar, and the time limit within which the application can be submitted to the registry may be shorter than the time granted to apply for a court order. Regardless of the method(s) chosen by the State to permit reinstatement of the registration of a business, once the

registration has been reinstated, the business is deemed to have continued its existence as if it had not been deregistered, which includes maintaining its former business name. In cases where the business name is no longer available (as having been assigned to another business registered in the interim), procedures are usually established by the State to govern the change of name of the reinstated business.

Recommendation 51: Reinstatement of registration

The law should specify the circumstances under which and the time limit within which the registrar is required to reinstate a business that has been deregistered.

X. Preservation of records

A. Preservation of records

226. As a general rule, the information in the business registry should be kept indefinitely. The enacting State should decide on the appropriate length of time for which such information should be kept and may choose to apply its general rules on the preservation of public documents.

227. However, the length of the preservation period for records is most often influenced by the way the registry operates, and whether the registry is electronic, paper-based or a mixed system. In the case of electronic registries, the preservation for extended periods of time of original documents submitted in hard copy might not be necessary, provided that the information contained in such documents has been recorded in the registry or that the paper documents have been digitized (through scanning or other electronic processing).

228. Those States with paper-based or mixed registration systems, for example, must decide the length of time for which the paper documents submitted to it should be kept by the registry, in particular in situations where the relevant business has been deregistered. Considerations relating to the availability of storage space and the expense of storing such documents would likely play a role in that decision.

229. Regardless of the way in which the business registry is operated, providing prospective future users with long-term access to information maintained in the registry is of key importance, not only for historical reasons, but also to provide evidence of past legal, financial and management issues relating to a business that might still be of relevance. The preservation of electronic records is likely to be easier and more cost-effective than preserving paper records. In order to minimize the cost and considerable storage space required for the preservation of documents in hard copy, paper-based registries that cannot convert the documents received by it into an electronic form may adopt alternative solutions (for example, the use of microfilm) that allow for the transmission, storage, reading, and printing of the information.

Recommendation 52: Preservation of records

The law should provide that documents and information submitted by the registrant and the registered business, including information in respect of deregistered businesses, should be preserved by the registry so as to enable the information to be retrieved by the registry and other interested users.

B. Alteration or deletion of information

230. The law should establish that the registrar may not alter or remove registered information, except as specified by law and that any change to that information can be made only in accordance with the applicable law. However, to ensure the smooth functioning of the registry, in particular when registrants submit registration information using paper forms, the registrar should be authorized to correct its own clerical errors (see paras. 28, 45 and 147 above) made in entering the information from the paper forms into the registry record. If this approach is adopted, notice of

this or any other correction should promptly be sent to the business (and a notification of the nature of the correction and the date it was effected should be added to the public registry record linked to the relevant business). Alternatively, the State could require the registrar to notify the business of its error and permit the submission of an amendment free of charge.

231. Further, the potential for misconduct by registry staff should be minimized by: (a) designing the registry system to make it impossible for registry staff to alter the time and date of registration or any registered information submitted by a registrant; and (b) designing the registry infrastructure so as to ensure that it can preserve the information and the documents concerning a deregistered business for as long as prescribed by the law of the enacting State.

Recommendation 53: Alteration or deletion of information

The law should provide that the registrar does not have the authority to alter or delete information contained in the business registry record except in those cases specified in the law.

C. Protection against loss of or damage to the business registry record

232. To protect the business registry from the risk of loss or physical damage or destruction (see also para. 52(f) and rec. 10(f) above), the State should maintain back-up copies of the registry record. Any rules governing the security of other public records in the enacting State might be applicable in this context.

233. The threats that can affect an electronic registry also include criminal activities that may be committed through the use of technology. Providing effective enforcement remedies would thus be an important part of a legislative framework aimed at supporting the use of electronic solutions for business registration. Typical issues that should be addressed by enacting States would include unauthorized access or interference with the electronic registry; unauthorized interception of or interference with data; misuse of devices; fraud and forgery.

Recommendation 54: Protection against loss of or damage to the business registry record

The law should:

(a) Require the registrar to protect the registry records from the risk of loss or damage; and

(b) Establish and maintain back-up mechanisms to allow for any necessary reconstruction of the registry record.

D. Safeguard from accidental destruction

234. An aspect that may warrant consideration by States is that of natural hazards or other accidents that can affect the processing, collection, transfer and protection of the data housed in the electronic registry and under the liability of the registry office. Given user expectations that the business registry will function reliably, the registrar should ensure that any interruptions in operations are brief, infrequent and minimally disruptive to users and to States. For this reason, States should devise appropriate measures to facilitate protection of the registry. One such measure could be to develop a business continuity plan that sets out the necessary arrangements for managing disruptions in the operations of the registry and ensures that services to users can continue. In one State, for example, the registry has established a “risk register”, i.e. a dynamic document that is updated as changes in the operation of the registry occur. Such a risk register allows the registrar to identify possible risks for the registration service as well as the appropriate mitigation measures. Designated staff are required to report on an annual basis the threats to the registry and the relevant actions taken to mitigate such threats.

Recommendation 55: Safeguard from accidental destruction

The law should provide that appropriate procedures should be established to mitigate risks from force majeure, natural hazards, or other accidents that can affect the processing, collection, transfer and protection of data housed in electronic or paper-based business registries.

XI. Underlying legal reforms

A. Changes to underlying laws

235. Business registration reform can entail amending different aspects of the law of a State. In addition to legislation that is meant to prescribe the conduct of business registration, States may need to update or change laws that may simply affect the registration process in order to ensure that such laws respond to the needs of MSMEs and other businesses. There is no single solution in this process that will work for all States, since the reforms will be influenced by a State's legislative approach. However, the reforms should aim at developing laws that support business registration with features such as: transparency and accountability, clarity and the use of flexible legal forms for business.

236. Regardless of the approach chosen and the extent of the reform, changes in laws should carefully consider the potential costs and benefits of this process, as well as the financial capacity and the commitment of the government and whether sufficient human resources are available to implement the reform. An important preparatory step of a reform programme involves a thorough inventory and analysis of the laws that are relevant to business registration with a view to evaluating the need for change, the possible solutions, and the prospects for effective reform. In some cases, this assessment could result in deferring any major legislative reform, particularly if significant gains to the process of simplification can be achieved by the introduction of operational tools. Once it has been decided what changes should be made and how, it is equally important to ensure their implementation. In order to facilitate successful reform, the implementation of the new legal regime should be carefully monitored.

B. Clarity of the law

237. For States wishing to facilitate the establishment of businesses, in particular of MSMEs, it is important to review existing laws to identify possible impediments to the simplification of the registration process.

238. These reforms may include shifting the focus of the law towards privately held businesses, and away from public limited companies, particularly if the former currently account for the majority of the firms in the State. Other approaches may involve moving the legal provisions pertaining to small businesses to the beginning of any new law on legal forms for business in order to make such provisions easier to find or to use simpler language when legislation is updated.

239. One reform that would greatly clarify the law would be a comprehensive review of all laws affecting business registration a simplification of their provisions and their unification into a single piece of legislation. This could also facilitate building some flexibility into the system, with the general principles of business registration incorporated in the legislation and more detailed provisions on the operation of the system, which could be introduced even at a later stage, that are left to other operational tools.

Recommendation 56: Clarity of the law

The law should, to the extent possible, consolidate legal provisions pertaining to business registration in a single clear legislative text.

C. Flexible legal forms for business

240. Entrepreneurs tend to choose the simplest legal form available for their business when they decide to register, and States with rigid legal forms have an entry rate considerably lower than those with more flexible requirements. For example, in States that have introduced simplified legal forms for business, the registration process for these business types is much faster and less costly. Businesses are not required to publish the rules governing the operation or management of their business in the Official Gazette; instead, these can be posted online through the business registry. There are many States in which the involvement of a lawyer, notary or other intermediary is not obligatory for the preparation of documents or conducting a business name search.

241. Legislative changes to abolish or reduce the minimum paid in capital requirement for businesses also tend to facilitate MSME registration, since micro and small businesses may have limited funds to meet a minimum capital requirement, or they may be unwilling or unable to commit their available capital in order to establish their business. Instead of relying on a minimum capital requirement to protect creditors and investors, some States have implemented alternative approaches such as the inclusion of provisions on solvency safeguards in their legislation; conducting solvency tests; or preparing audit reports that show that the amount a company has invested is enough to cover the establishment costs.

242. Introducing simplified forms of limited liability and other types of businesses may also be coupled with a considerable reduction or complete abolition of the minimum capital requirements that other legal forms of business are required to meet upon formation. In several States that have adopted simplified legal business forms, the minimum capital requirement has been abolished completely, and in other cases, initial registration or incorporation has been allowed upon deposit of a nominal amount. In other States, progressive capitalization has been introduced, requiring the business to set aside a certain percentage of its annual profits until its reserves and the share capital jointly total a required amount. In other cases, progressive capitalization is required only if the simplified limited liability entity intends to graduate into a full-fledged limited liability company (for which a higher share capital would be required), but there is no obligation to do so.

243. Another reform that would be conducive to improved business registration is to provide freedom to entrepreneurs to conduct all lawful activities without requiring them to specify the scope of their venture. This is particularly relevant in those jurisdictions where entrepreneurs are required to list in their articles of association the specific activity or activities in which they intend to engage so as to restrain businesses from acting beyond the scope of their goals and, if needed, to protect shareholders and creditors. Allowing for the inclusion in the articles of association (or other rules governing the operation or management of a business) of a so-called "general purpose clause" which states that the business's aim is to conduct any trade or business and grants it the power to do so, facilitates business registration. This approach is far less likely to require additional or amended registration in the future, as businesses may change their focus and activities without amending the registration, provided that the new business activity is a lawful one and that the appropriate licences have been obtained. Additional options to the inclusion of a general purpose clause, which would support the same goal, could include passing legislation that makes unrestricted objectives the default rule in the jurisdiction, or abolishing any requirement for businesses, in particular those that are privately held, to state objectives for registration purposes.

Recommendation 57: Flexible legal forms for business

(a) The law should permit flexible and simplified legal forms for business in order to facilitate and encourage registration of businesses of all sizes; and

(b) States should consider providing for the optional use of intermediaries by MSMEs.

D. Legislative approach to accommodate the evolution of technology

244. As noted above (see paras. 8 and 85 and rec. 13), this guide supports the view that online registration systems greatly facilitate the registration of MSMEs. If appropriate laws governing electronic transactions are not in place, a preliminary step for a reform aimed at supporting electronic business registration would be to recognize and regulate the use of such electronic transactions in the domestic legislation. In this respect, States should consider adopting laws permitting electronic signatures and the submission of electronic documents (see para. 85 above).

245. Since information technology is a field marked by rapid technological evolution, however, requirements in the law that establish a technology-specific approach may result in preventing further technological development. States should thus consider establishing only guiding legal principles in their legislation (in particular those of technical neutrality and functional equivalence, see para. 85 and rec. 13 above), leaving the specific provisions regulating the detailed functioning and requirements of an online registration system to other policy or legal tools.

Recommendation 58: Legislative approach to accommodate the evolution of technology

The law should establish provisions on electronic transactions that accommodate the evolution of technology.

H. Note by the Secretariat on adopting an enabling environment for the operation of micro, small and medium-sized enterprises (MSMEs)

(A/CN.9/941)

[Original: English]

Contents

Introduction

1. The current revision of the document on adopting an enabling legal environment for the operation of micro, small and medium-sized enterprises (MSMEs) is based on the deliberations and decisions of Working Group I at its thirtieth session (New York, 12 to 16 March 2018).

2. In order to be consistent with the final form in which the document will be published, guidance to the changes arising from the thirtieth session of the Working Group is not reflected in footnotes to the text and the Commission might wish to refer to the report of that session (A/CN.9/933).

3. In the final version of the document, text along the following lines will be inserted into the preface:

> "*In light of the disadvantaged position in which many micro, small and medium-sized enterprises (MSMEs) are found globally, UNCITRAL, at its forty-sixth session in 2013, decided to commence work on reducing the legal obstacles faced by MSMEs throughout their life cycle, and in particular, specified that such work should focus on MSMEs in developing economies. In taking up this topic, UNCITRAL decided to focus its attention, at least initially, on the reduction of legal obstacles that MSMEs face at the beginning of their life cycle*".

4. The text of the document on adopting an enabling legal environment for the operation of MSMEs is reproduced as an Annex to this introduction.

Annex

Adopting an enabling legal environment for the operation of micro, small and medium-sized enterprises (MSMEs)

Introduction

1. The work of UNCITRAL on micro, small and medium-sized enterprises (MSMEs) aims at facilitating the formalization and operation of such enterprises throughout their life cycle. Undertaking this work emphasizes the relevance and importance of UNCITRAL in the promotion of the rule of law at the national and international levels and for the implementation of the international development agenda. UNCITRAL's work also supports the achievement of the Sustainable Development Goals, which build upon the successes of the Millennium Development Goals, and which specifically note the encouragement of the formalization and growth of MSMEs in target 3 of goal 8 to "Promote inclusive and sustainable economic growth, employment and decent work for all". By focusing on the legal environment for the operation of MSMEs, UNCITRAL's work is intended to be applicable to all States, regardless of the level of development of the local economy.

2. The global community has recognized the importance of fair, stable and predictable legal frameworks for: generating inclusive, sustainable and equitable development, economic growth and employment; stimulating investment; and facilitating entrepreneurship, as well as UNCITRAL's contribution to the attainment of those goals through its efforts to modernize and harmonize international trade law.[1] Work aimed at supporting and fostering the establishment and growth of MSMEs further underpins UNCITRAL's contribution in providing internationally acceptable rules in commercial law, and supporting the enactment of those rules to assist in strengthening the economic fibre of States.

3. To accompany UNCITRAL's work programme on adopting an enabling legal environment for the operation of MSMEs, this text serves as an introduction and overarching framework for UNCITRAL's current and future work on MSMEs. This contextual framework is underpinned by the legal standards developed to provide legislative pillars; importantly, such an approach could accommodate expansion through the addition of other legislative texts regarding MSMEs as such texts might be adopted by the Commission. This work is further underpinned by texts already developed by UNCITRAL, such as the Model Law on Secured Transactions (2016), which seeks to increase access to credit at affordable rates, and the Model Law on Public Procurement (2011), which promotes access to and participation of small and medium-sized enterprises (SMEs), a subset of MSMEs, to public procurement markets. MSMEs will benefit from other work, including UNCITRAL's electronic commerce texts.[2] Taken in conjunction, current and future work by UNCITRAL will assist in creating a legal and regulatory framework that can best support entrepreneurs and MSMEs in establishing business rights, thereby reducing some of the legal obstacles that such businesses face.

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[1] See, for example, "Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels", United Nations General Assembly resolution A/RES/67/1 (67th session, 2012), para. 8; and "Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)", United Nations General Assembly resolution A/RES/69/313 (69th session, 2015), Annex, para. 89.

[2] Such texts include: the UNCITRAL Model Law on Electronic Commerce (1996); the UNCITRAL Model Law on Electronic Signatures (2001) and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).

I. Micro, small and medium-sized enterprises (MSMEs)

4. The international community has underscored the importance of business law as one of four pillars key to strengthening the legal empowerment of the poor, many of whom rely upon micro and small businesses for their livelihood. In addition to other pillars (such as access to justice and the rule of law; property rights; and labour rights), business rights are seen as important to empower the less advantaged, not only in terms of their employment by others, but also in developing micro and small businesses of their own. Business rights may be regarded as a composite of existing rights of groups and individuals to engage in economic activity and market transactions, and which include the right to start a business in the formal economy without facing arbitrarily enforced regulations or discrimination, removing unnecessary barriers that limit economic opportunities, and protecting business investments, regardless of their size. Measures that have been called for to strengthen business rights include:

(a) Guaranteeing basic business rights, including the right to sell, the right to have a workspace and the right to have access to the necessary infrastructure and services (for example, to electricity, water and sanitation);

(b) Strengthening, and making effective, economic governance in order to permit entrepreneurs to easily and affordably establish and operate a business, to access markets, and to exit a business;

(c) Expanding the accessibility for entrepreneurs of limited liability entities and other legal mechanisms that allow owners to separate their business and personal assets;

(d) Promoting inclusive financial services that offer savings, credit, insurance, pensions and other tools for risk management; and

(e) Expanding the access of entrepreneurs to new business opportunities through specialized programmes to familiarize entrepreneurs with new markets, assisting them in creating links with other businesses of all sizes, and in complying with regulations and requirements.

A. The importance of MSMEs in the global economy

5. UNCITRAL's decision to work on reducing the legal obstacles faced by MSMEs recognizes the importance of such enterprises to the economic health of the States in which they are found, and to the global economy more generally. This importance is underscored by a number of key facts that illustrate that MSMEs are seen as the backbone of the economy in both the developed and the developing world.

6. The total number of MSMEs worldwide is estimated to be around 500 million, of which approximately 85 per cent are in emerging markets. Statistics for SMEs indicate that such businesses account for over 70 per cent of total employment and 64 per cent of Gross Domestic Product (GDP) in developed economies, and approximately 45 per cent of employment and 63 per cent of GDP in low-income countries.[3]

7. While MSMEs are of great importance in regions of the world where a large number of developing States are found, it may be instructive to note that MSMEs constitute the vast majority of business types in all States. Even in the most developed economies, upwards of 90 per cent of all business are MSMEs, or which 90 per cent are microenterprises.

[3] "IFC Jobs Study: Assessing Private Sector Contributions to Job Creation and Poverty Reduction", 2013, pp. 10–11 (https://www.ifc.org).

B. Defining MSMEs

8. There is no standardized international definition of what constitutes an MSME, since each economy will define its own parameters for each category of business size by taking into account its own specific economic context.[4] For that reason, it is not necessary or advisable for UNCITRAL to seek consensus on a definition for each category of MSME, since any legislative texts produced will be applied by States or regional economic groups to MSMEs in accordance with their own definitions, based on each unique economic context. The important common factor from State to State is that MSMEs, regardless of how they are defined, are enterprises that, by virtue of being the smallest and most vulnerable, face a number of common obstacles irrespective of the particular jurisdiction in which they are found.

C. The nature of MSMEs

9. MSMEs are incredibly varied in nature. They may consist of sole entrepreneurs, small family businesses or larger enterprises with several or many employees, and may operate in virtually any commercial sector, including in the service industry and the artisanal and agricultural sectors.

10. Moreover, MSMEs may be expected to vary depending on the local economic conditions, cultural traditions and the different motivations and characteristics of the entrepreneurs establishing them. Enterprises that operate in the formal economy may also take various legal forms, depending on the options available to them under applicable law, and on how those different forms may meet their needs.

11. In addition, although MSMEs may be seen, particularly in the context of developing economies, mainly as a source of livelihood for the working poor, such enterprises need not be static; in fact, MSMEs may also serve a dynamic purpose as a source of entrepreneurial talent in an economy. Indeed, their importance in the world economy suggests that providing for and fostering the growth of MSMEs is a key goal in order to achieve economic progress, innovation and success.

12. However, despite their disparate nature and size, certain possible characteristics of MSMEs may be broadly shared, such as:

(a) Small size; they are and remain small operations;

(b) Disproportionate impact of burdensome regulatory hurdles;

(c) Reliance on family and friends for loans or risk-sharing;

(d) Limited access to capital or to banking services;

(e) Limited source of employees; if any, they are often drawn from family and friends and may be unpaid and unskilled, including having limited administrative capacity;

(f) Limited markets; these may comprise only relatives, close friends and local contacts;

(g) Vulnerability to arbitrary and corrupt behaviour;

(h) Limited access to dispute settlement mechanisms, which puts them at a disadvantage in disputes with the State or with larger businesses;

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[4] States may wish to note the definitions of the different categories of businesses included in MSMEs that have been established either by various States or by regional economic groups. Those definitions tend to be based on a number of elements, considered separately or along with other factors, including: (i) the number of employees at a specific point in time, such as the end of the financial or calendar year; (ii) the amount of annual revenue or turnover generated by the enterprise, or the balance sheet total of the business; (iii) the asset base of the business; (iv) the total monthly wages paid by the enterprise; or (v) the amount of capital invested in the enterprise.

(i) Lack of ability to partition assets, so business failure often means that personal assets are also lost;

(j) Vulnerability to financial distress; and

(k) Difficulty in transferring or selling a business and in profiting from both tangible and intangible assets (such as client lists or relationships with customers).

D. Creating sound business environments for all businesses

13. Efforts to assist MSMEs at the start of their life cycle might first begin with consideration of the business environment in which an MSME will be conducting its affairs. A "business environment" may be defined in a number of different ways, but could be said to comprise the policy, legal, institutional and regulatory conditions that govern business activities, and the administration and enforcement mechanisms established to implement government policy, as well as the institutional arrangements that influence the way key actors operate. These key actors may include government agencies, regulatory authorities, business organizations, trade unions, and civil society organizations. All of these factors affect business performance.

14. Sound business environments can have a positive influence on economic growth and poverty reduction. While views differ as to the significance and measurability of the link between the business environment, on one hand, and economic growth and poverty reduction, on the other, poor business environments are unlikely to provide sufficient incentives and opportunities for entrepreneurs to carry on their commercial activities in the formal economy. In addition, poor business environments tend to be more susceptible to corruption and usually have a disproportionate gender impact, since the businesses most vulnerable in a weak business environment are micro-businesses, which are often owned by women.[5]

15. It should be noted that the quality of the business environment varies not only as between States, but also within the different regions of those States. Such regional variations make it unlikely that a single solution will provide the answer for improving the business environment in every State. Similarly, the challenges faced by MSME entrepreneurs vary depending on the context in which they are doing business. However, the two concepts are linked, since many of the challenges faced by MSMEs are similar to those considered detrimental to a favourable business environment in general, including: burdensome regulation and taxation rates, high economic inequality, low institutional quality, low quality of public infrastructure, and a lack of access to credit and other resources.

16. Improving the quality of the business environment and assisting MSMEs in overcoming the particular challenges facing them often require a State to take measures towards legal and policy reform. These reforms may include, among others, providing for a simple and effective system of registration with those public authorities with which a business may be required to register (which may include the business registry, as well as taxation and social security authorities), as well as providing for a range of simplified and flexible legal forms for business so as to meet the varied needs of MSMEs. States most often initiate such reforms in order to: facilitate business start-up and operations, stimulate investment opportunities, and increase growth rates and employment. Such reforms require careful planning and commitment on the part of the State, as well as the involvement of many different entities at various administrative and governmental levels.

II. MSMEs in the informal economy

17. As outlined above in paragraph 12, MSMEs generally face a number of key challenges, some of which are caused, and many of which are exacerbated, by

[5] The draft legislative guide on key principles of a business registry (A/CN.9/940) provides greater detail on the challenges faced by women running micro-businesses.

operating in the informal economy. While developing States host the largest percentage of the number of MSMEs in business globally, the vast majority of these enterprises operate in the informal economy. Moreover, the percentage of MSMEs operating in the informal economy is likely to grow. Although SMEs that are operating in the informal economy are estimated to provide nearly half of all jobs in developing States and a quarter in developed States, they account for only around 35 per cent and 15 per cent of the GDP, respectively, in those economies.[6]

18. "Informality" is by no means a uniform concept. Many businesses that might be considered "informal" actually operate in fixed premises and according to locally accepted commercial rules. In addition, they may be well-known by local authorities, pay some form of local taxes, and may even engage in cross-border trade. Others, on the other hand, may have little interaction with the State.

19. Although measurement tools are imperfect and no clear boundaries exist between formal and informal sectors, businesses can be viewed as operating on a formality-informality spectrum, according to the extent to which their operations fall within the ambit of a State's official laws or take place outside its official structures. The term "formal economy" in these materials thus refers to the sector of the economy characterized by activities that are conducted within the ambit of formal regulation and structure, and commercial activity that falls outside of this scope will be referred to as "informal". Moreover, since the entry point for businesses wishing to access the formal economy is often by way of mandatory registration with certain public authorities (often the business registry, as well as taxation or social security authorities), informal enterprises will refer to those that have not complied with mandatory registration with the authorities as required by the applicable law of the State. Mandatory registration with those public authorities will be considered in these materials to be the main conduit through which businesses are encouraged to operate in the formal economy. However, it should be noted that in some States, certain businesses (due to their size and legal form) are not required to register with the business registry, taxation or social security authorities, and provided those businesses fulfil other mandatory requirements, they are regarded as operating in the formal economy.

20. In addition, the informal economy is not related to illegal or criminal activity. Illegal activities are contrary to the law, but informal activities are extralegal, in that they are not officially declared and occur outside the legal and regulatory regime that should govern such activities. The discussion in these materials is limited to extralegal commercial activities and does not address illicit trade in goods or services.

21. Further, informal commercial activity may be mainly of a different nature in some States, such as in developed economies. In such States, the informal economy may consist mainly of firms and workers that underreport their income to tax authorities, or that use undeclared labour in certain business domains. These types of informal activities are not the focus of these materials.

22. It is also important to note that although informal commercial activity, particularly in the developing world, may exist largely as a result of economic necessity (as noted above in respect of MSMEs in general, see para. 11) components of the informal economy may also be seen as quite dynamic and as an incubator for business potential that in fact provides economies with a large number of potential contributors to business development. In fact, businesses operating in the informal economy may be seen to provide a pool of talent and an important base of operations from which entrepreneurs can access, and graduate into, the formal economy. In that regard, the informal economy should not be considered a marginal or peripheral sector, but rather as an important building block of a State's overall economy.

23. The institution of reforms to improve the business environment, as noted above in paragraphs 13 to 16, may encourage and facilitate the operation of enterprises in the formal economy. However, in order to achieve success, policies encouraging businesses to operate in that economy should take into account the different

[6] Supra, note 4.

motivations and characteristics of entrepreneurs operating in the informal sector, and ensure sufficient incentives are offered to encourage them to operate in the formal economy. An entrepreneur's reasons for operating a business in the informal sector will vary depending on the economy, but may include: high entry barriers and costs (including taxes and other social contributions) that outweigh the benefits that can be expected from entering the formal economy; lack of information required to access the formal economy; and a lack of job opportunities in the formal economy.

24. Variations in the size and characteristics of the informal economy are also apparent from region to region. In some regions, for example, high levels of informal commercial activity may be partially due to the fact that the informal economy is where most new jobs are found, and where many entrepreneurs must trade by necessity. In such a region, a job, an enterprise and a household may be the same thing, and lack of entrepreneurial skills, access to credit, and infrastructure are seen as the most obvious constraints to growth. In other regions, the informal sector tends to behave like a typical small business sector, and is often the main entry point for young, uneducated workers seeking employment, as well as for those seeking part-time work. Other regions have experienced growth of the informal economy in recent years, apparently driven by a lack of jobs in the formal sector and reduced demand for goods and services from those employed in that sector.

25. The debate on the reasons for the informal sector, on its effect on national economies and on how to approach the issue has been vibrant for decades and has in recent years had a major influence on policymaking. The view that informal commercial activity is the result of burdensome regulation and costly procedures required by the State for businesses to enter the formal economy, and that a reduction of those barriers will help informal MSMEs move towards a higher degree of compliance with mandatory registration requirements, has generated momentum for reforming regulations and laws in order to simplify business entry into the formal economy. A wide array of policies has been designed and implemented in several States and regions of the world, since, as noted earlier, the variable nature of the informal sector, and the different levels of development of States, render elusive the identification of a single optimal approach. The most successful interventions have been comprehensive policy packages aimed at achieving various goals, such as economic growth, social protection and inclusion, and which often involve:

(a) Reducing the costs of a business entering and operating in the formal sector, which include entry costs, taxes, fees and social contributions, and costs of compliance;

(b) Improving the benefits of operating in the formal economy by reducing the bureaucracy and expense involved in obtaining fixed premises, and providing access to business development services and new markets;

(c) Improving the general business environment, so that policies to reduce costs and to improve the benefits of entering the formal economy also assist firms already operating in that sector; and

(d) Strengthening the enforcement of a State's legal regime in order to encourage operation in the formal economy.

III. Ensuring that operation in the formal economy is simple and desirable for MSMEs

26. In order to encourage MSMEs to operate their business in the formal economy, States may wish to consider how best to effectively convey to MSMEs the availability of and the advantages offered by that approach. In addition, States should also consider what steps they can take to motivate such behaviour by making it a desirable, easily accessible process that will impose the least burden possible on MSMEs.

A. Explaining the meaning of operating in the formal economy

27. To ensure widespread understanding of the advantages available to MSMEs, steps must be taken to explain the meaning of participating in the formal economy and to provide clear and accessible information on how to achieve that aim. The State should consider how best to effectively convey relevant information to MSMEs, including on the necessary requirements in their jurisdiction and how such businesses can fulfil them, and any other information necessary for them to operate in the formal economy. In addition to advising on the benefits of operating in the formal economy, information should also be provided on the types and advantages of the legal forms that are available to a business, and the public authorities with which registration might be necessary (e.g. business registration, taxation and social security authorities). Ideally, a business should be able to use a single physical or electronic interface (a "one-stop shop") to register simultaneously with all necessary public authorities.[7] Information in respect of these matters should be specifically adapted so that it is tailored to and clear and easily understandable by the target audience.

1. The advantages of the formal economy

28. Part of the message that must be conveyed to MSMEs in order to persuade them to operate their businesses in the formal economy is an explanation of the advantages of that approach. These advantages are outlined below.

(a) Advantages for the State

29. States have a clear interest in encouraging MSMEs to operate in the formal economy. One of the reasons often cited for that interest is in terms of taxation, since encouraging MSMEs to operate in the formal economy will broaden the tax base of the State.[8] It may also help reduce any friction that may exist with enterprises already operating in the formal economy and paying taxes, but that must compete for market share with informal businesses. Additional reasons for a State to take action to encourage businesses to operate in the formal economy may include, depending upon the specific economic sector, ensuring consumer protection and compliance with labour laws, and, in general, engendering trust in business and commerce in the State for stakeholders including consumers, business partners and banks.

30. Other advantages to the State may be less direct, but are no less valuable. For example, providing previously informal businesses with the means to enter the formal economy will permit those MSMEs to grow, create jobs, and increase their earnings and contribution to the creation of wealth and the reduction of poverty in the State. Businesses that operate in the formal economy can be expected to attract more qualified employees and to stay in business longer, thus making investment in the training of personnel and the acquisition of capital more profitable. The increase in the number of businesses that comply with mandatory registrations will mean that there is more and better economic data available, that more information will be exchanged in respect of such businesses and that information will become more transparent. All of these effects will have an overall positive impact on the economy of the State.

(b) Advantages for entrepreneurs

31. Entrepreneurs will also receive benefits from operating in the formal economy. The following factors are often cited as key advantages for MSMEs that operate in that commercial context.

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[7] The draft legislative guide on key principles of a business registry (A/CN.9/940) provides greater detail on the function of one-stop shops.

[8] States may wish to note that reduced taxation rates and administration may be an incentive offered to MSMEs to join the formal economy, and that too great an emphasis on expanding the tax base might be counterproductive.

(a) Visibility to the public and to markets

Registering a business with public authorities, including mandatory or non-mandatory registration in the business registry, can be a means through which the business becomes visible to the public and to markets, thus providing a means for exposure to potential clients and business contacts, and an expansion of market opportunities. This membership in the marketplace may provide opportunities to become a supplier of goods and services under favourable conditions, and can improve the profitability of the business. Moreover, such visibility both reduces costs and enables MSMEs to trade in economic circles beyond their relatives, friends and local contacts, thus opening up new markets.

(b) Visibility to the banking system and financial institutions

Registration with public authorities, including mandatory or non-mandatory business registration, can also provide an enterprise with improved access to banking and financial services, including to bank accounts, loans and credit. This permits MSMEs to move away from financial reliance on relatives and friends, making it easier for them to raise capital from a broader group of investors, as well as lowering the cost of that capital. This, in turn, permits businesses to expand, to make new investments, to diversify their risk, and to take up new business opportunities.

(c) Public procurement

In most States, public procurement contracts are only available to those businesses that are in compliance with mandatory registration requirements and are part of the formal economy. Access to such contracts may be enhanced for certain groups, since some States have developed specific programmes to ensure that a certain percentage of public procurement contracts are granted to less entitled entrepreneurs, including women, youth, the disabled and the elderly.

(d) Legal validation

Compliance with mandatory registration requirements permits a business to operate legally in the jurisdiction and provides the entrepreneur with documentation of that status. This status also enables businesses to have access to justice for commercial purposes, to enter into and enforce contracts more easily, and may facilitate access to exit mechanisms, such as reorganization or liquidation, in the event of financial difficulty. In some legal systems, compliance with all mandatory registrations provides additional legal rights for the entrepreneur operating in the commercial sector, including flexible provisions on commercial contracts, specialized commercial court divisions, a relaxation of certain requirements in forming a business entity, and similar benefits.

(e) Legal compliance

While related to the concept of legal validation, compliance with the law can itself be seen as an advantage, since it alleviates entrepreneurial anxiety in respect of operating informally, and makes it less likely that fines may be imposed. Being in compliance with the law will also reduce the business' vulnerability to corruption and bribery, and should assist the entrepreneur by providing recourse in cases of tax and other inspections.

(f) Access to flexible business forms and asset partitioning

Through registration, the entrepreneur will be entitled to choose the legal business form available in the jurisdiction that is best suited to his or her needs; ideally, the State will provide for a range of legal business forms for that purpose. Most jurisdictions have at least one business form that permits the entrepreneur to separate personal finances from business finances; such asset partitioning can be invaluable to a business, particularly if financial difficulty is encountered, as the entrepreneur is not in danger of losing all personal assets, and the value of the business assets can be

maximized in the case of reorganization or liquidation. Moreover, the value of a business with separate assets may be greater and can be more readily transferred.

(g) Unique name and intangible assets

Compliance with mandatory registrations often requires an enterprise to operate under a sufficiently unique business name. This unique name translates into a market identity that can develop a value of its own and be traded to a subsequent owner. Other intangible assets that can add to the value of a business and be traded, particularly in the case of asset partitioning and a separate legal business identity, include client lists and commercial relationships.

(h) Opportunities for growth

In addition to the advantages of visibility set out above, compliance with mandatory registration requirements, including with the business registry, provides an enterprise with access to a much larger business network, which can permit it to grow the business and operate on a much greater scale. Some States permit a business that has fulfilled its legal requirements to become a member of a trade organization, which can greatly enhance an enterprise's opportunities for development.

(i) Opportunities for specialization of labour

Businesses that have complied with their mandatory registration requirements tend to be less constrained in their hiring practices and may be able to recruit employees outside of family and friends. This can facilitate access to a larger pool of talent and permit specialization among employees, enabling the MSME to make better use of employee talents and improving overall productivity.

(j) Access to government assistance programmes

Many States provide specific assistance programmes for MSMEs or for specific types of disadvantaged entrepreneurs. Operation in the formal economy will usually permit an enterprise to access all forms of government assistance available to such businesses.

(k) Empowerment and emancipation effects

The operation in the formal economy of businesses that are owned by women, youth, the disabled, the elderly and other less advantaged groups may have important empowerment and emancipation effects. This may be particularly so in respect of women entrepreneurs, many of whom are micro-entrepreneurs that are often exposed to greater risk as a result of corruption and abuse of authority.

(l) Longer term gains

The visibility of a business operating in the formal economy can also be the main conduit for its growth into cross-border trading. It is also possible that, in the longer term, and particularly through the use of electronic commerce and Internet facilities, robust compliance of businesses with mandatory registration requirements may lead to an increase in cross-border trading and foreign investment – advantages not only for the enterprise, but for the State as well.

2. Communication and education

32. Communication of, and education on, the advantages of legal and policy reforms undertaken by the State to assist MSMEs will be key to the success of those reforms. While this might seem a relatively small detail, in the context of States and regions in transition or with remote areas, all potential entrepreneurs may not be well-served by mass media or have dependable and regular access to telecommunications or the Internet. In such contexts, the potential obstacles to communication and education, and thus to the success of the reforms, can be expected to be more numerous.

33. An additional consideration for a State in developing communication and education strategies should be the literacy challenges faced by many

micro-entrepreneurs and the particular steps that may need to be taken to overcome this hurdle.

34. In designing its communication and education plan, a State must be cognizant of the potential impediments outlined above and think practically about how best to overcome such difficulties. Possible solutions could include:

(a) Providing mobile education and communication efforts, and for mobile registration and facilitation counters, so as to enable travel to the entrepreneur's location;

(b) Using trade organizations or informal workers' associations to assist in publicizing the programmes;

(c) Using mass media that is broadly available, including radio, television and print media, as well as posters and billboards;

(d) Making blanket announcements via text on mobile phones; this may be particularly effective in areas where mobile payments are being used;

(e) Ensuring communication and education is in the local language;

(f) Making use of social media; while less practical in terms of States that face technological hurdles, social media may be an effective tool, particularly to disseminate information among younger entrepreneurs and family members;

(g) Developing courses for gender-specific trading or involving other disadvantaged groups; and

(h) Using educational techniques that may be particularly useful in the context.

B. Making it desirable for MSMEs to operate in the formal economy

35. Another component of the communication package that should be conveyed to prospective businesses is clear information on the incentives a State provides to MSMEs to encourage them to participate in the formal economy. It is important that businesses are made aware of such incentives and that they outweigh the perceived advantages of operating in the informal economy.

36. The effectiveness of the incentives offered by the State will vary according to the specific economic, business and regulatory context. While it is not possible to specify precisely which incentives should be offered, States may wish to consider the incentives outlined in the following paragraph, each of which, often in combination with others, has been found to be an effective means of encouraging MSMEs to enter the formal economy. In addition, in planning for the creation of these incentives, States may need to ensure coordination with international organizations which work with MSMEs (including, for example, the World Bank Group, UNCTAD, UNIDO, the Asian Development Bank, or OHADA), officials of public authorities with which businesses must register, local business incubators, the tax authority, and banks in order to maximize the impact of the incentives chosen.

37. A State may consider programmes along the following lines:

(a) Simplification of the registration process for businesses;

(b) Assistance with the registration process for businesses;

(c) Free (or at least very low-cost) registration;

(d) Receipt of an official certificate indicating the registered status and legal form of the business;

(e) Organized access to and support with banking services (bank accounts and chequing accounts);

(f) Easier access to credit for businesses operating in the formal economy;

(g) Accountancy training and services, and ensuring simplified accounting rules suitable for MSMEs;

(h) Assistance with the preparation of a business plan;

(i) Training (including managing inventory and finances);

(j) Tax and other credits for training costs;

(k) Protection against potential administrative abuse, possibly through access to mediation or other dispute resolution mechanisms;

(l) Simpler and more equitable taxation (lower, simplified taxation rates), including tax mediation services and simplified tax forms;

(m) Business counselling services;

(n) A transition period to give new businesses time to comply fully with applicable laws;

(o) A temporary "tax holiday" for small and microenterprises upon their initial registration with the necessary public authorities;

(p) Lump sum monetary compensation or government subsidies and programmes to foster MSME growth;

(q) Public communication and promotion of the business, as well as networking opportunities and access to experienced businesses, for example through free memberships in industry organizations;

(r) Specific public procurement programmes to encourage small and micro-businesses or those owned by disadvantaged groups to have access to contracts;

(s) Low-cost technological infrastructure;

(t) Access to and support with obtaining health insurance; and

(u) The establishment of a business mentoring programme with experienced business owners to facilitate access to experience and information for MSMEs.

C. Making it easy for MSMEs to operate in the formal economy

38. In addition to a lack of information, one of the most often-cited reasons given by MSMEs for their reluctance to operate in the formal economy is the cost and administrative burden of doing so. Two areas of reform that States may undertake to assuage these concerns are to simplify and streamline the procedures necessary for a business to comply with the mandatory registrations with public authorities, focusing on the needs of the user, and to provide flexible and simplified legal business forms for MSMEs.

1. Simplified and streamlined registration for businesses

39. One aspect of making it simple and desirable for an MSME to operate its business in the formal economy is to take a user-centric approach and to make the procedures for mandatory registrations with public authorities, including business registration, accessible, simple and clear. Improvements made by a State to its registration system may be expected to assist not only MSMEs, but also larger businesses, including those already operating in the formal economy. Importantly, care must also be taken to effectively communicate these changes and their advantages to MSMEs and potential entrepreneurs throughout the jurisdiction.

2. Flexible and simplified business forms for MSMEs

40. Another aspect of creating an enabling legal environment for MSMEs is for the State to permit them simple access to flexible, legally recognized business forms. Many micro and small businesses are either sole proprietorships or family enterprises that do not possess a legal identity or a business form distinct from that of the owner.

An entrepreneur should be permitted to easily and inexpensively register a business with a legally recognized form in that jurisdiction. States may wish to permit registration of a range of different legal forms so as to provide entrepreneurs with sufficient flexibility to meet the needs of MSMEs, to allow them access to investment and venture capital, and to foster their growth.

41. In this respect, some States and regional economic organizations have created a legal business form for individual entrepreneurs (for example, for those whose business turnover is below a certain amount) which adds certain benefits to those otherwise available to the sole proprietor. These benefits tend to include being subject to a simplified scheme for the calculation and payment of taxes and social security contributions, as well as fast, simplified and low (or no) cost registration requirements and formalities. Nonetheless, such business forms typically do not change the unlimited personal liability of a sole proprietor, whose personal and professional assets are all available to meet any business debt.

42. States should also consider offering to MSMEs the opportunity for an enterprise to partition its business assets from the personal assets of its owner(s). The legal ability of an enterprise to partition its business assets from the personal assets of its owner(s) is an important building block for the encouragement of entrepreneurial activity since, even though a business may fail, the personal assets of the entrepreneur(s) will be protected.

43. Asset partitioning is seen as one of the defining features of a limited liability business entity, which is said to be among the most productivity enhancing legal institutions available. Models that provide limited liability may include stock companies, and many States have introduced simplified forms of stock companies that prioritize flexibility and contractual freedom, making them suitable for MSMEs. However, it should be noted that the benefits of asset partitioning for MSMEs registering their businesses may also be available in a legal structure that stops short of legal personality, while being subject to fewer formal requirements. Offering entrepreneurs the opportunity to take on legal personality and limited liability through the adoption of a simplified business form is a feature that States should consider in making policy decisions on legal forms to adopt in order to reduce the legal obstacles encountered by MSMEs.

44. One model that has been adopted permits an individual entrepreneur to officially allocate a certain share of personal assets to the entrepreneur's professional activity. This approach permits the entrepreneur to segregate professional assets from personal assets so that, in the event of financial difficulty of the business, creditors will have access only to the professional assets of the entrepreneur. In several States, the adoption of simplified corporate forms has enabled SMEs, in particular, to become more competitive with larger businesses by offering greater flexibility (as compared with the potentially burdensome and complex mandatory rules often required in more traditional incorporation regimes), limited liability of the partners in the business, and relative ease and simplicity of formation and registration, including the typical absence of a minimum capital requirement. Simplified corporate forms usually provide default provisions to fill any gaps that might exist in the rules established by the founders of the enterprise. These default rules can be particularly important for smaller or less-experienced business persons.

45. Another model that has been used in this regard is the establishment of a separate capital fund that has been established for a specific purpose. Such a fund may be established by individuals (and their spouses), into which specific assets can be placed that are identified as necessary for the family requirements of the individuals. Such assets are then protected from seizure in the case of business insolvency. A variation on this model may also be created by a corporation, which can establish a separate capital fund devoted to a specific purpose or which can agree that the earnings of an activity be dedicated to the repayment of loans obtained for the execution of certain specified activities. The establishment of such a fund is subject to certain requirements, including that its existence be made public by way of the business registry, and that it be open to opposition by existing creditors of the corporation.

Once the fund is constituted, it is segregated from the other funds of the company, and may only be used to satisfy the claims of creditors arising as a result of the relevant activities. Other variations on the creation of a segregated fund may include the declaration of the fund to a specific purpose to the benefit of a natural or legal person, a public administrative body, or other entity, provided that the fund is established by public deed and is registered.

46. An additional example of asset partitioning that stops short of providing legal personality is the concept of "business network contracts". This legal tool can be used by a group of entrepreneurs (of various types and sizes, including sole proprietors, companies, public entities, and non-commercial and not-for-profit entities) who undertake a joint venture as agreed in the business network contract, which may be in respect of certain services or common activities within the scope of their business, or even with respect to the exchange of information. The goal of such an approach is to strengthen the individual businesses involved in the contract, as well as the network itself, at the national and international levels, so as to enable access to business opportunities not available to an individual enterprise, and thus to improve competitiveness. The contract must meet the formal requirements established by the State (for example, be duly executed in writing, indicate the objectives of the venture, its duration, the rights and obligations of participants, etc.), and be registered with the business registry. In addition, the contract must establish a capital fund to carry out the programme of the business network; this fund is then segregated from the individual assets of the founding entrepreneurs, and is available only to satisfy claims deriving from the activities performed within the scope of the network, and not for creditors of the individual entrepreneurs that created the business network.

II. DISPUTE SETTLEMENT

A. Report of the Working Group on Dispute Settlement on the work of its sixty-seventh session (Vienna, 2–6 October 2017)

(A/CN.9/929)

[Original: English]

Contents

I. Introduction

1. At its forty-eighth session, in 2015, the Commission mandated the Working Group to commence work on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the possible preparation of a convention, model provisions or guidance texts. The Commission agreed that the mandate of the Working Group should be broad to take into account the various approaches and concerns.[1] The Working Group commenced its consideration of that topic at its sixty-third session (A/CN.9/861).

2. At its forty-ninth session, in 2016, the Commission had before it the report of the Working Group on the work of its sixty-third and sixty-fourth sessions (A/CN.9/861 and A/CN.9/867, respectively). After discussion, the Commission commended the Working Group for its work on the preparation of an instrument dealing with enforcement of international commercial settlement agreements resulting from conciliation and confirmed that the Working Group should continue its work on the topic.[2]

3. At its fiftieth session, in 2017, the Commission had before it the report of the Working Group on the work of its sixty-fifth and sixty-sixth sessions (A/CN.9/896 and A/CN.9/901, respectively). The Commission took note of the compromise reached by the Working Group at its sixty-sixth session, which addressed five key issues as a package (A/CN.9/901, para. 52) and expressed support for the Working Group to continue pursuing its work based on that compromise. The Commission

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 135-142.

[2] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162–165.

expressed its satisfaction with the progress made by the Working Group and requested the Working Group to complete the work expeditiously.[3]

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its sixty-seventh session in Vienna, from 2-6 October 2017. The session was attended by the following States members of the Working Group: Argentina, Australia, Austria, Belarus, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Côte d'Ivoire, Czechia, Denmark, Ecuador, El Salvador, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kuwait, Malaysia, Mexico, Panama, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Belgium, Bolivia (Plurinational State of), Bosnia and Herzegovina, Croatia, Cyprus, Democratic Republic of the Congo, Dominican Republic, Estonia, Finland, Luxembourg, Malta, Morocco, Netherlands, Norway, Paraguay, Qatar, Saudi Arabia, Slovakia, South Africa, Sweden, Syrian Arab Republic and Viet Nam.

6. The session was also attended by observers from the European Union.

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

(a) *Intergovernmental organization*: Gulf Cooperation Council (GCC);

(b) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), Arab Association for International Arbitration (AAIA), Association for the Promotion of Arbitration in Africa (APAA), Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Belgian Centre for Arbitration and Mediation (CEPANI), Center for International Legal Studies (CILS), Chartered Institute of Arbitrators (CIARB), Construction Industry Arbitration Council (CIAC), Forum for International Commercial Arbitration (FICA), Hong Kong Mediation Centre (HKMC), International Academy of Mediators (IAM), International Council for Commercial Arbitration (ICCA), International Law Association (ILA), International Mediation Institute (IMI), Korean Commercial Arbitration Board (KCAB), Law Association for Asia and the Pacific (LAWASIA), Madrid Court of Arbitration (CÁMARA), Miami International Arbitration Society (MIAS), Moot Alumni Association (MAA), Russian Arbitration Association (RAA), Singapore International Mediation Institute (SIMI), Swiss Arbitration Association (ASA) and Vienna International Arbitration Centre (VIAC).

8. The Working Group elected the following officers:

Chairperson: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

Rapporteur: Mr. Itai Apter (Israel)

9. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.201); and (b) notes by the Secretariat regarding the preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation (A/CN.9/WG.II/WP.202 and addendum as well as A/CN.9/WG.II/WP.203).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.

[3] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 236–239.

3. Adoption of the agenda.
4. Preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group considered agenda item 4 on the basis of the notes by the Secretariat (A/CN.9/WG.II/WP.202 and addendum as well as A/CN.9/WG.II/WP.203). The deliberations and decisions of the Working Group with respect to item 4 are reflected in chapter IV. At the close of its session, the Working Group requested the Secretariat to prepare revised draft model legislative provisions complementing the UNCITRAL Model Law on International Commercial Conciliation ("Model Law on Conciliation" or "Model Law") and a draft convention, both addressing enforcement of international settlement agreements resulting from conciliation, reflecting the deliberations and decisions of the Working Group.

IV. International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation

12. The Working Group continued its deliberations on the preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation ("instrument") on the basis of document A/CN.9/WG.II/WP.202 and its addendum.

13. The Working Group recalled that the draft provisions contained in A/CN.9/WG.II/WP.202 reflected the compromise reached by the Working Group at its sixty-sixth session (the "compromise"), which had received the support of the Commission at its fiftieth session (see, para. 3 above). It was further agreed that texts as agreed in the compromise should be preserved with minimal revisions to clarify the meaning of those texts.

A. Scope

1. Draft provision 1(1)

14. While a suggestion was made to include a reference to "enforcement" in draft provision 1(1), it was widely felt that that provision, which reflected the compromise, should remain unchanged because the instrument did not deal only with enforcement of settlement agreements and the insertion of the word "enforcement" could be misleading.

2. Draft provision 1(2)

15. A suggestion to clarify draft provision 1(2) received support. Accordingly, it was agreed that it could read along the following lines: "2. This [instrument] does not apply to settlement agreements: (a) Concluded to resolve a dispute arising from transactions engaged by one of the parties (a consumer) for personal, family or household purposes; (b) Relating to family, inheritance or employment law."

16. In that context, the Working Group confirmed that draft provision 1 provided an exhaustive list of exclusions, where the instrument would take the form of a convention.

3. Draft provision 1(3)

Purpose and placement

17. With respect to draft provision 1(3), it was reiterated that the purpose of excluding from the scope of the instrument settlement agreements that have been approved by a court or concluded before a court was to avoid possible overlap or gap with other existing or future international instruments (see A/CN.9/901, para. 26). The view was expressed that, due to their different substantive nature, such settlement agreements required a treatment different from that provided under the instrument. Accordingly, it was suggested that draft provision 1(3) should be retained in the scope provision rather than in the provision on grounds for refusing to grant relief. That suggestion received support.

18. The Working Group then considered a number of issues raised in paragraphs 8 to 22 of document A/CN.9/WG.II/WP.202 and reached the following conclusions.

The more-favourable-right provision

19. It was clarified that the more-favourable-right provision that was being contemplated for inclusion in the instrument would not allow States to apply the instrument to settlement agreements excluded in draft provision 1(3), as such settlement agreements would fall outside the scope of the instrument (see para. 8 of document A/CN.9/WG.II/WP.202). After discussion, it was understood that States would have the flexibility to enact domestic legislation, which would include in its scope such settlement agreements and that such an inclusion would not be a breach of their international obligations under the instrument, if it were to be a convention.

Meaning of "approved by a court or concluded before a court"

20. Regarding the notions of a settlement agreement being approved by a court or concluded before a court, it was clarified that if court proceedings began but the parties were able to settle through conciliation without any court assistance, such settlement agreements would fall outside the scope of the instrument as long as the settlement agreement was enforceable as a judgment in the State where court proceedings began (see para. 11 of document A/CN.9/WG.II/WP.202).

21. The Working Group further clarified that settlement agreements reached during court proceedings but not recorded as judicial decisions would fall outside the scope of the instrument as long as the settlement agreement was enforceable as a judgment in the State where court proceedings took place (see para. 12 of document A/CN.9/WG.II/WP.202). It was noted that this would be different from the Working Group's understanding prior to the compromise (see A/CN.9/867, para. 125, A/CN.9/896, para. 48 and A/CN.9/901, para. 25).

22. The suggestion that the instrument should also use the term "judicial settlement" found in the Convention on Choice of Court Agreements (2005) and the draft convention on judgments under preparation by The Hague Conference on Private International Law was not supported as that term, though used in some legal systems, was not necessarily known in all jurisdictions.

"in the same manner"

23. The Working Group agreed that the square-bracketed phrase "in the same manner" should be deleted to avoid any uncertainty about its meaning (see para. 13 of document A/CN.9/WG.II/WP.202). It was further clarified that the phrase "enforceable as" in draft provision 1(3) referred to the possibility of enforcement (see para. 14 of document A/CN.9/WG.II/WP.202).

Determination of the enforceability

24. It was widely felt that enforceability should be determined by considering whether settlement agreements approved by a court or concluded before a court were enforceable as a judgment "in the State of that court." It was agreed that the phrase

"according to the law of" in the square-bracketed text was not necessary as it might create confusion (see paras. 15 and 16 of document A/CN.9/WG.II/WP.202). A suggestion to align draft provision 1(3)(a) with draft provision 1(3)(b) so that enforceability would be determined according to the law of the State where enforcement was sought did not receive support.

25. It was pointed out that the addition of the phrase "enforceable as an arbitral award [legislative provision: according to the law of this State] [convention: according to the law of the Contracting State where enforcement is sought]" in draft provision 1(3)(b) was intended to address the gap that might arise from non-enforceability of settlement agreements recorded in the form of awards in certain jurisdictions. In that respect, it was clarified that if an arbitral award recording a settlement agreement fell outside the scope of the relevant enforcement regime at the place where enforcement of the settlement agreement was sought, the settlement agreement might still be considered for enforcement under the instrument (see paras. 17 and 18 of document A/CN.9/WG.II/WP.202).

26. However, doubts were expressed with regard to adopting such an approach, which would be distinct from that in draft provision 1(3)(a) (see para. 24 above). It was stated that enforceability of an arbitral award should be determined by reference to the place of arbitration. In that context, reference was made to article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention"). It was explained that if enforceability were to be determined by reference to the place where enforcement of the settlement agreement was sought, it would provide a party the opportunity to seek enforcement twice (as an award and as a settlement agreement). It was therefore suggested that determining the "enforceability" by reference to the place of arbitration would ensure a similar approach as taken with regard to settlement agreements approved by a court or concluded before a court.

27. After discussion, it was agreed that enforceability of a settlement agreement as an arbitral award would be left to the competent authority and that the square-bracketed texts in draft provision 1(3)(b) would be deleted.

"prior to any application under article 3"

28. The Working Group agreed that the square-bracketed phrase "prior to any application under article 3" would not be necessary. Nonetheless, it was agreed that draft provision 1(3) should not be interpreted to allow a party against whom the enforcement of a settlement agreement was sought to, at that stage, seek a consent award or apply to a court for the approval of a settlement agreement, which would result in the settlement agreement falling outside the scope of the instrument (see para. 22 of document A/CN.9/WG.II/WP.202).

Revised draft provision 1(3)

29. After discussion, the Working Group agreed that draft provision 1(3) should read as follows: "This [instrument] does not apply to: (a) Settlement agreements (i) that have been approved by a court or have been concluded in the course of proceedings before a court; and (ii) that are enforceable as a judgment in the State of that court; (b) Settlement agreements that have been recorded and are enforceable as an arbitral award."

4. Conclusion on draft provision 1

30. Subject to the above-mentioned changes (see paras. 15, 23 and 27 to 29 above), the Working Group approved draft provision 1.

B. Definitions

1. Draft provisions 2(1) and 2(2)

31. The Working Group recalled that draft provisions 2(1) and 2(2) contained a definition of "international" settlement agreements modelled on articles 1(4) and 1(5) of the Model Law on Conciliation. The Working Group also recalled its decision that the "international" nature of settlement agreements should not be derived from the "international" nature of conciliation but from the settlement agreement itself.

Definition of "international"

32. Noting that the place of business of the parties constituted the criteria for determining the "internationality" of settlement agreements, it was questioned whether that definition should be expanded to also cover situations where parties would have their places of business in the same State, but the settlement agreement would nevertheless contain an international element, for instance, where the parties' parent company or shareholders were located in different States. It was suggested that such an expansion would reflect current global business practices as well as complex corporate structures.

33. The Working Group recalled that it had agreed that the instrument should contain a clear and objective criteria for defining "international" settlement agreements (A/CN.9/896, paras. 20 and 21, and A/CN.9/867, paras. 93–101). In that light, it was generally felt that there would be complexities in referring to circumstances mentioned in paragraph 32 above and that providing a comprehensive definition to capture complex corporate structures would be difficult.

34. It was recalled that when preparing the Model Law on International Commercial Arbitration ("Model Law on Arbitration"), that matter was resolved by including article 1(3)(c), which provided that the parties might agree that the "subject matter of the arbitration agreement relates to more than one country". A similar approach was adopted in article 1(6) of the Model Law on Conciliation.

35. After discussion, the Working Group agreed that draft provisions 2(1) and 2(2) would remain unchanged subject to any concrete drafting proposals.

Article 1(6) of the Model Law on Conciliation

36. On whether draft provision 2 should include a provision similar to article 1(6) of the Model Law on Conciliation, the Working Group reaffirmed its understanding that the instrument should not contain a similar provision where it would take the form of a convention.

37. Therefore, the discussion focused on how article 1(6) would operate when the Model Law on Conciliation would be complemented by draft provisions on settlement agreement (referred to as the "amended Model Law"). One view was that article 1(6) should also apply to those provisions. It was stated that article 1(6) currently applied to article 14 of the Model Law, which dealt with enforceability of settlement agreements. In addition, it was said that the Model Law had already been enacted in a number of States, and that deleting that provision in the amended Model Law would be problematic. In line with the understanding that the existing provisions of the Model Law should not be modified to the extent possible as States had already enacted legislation based on it, it was suggested that article 1(6) should apply also to the draft provisions on settlement agreements. Another view was that article 1(6) should either be deleted entirely from the amended Model Law or not be applicable to provisions on settlement agreements for the sake of consistency with the approach in the draft convention (see para. 36 above).

"at the time of the conclusion of that agreement"

38. To ensure consistency of the temporal determination between subparagraphs (a) and (b) in draft provision 2(1), the Working Group agreed to move the words "at the

time of the conclusion of that agreement" in subparagraph (a) to the chapeau of draft provision 2(1).

Definition of "internationality" of the "conciliation" and "settlement agreement" under the amended Model Law on Conciliation

39. The Working Group considered whether the amended Model Law should contain a single definition of "internationality", which would apply to both conciliation and settlement agreements as provided for in document A/CN.9/WG.II/WP.202/Add.1, paragraph 6. It was noted that the draft contained in that document defined the internationality of conciliation by reference to the place of business of the parties at the time of the conclusion of the settlement agreement. However, it was stated that the applicability of the law would need to be determined when the conciliation was initiated and not at a later stage when a settlement agreement was concluded. It was further said that parties might not necessarily conclude a settlement agreement. It was therefore suggested to define separately the internationality of the conciliation and the internationality of the settlement agreement by reference to the agreement to conciliate in accordance with article 1(4) of the Model Law. However, it was suggested that a reference to the agreement to conciliate might not always be feasible, as there might not be such an agreement concluded by the parties as a basis for the conciliation process.

Additional definitions

40. A suggestion was made to include a definition of "parties", which would clarify that reference to "parties" in the instrument would include their authorized representatives. In response, it was said that including a reference to authorized representatives in the definition of "parties" would be problematic. For example, the "internationality" of a settlement agreement was determined in accordance with the parties' places of business.

41. As an alternative, it was suggested that draft provision 3(3)(a) could include a reference to "authorized representatives of the parties". It was also mentioned that reference to the authorized representatives of the parties might be implicit in the instrument (as is the case with other UNCITRAL texts), which could be clarified in any material accompanying the instrument. After discussion, the Working Group agreed to consider that matter further when discussing draft provision 3(3)(a) (see paras. 49 and 50 below).

2. Draft provisions 2(3) and 2(4)

42. There was general support for draft provisions 2(3) and 2(4). In that light, the Working Group agreed to consider in the context of draft provision 3(3)(a) whether draft provision 2(3) would include a reference to parties' authorized representatives (see paras. 40 and 41 above, and paras. 49 and 50 below). In response to a question whether the instrument would apply to settlement agreements whether or not they resulted from conciliation, the Working Group agreed to consider that question in conjunction with matters raised in paragraphs 37 and 38 of document A/CN.9/WG.II/WP.202 (see paras. 68–72 below).

3. Conclusion on draft provision 2

43. **Subject to the above-mentioned change (see para. 38 above)** and subject to further consideration of the remaining issues pertaining to how article 1(6) and other related provisions would operate in the amended Model Law (see paras. 36 and 37 above), the Working Group approved draft provision 2.

C. Application

1. Draft provisions 3(1) and 3(2)

Placement and heading

44. With regard to the placement of draft provisions 3(1) and 3(2), the Working Group agreed that they should be placed under a separate article in the instrument following draft provision 1, possibly entitled "General principles". In response to a question about the meaning of the draft provision 3(2), an explanation from the sixty-sixth session was reiterated, namely that by meeting all the conditions laid down in the instrument, the party seeking relief would thereby be able to prove that the dispute had been settled.

"in order to conclusively prove that the matter has been already resolved"

45. With regard to the square-bracketed text at the end of draft provision 3(2), a number of suggestions were made. The suggestion to delete that text as it could narrow the scope of application of the draft provision did not receive support. It was widely felt that the text, which was part of the compromise, should be retained outside square brackets. It was said that that phrase removed the ambiguity regarding the consequences of invoking the settlement agreement as a defence and clarified that the settlement agreement could prove that the dispute had been resolved.

46. Nonetheless, concerns were expressed regarding the inclusion of the word "conclusively". It was said that the inclusion could affect the application of the rules of procedure of the State. In response, it was said that the word "conclusively" would not affect the application of rules of procedure but that that deletion would be acceptable as it would not alter the meaning of the provision. It was generally felt that the inclusion did not have much merit and therefore, it was agreed that the word "conclusively" should be deleted.

47. In addition, the Working Group agreed that draft provision 3(2) with the above-mentioned changes (see paras. 45 and 46 above) was broad enough to cover set-off claims and that there was no need to make a specific reference to such claims in that provision.

48. After discussion, the Working Group agreed that draft provision 3(2) should read as follows: [Legislative provision] "If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State and under the conditions laid down in this Law, in order to prove that the matter has been already resolved." [Convention] "If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Contracting State shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has been already resolved."

2. Draft provision 3(3)(a)

49. The Working Group considered whether draft provision 3(3)(a) should provide that settlement agreements might be signed by the parties "or their authorized representatives" (see paras. 40-42 above). It was pointed out that it was common for representatives of parties to sign settlement agreements on their behalf and referring only to the parties in draft provision 3(3)(a) could unduly restrict the application requirement. However, it was mentioned that the notion of parties' representatives might be understood differently in different jurisdictions and in different contexts. It was further mentioned that including the words "or their authorized representatives" in draft provision 3(3)(a) might create complexities and discrepancies, as there were other instances where the instrument referred to "parties". It was suggested that the matter should be left to be addressed in relevant applicable domestic legislation.

50. After discussion, the Working Group agreed that the instrument should not include a reference to "authorized representatives" of the parties with the understanding that that notion was implicit in the text of the instrument.

51. During the discussion on draft provision 3(3)(a), a proposal was made that the instrument should require that the settlement agreement should set out in a clear and comprehensible manner its enforceable content. It was explained that the purpose of adding such a requirement would mean that only settlement agreements with enforceable obligations and which clearly set out the content of the settlement, would be accepted for enforcement under the instrument. After hearing the suggestion that such a requirement might be better placed in the draft provision on grounds for refusing enforcement, the Working Group agreed to consider the matter in conjunction with draft provision 4 (see para. 88 below).

3. Draft provision 3(3)(b)

52. The Working Group agreed to retain the word "evidence" as it was considered more appropriate than the word "indication" for the purpose of draft provision 3.

53. Various suggestions were made regarding subparagraph (b). It was suggested that the list of examples contained in subparagraph (b) should be deleted, as draft provisions 1 and 2(4) required that the settlement agreement resulted from conciliation, and defined conciliation as requiring the involvement of a third party; and as it would be preferable to leave it to the competent authority to determine the evidence required to prove that the settlement agreement resulted from conciliation.

54. As a matter of drafting, it was suggested that the phrase "attesting to the involvement of the conciliator in the conciliation process," should be replaced by the words "to that effect". It was explained that subparagraph (b) should make it clear that the attestation to be produced should be to the effect that the settlement agreement resulted from conciliation, and not refer to a mere involvement of the conciliator.

55. In relation to the example that an attestation could be provided by an institution that administered the conciliation process, it was said that institutions were generally not involved in conciliation processes; therefore, that example would not necessarily constitute an appropriate means to prove that the settlement agreement resulted from conciliation.

56. A question was raised whether the list in subparagraph (b) should be illustrative (open) (as currently drafted with the words "such as") or exhaustive (closed). On a practical note, it was suggested that an illustrative list would be preferable as it would not necessarily be feasible to reach out to the conciliator in various circumstances, including when the settlement agreement would need to be raised as a defence against a claim, a procedure which might take place a number of years after the conciliation. It was also highlighted that there might be costs involved, or conciliators might be hesitant, in providing attestations or signing settlement agreements.

57. A proposal was made to amend subparagraph (b) to the effect that it would establish a hierarchy among the means for evidencing that a settlement agreement resulted from conciliation, along the following lines: "(b) Evidence that the settlement agreement resulted from conciliation either by including the conciliator's signature on the settlement agreement or by providing a separate statement by the conciliator attesting to the involvement of the conciliator in the conciliation process; the competent authority can accept any other form of evidence that the settlement agreement resulted from conciliation only if the party has shown that it has made an attempt to receive either of the above."

58. Some support was expressed for that proposal, as it provided a middle ground between an open-list and a close-list approach. However, it was widely felt that a flexible approach as provided in the current draft provision 3(3)(b) (see document A/CN.9/WG.II/WP.202, para. 29) was preferable. It was pointed out that it would be difficult to provide a hierarchy, particularly when the list was open-ended. It was further said that prescribing a hierarchy would give prevalence to certain practices to the detriment of others and could run contrary to existing laws and practices. Further,

it was suggested that the proposal would be difficult to implement, for instance when the conciliation involved multiple conciliators, and might give rise to legal disputes particularly with regard to the party being obliged to demonstrate that it had made such attempts.

59. After consideration of various drafting suggestions, the Working Group agreed that draft provision 3(3)(b) should read as follows: "(b) Evidence that the settlement agreement resulted from conciliation, such as: (i) the conciliator's signature on the settlement agreement; (ii) a document signed by the conciliator indicating that the conciliation was carried out; (iii) an attestation by an institution that administered the conciliation process; or (iv) in the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority."

4. Draft provision 3(3)(c)

60. The Working Group then considered a number of suggestions with respect to draft provision 3(3)(c).

61. One view was that draft provision 3(3)(c) should remain unchanged. In support, it was noted that the competent authority should be provided flexibility in requiring documents as necessary in the enforcement process. In that context, it was noted that draft provision 3(3)(c) should be read in conjunction with draft provision 3(6) requiring the competent authority to act expeditiously. Another view was that draft provision 3(3)(c) should be qualified with additional wording along the following lines: "to demonstrate that the requirements of this [instrument] are met." It was further mentioned that the requirements were those found in draft provisions 3(3)(a) and 3(3)(b). During the discussion, a suggestion was made that the word "necessary" could be replaced by "relevant". Yet another view was that draft provision 3(3)(c) could be deleted as it might invite the competent authority to require parties to supply documents not required in the instrument, which would make it burdensome for parties seeking enforcement. It was further pointed out that the rules of procedure of a given State would generally allow the competent authority to require such necessary documents.

62. Considering the revised draft provision 3(3)(b) (see para. 59 above), a proposal was made that draft provision 3(3)(c) should be deleted and that a separate paragraph should be added in draft provision 3. It was said that article 13(2) of the Convention on Choice of Court Agreements (also reproduced in the draft convention on judgments, under preparation by The Hague Conference on Private International Law) could provide a useful model for drafting that new paragraph, which would allow the competent authority to require necessary documents to verify that the conditions of the instrument have been complied with.

63. While views were expressed that there was no need for such a provision in light of the inclusion of subparagraph (iv) in draft provision 3(3)(b) (see para. 59 above), general support was expressed for inclusion of a new paragraph. In that context, it was highlighted that draft provisions 3(3)(a) and 3(3)(b) dealt with what a party would need to supply to the competent authority upon submitting an application, whereas the new paragraph could address the power of the competent authority to require documents necessary for considering an application. It was further mentioned that the new paragraph would provide broader flexibility to the competent authority as subparagraph (iv) in draft provision 3(3)(b) was limited to any other evidence acceptable to the competent authority to prove that the settlement agreement resulted from conciliation.

64. Concerns were expressed that the new paragraph could result in the competent authority introducing additional application requirements, which would unduly burden the party seeking enforcement. In response, it was stated that such concerns could be addressed by providing that the competent authority would be able to require any necessary document "only to verify that the conditions of this instrument are met." In that context, it was suggested that the new paragraph could indicate what those conditions were, for example, by stating that request of additional documents by the competent authority should be limited to verifying that the requirements in

draft provisions 3(3)(a) and 3(3)(b) were met. That suggestion did not receive support, as it would restrict the powers of the competent authority. As illustrations, it was mentioned that the competent authority might require (i) proof of authority of parties' representatives where they signed the settlement agreement on the parties' behalf, or (ii) proof of the internationality of a settlement agreement, which was not covered under draft provisions 3(3)(a) and 3(3)(b). It was pointed out that limiting the power of the competent authority to require documents as necessary in light of the conditions of the instrument constituted an acceptable safeguard.

65. After discussion, the Working Group agreed that a new paragraph replacing paragraph (3)(c) would be included in draft provision 3 along the following lines: "The competent authority may require any necessary document in order to verify that the conditions of this [instrument] have been complied with."

5. Draft provision 3(4)

66. The Working Group approved draft provision 3(4) without any modification.

6. Draft provisions 3(5) and 3(6)

67. While a suggestion was made that draft provision 3(5) would be superfluous if a new paragraph were to be included in draft provision 3 (see para. 65 above), the Working Group agreed to retain draft provision 3(5) unchanged. While a suggestion was made that an element of "reasonableness" should qualify the relative notion of "expeditiously" in draft provision 3(6), the Working Group agreed to retain draft provision 3(6) unchanged.

7. Informal processes

68. The Working Group then considered whether the instrument should provide flexibility to States to broaden the scope of the instrument to agreements settling disputes between parties not reached through conciliation (see para. 42 above). The discussion took into account drafting proposals for a reservation or declaration (where the instrument would take the form of a convention) and a footnote (where the instrument would take the form of the amended Model Law) (see document A/CN.9/WG.II/WP.202, para. 38).

69. One view was that flexibility should be provided to States that wished to provide agreements settling disputes not reached through conciliation a similar enforcement mechanism as envisaged by the instrument for settlement agreements resulting from conciliation. In support, it was suggested that the instrument could include a reservation or a footnote to that effect, which would afford such flexibility to States and encourage States adopting the instrument to consider such options. It was further mentioned that there would be no detriment in allowing States to expand the scope of the instrument, as it would actually be beneficial to parties wishing to enforce such agreements.

70. Another view was that States should not be given the flexibility to overstep the scope of the instrument. In support, it was stated that providing such flexibility would defeat not only the purpose of the instrument but also the carefully drafted scope and definitions provisions therein. Concerns were also expressed about the possible negative consequences such provisions could have on the overall credibility of the enforcement mechanism envisaged by the instrument. Furthermore, it was stated that a reservation to that effect would be considered not permissible under article 19 of the Vienna Convention on the Law of Treaties, as it would be incompatible with the object and purpose of the convention. It was further mentioned that the mandate given to the Working Group was limited to preparing an instrument on enforcement of international settlement agreements "resulting from conciliation". While there was less hesitation about including a footnote in the amended Model Law, it was indicated that it would not be appropriate for an instrument on enforcement of settlement agreements to encourage States to consider expanding the regime to agreements not reached through conciliation.

71. With respect to a suggestion that a more-favourable-right provision contemplated for inclusion in the instrument could allow States to apply the enforcement regime to agreements not reached through conciliation, it was stated that a more-favourable-right provision presupposed that the agreement in question fell within the scope of the instrument and would not allow the State to extend the scope of the instrument. In that context, it was emphasized that States, in any case, would be free to enact legislation that would grant agreements not reached through conciliation a treatment similar to that granted to settlement agreements under the instrument, which need not be mentioned in the instrument. In contrast, it was stated that this possibility needed to be highlighted in the instrument as a footnote in the amended Model Law, which would encourage States to consider that approach.

72. After discussion, it was agreed that the instrument in the form of a convention would not include a provision that would allow a State to declare that it would apply the convention to agreements not reached through conciliation. The Working Group decided to further consider whether the instrument in the form of an amended Model Law could include a footnote indicating that States may consider applying the instrument to such agreements. It was also agreed that explanatory material accompanying the instrument, if any, could outline relevant considerations.

8. Conclusion on draft provision 3

73. Subject to the above-mentioned modifications (see paras. 44, 48, 52, 59 and 65 above) and decision (see para. 72 above), the Working Group approved draft provision 3.

D. Defences

1. Draft provision 4 – title and chapeau

74. To clarify that draft provision 4 applied to both enforcement dealt with in draft provision 3(1) and the procedure dealt with in draft provision 3(2), a suggestion was made to revise the heading of draft provision 4 along the following lines: “Grounds for refusing to enforce or to invoke the settlement agreement”. In that context, some concerns were expressed whether draft provision 4 applied to both enforcement dealt with in draft provision 3(1) and the procedure dealt with in draft provision 3(2). It was said that draft provision 4 would not be applicable to certain procedures, for example, declaratory procedures.

75. With regard to the chapeau of draft provision 4(1), the Working Group agreed to delete the square-bracketed text “under article 3” where it appeared after the word “relief”.

2. Draft provision 4(1)(a)

76. Recalling its previous consideration of subparagraph (a) (A/CN.9/896, para. 85), the Working Group agreed to retain that subparagraph unchanged.

3. Draft provision 4(1)(b)

77. With respect to subparagraph (b), a suggestion was made to delete the first clause, which read: “The settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement.” In support, it was said that the clause was redundant as the binding nature of a settlement agreement would be derived from complying with the requirements in draft provisions 1(1) and 3(3)(a). It was also said that the “final” nature of a settlement agreement was addressed in the second clause of subparagraph (b) as well as draft provision 3(3)(a). In addition, it was stated that other subparagraphs of draft provision 4 sufficiently addressed those points.

78. A contrary view was that the first clause ought to be retained as it served an important purpose to ensure that only final and binding agreements would be enforced. It was stated that such a defence needed to be provided at the stage of enforcement, and was not covered by other provisions in the instrument, which served

different purposes. In addition, it was suggested that the first clause could be supplemented by the following words: "in accordance with the law of the State where relief is sought, including the law designated by its private international law".

79. With respect to the second clause of subparagraph (b) that "the obligations in the settlement agreement have been subsequently modified by the parties or have been performed", a suggestion was made to delete the words "by the parties" as there might be instances where the settlement agreement might be modified without the involvement of the parties. In addition, it was mentioned that the clause should be clarified in order to avoid situations where enforcement of a settlement agreement would be denied because the parties subsequently modified certain terms of that agreement.

80. With respect to the phrase "other than a failure by the party" in the third clause of subparagraph (b), it was suggested to clarify its meaning using the following phrase: "other than the non-performance by the party".

81. From a practical perspective, concerns were expressed that including too detailed as well as broad grounds to refuse enforcement would run contrary to the expectations of the parties that the instrument would provide for an efficient mechanism to enforce or invoke settlement agreements. It was mentioned that detailed or ambiguous provisions could lead the competent authority to question a number of issues at the enforcement stage and provide parties not willing to comply with the settlement agreement tools to impede enforcement. It was emphasized that such a result could eventually weaken the usefulness of the instrument. While acknowledging the need to reflect the perspectives of the practitioners, it was underlined that the instruments being prepared were texts for adoption or enactment by States and that if their concerns were not adequately addressed in the instruments, they were not likely to be adopted. Therefore, the need to balance both aspects was emphasized.

82. The Working Group considered a number of proposals in relation to draft provision 4(1)(b).

83. One proposal was to replace subparagraph (b) with the following text: "(i) The obligations in the settlement agreement have been subsequently modified, except where those subsequent modifications have been reflected in the settlement agreement, or have been performed; or (ii) the settlement agreement is not a final resolution of the dispute covered by the settlement agreement because the conditions set forth in the settlement agreement have not been met other than for the non-performance of the party against whom the settlement agreement was invoked and, therefore, have not yet given rise to the obligations of that party". It was further suggested that the *travaux préparatoires* should explain that while not explicitly mentioned in subparagraph (b), a party would be able to argue that the settlement agreement was not binding or to present evidence of the non-binding nature of the settlement agreement (for instance, a party could argue that the person who signed the settlement agreement was not authorized to do so).

84. While there was some support for that proposal, it was felt that it was complicated and could lead to difficulties in interpretation. It was pointed out that the conditions of the settlement agreement not being met could mean that the settlement agreement would be enforceable at a later stage, and not necessarily that it was not the final resolution of the dispute. With respect to the additional language suggested for the *travaux préparatoires*, it was cautioned that the grounds for resisting enforcement should be exhaustive, as indicated by the word "only" in the chapeau of draft provision 4(1).

85. With a view to provide a simpler text, the following proposal was made: "The settlement agreement is not binding, or is not final, or is conditional, or the obligations in the settlement agreement have been modified or have been performed." While there was support for that proposal, a number of drafting suggestions were made.

86. First, it was suggested to replace the word "modified" by the words "subsequently modified without consent". While there was support for the inclusion

of the word "subsequently", there was hesitation about including the words "without consent" as the purpose of the clause was to ensure that only the latest version of the settlement agreement "concluded by the parties" should be enforced.

87. Second, it was suggested that the meaning of the terms "binding" and "final" should be set out, by providing that a settlement agreement would be binding under the terms of the instrument and would be final in light of whether conditions therein have been met or modified. A further suggestion was to replace the word "final" by explanatory language, along the following lines: "or the obligation that is sought for enforcement was not meant to be enforced by the parties independently of the other parts of the settlement agreement". It was noted, however, that it might be cumbersome to agree on a definition of the terms "binding" and "final" which had already been interpreted in a variety of manners under various instruments, including the New York Convention.

88. Third, it was suggested to include an additional ground for refusing enforcement along the following lines: "the settlement agreement is not clear or comprehensible rendering it not capable of being enforced" (see para. 51 above). As an alternative, the following text was suggested: "the settlement agreement is not capable of being enforced". Concerns were expressed that those suggestions would introduce ambiguity and provide too wide a discretionary power to the competent authority. It was further suggested that such text would be redundant as only a clear and comprehensible settlement agreement would be binding and enforceable.

89. During the discussion, a number of other drafting proposals to replace or clarify subparagraph (b) were made.

90. A drafting proposal was made with the aim of retaining a simple drafting approach, while clarifying certain elements, along the following lines: "The settlement agreement: (i) is not binding or not final [under the conditions of this instrument]; (ii) is conditional or the settlement agreement has been [subsequently] modified [without consent] so that the obligations in the settlement agreement of the party against whom the settlement agreement is invoked have not yet arisen; (iii) the obligations in the settlement agreement have been performed; or (iv) is not clear or comprehensible rendering it not capable of being enforced."

91. Another drafting proposal read along the following lines: "the settlement agreement is not final and binding; or the obligations of the settlement agreement have been fully performed; or it is impossible to enforce the settlement agreement because significant modifications have been made by the parties in the absence of a conciliator, or because reciprocal obligations of the other party have not been performed. For the purpose of this [instrument], 'final' means that the implementation of the agreement shall not be dependent on a condition that has not yet been achieved, or a specific date that has not yet been reached; ''obligation' means that the subject matter of the agreement is clear, understandable and final, and can be settled by applicable law."

92. Yet another proposal was made aimed at avoiding the notions of binding and final, and focusing on the time of performance of obligations. It read: "Under the terms of the settlement agreement, the obligations sought to be enforced were not agreed to be performed by the time of enforcement."

93. After discussion, the Working Group agreed that the following text would form the basis of its future discussion on subparagraph (b), not disregarding the above-mentioned proposals and suggestions, and acknowledging that there could be further improvements of the text: "The settlement agreement: (i) obligations have been performed; (ii) is not binding, or is not final, according to its terms; (iii) has been subsequently modified; (iv) is conditional so that the obligations in the settlement agreement of the party against whom the settlement agreement is invoked have not yet arisen; or (v) is not capable of being enforced because it is not clear and comprehensible."

4. Draft provision 4(1)(c)

94. With respect to draft provision 4(1)(c), it was suggested that the phrase "under the law to which the parties have subjected it, or failing any indication thereon," should be deleted because party autonomy should operate within the limits of mandatory laws and public policy. The Working Group recalled that the matter had already been addressed at a previous session (see A/CN.9/896, para. 101). However, to clarify the meaning of draft provision 4(1)(c), the Working Group agreed to insert the word "validly" between the words "have" and "subjected" in subparagraph (c). It was explained that the addition would highlight that the competent authority could assess the validity of the choice of law made by the parties in the settlement agreement in accordance with applicable mandatory laws and public policy.

95. The Working Group heard a suggestion that subparagraph (c) should be placed before subparagraph (b) and requested the Secretariat to make the necessary drafting adjustments.

5. Draft provisions 4(1)(d) and 4(1)(e)

96. With respect to a suggestion to replace the word "standards" by the word "requirements" or to add the word "requirements" in subparagraph (d), the Working Group recalled its previous discussion on the topic mainly that subparagraph (d) would allow the competent authority to determine the standards applicable, which could take different forms such as the law governing conciliation and codes of conduct, including those developed by professional associations (see A/CN.9/901, para. 87). It was further confirmed that the text accompanying the instrument would provide an illustrative list of examples of such standards. In response, it was also suggested that there would be merit in including a definition of "standards" in the instrument, possibly based on article 6(3) of the Model Law, as that would prevent legal disputes in relation to the interpretation of subparagraph (d). That suggestion did not receive support.

97. With respect to the suggestion that subparagraphs (d) and (e) should be merged (also considering the repetition of words to the end of the subparagraphs), or their sequence changed considering the importance of the standard in subparagraph (e), the Working Group recalled that the substance of both subparagraphs had been already agreed upon by the Working Group subject only to drafting improvements. There was strong support to retain the subparagraphs as separate subparagraphs.

98. After discussion, the Working Group agreed to retain subparagraphs (d) and (e) without any modifications.

6. Draft provision 4(2)

99. With regard to the chapeau of draft provision 4(2), the Working Group agreed to delete the square-bracketed text "under article 3" where it appeared after the word "relief".

7. Draft provision 4(2)(a)

100. With regard to the suggestions to add the word "manifestly" before the word "contrary" along the lines of the Convention on Choice of Court Agreements and to add the words "including the national security or national interest of the State" in subparagraph (a), it was agreed that the subparagraph should remain unchanged mirroring the phrase in the New York Convention and the Model Law on Arbitration, which have already been broadly interpreted. It was cautioned that departure from such language could raise more confusion for the competent authority, which would be tasked with determining what the public policy of that State was. During the discussion, it was also mentioned that public policy could, in any case, include issues relating to national security or national interest.

8. Conclusion on draft provision 4

101. Subject to the above-mentioned modifications (see paras. 94, 95 and 99 above) and subject to further consideration of subparagraph (1)(b) (see para. 93 above) and issues that may arise on subparagraph (1)(c) from the revision of subparagraph (1)(b), the Working Group approved draft provision 4.

E. Terminology and presentation of draft provisions

1. Terminology

102. The Working Group considered the possibility of replacing the terms "conciliation" and "conciliator" in the instrument as well as other UNCITRAL texts on conciliation with the terms "mediation" and "mediator". Some hesitation was expressed about changing the terminology historically used in UNCITRAL texts. It was also mentioned that a cautious approach should be taken in making any such change as there could be substantive change in meaning (for example, the term "mediation" included not only facilitative but also evaluative conciliation).

103. Nonetheless, it was stated that there was merit in considering the replacement, as the terms "mediation" and "mediator" were more widely used and it would make it easier to promote the instrument giving it more visibility. It was mentioned that this would not entail any substantive change. To ensure that there was no confusion or misunderstanding about the replacement, it was suggested that the text accompanying the instrument (or a footnote therein) could explain the historical developments of the terminology in UNCITRAL texts and emphasize that the term "mediation" was intended to cover a broad range of activities that would fall under the definition as provided in article 1(3) of the Model Law regardless of the expressions used. That text would also stress that the replacement was not aimed at promoting a notion known to a specific legal system or tradition. It was also stated that if the replacement were to be made, it should be done consistently throughout UNCITRAL texts along with accompanying explanations as discussed above.

104. After discussion, the Working Group confirmed its shared understanding that the replacement of the term "conciliation" by the term "mediation" could be implemented as a basis for further consideration by the Working Group.

2. Presentation of the draft provisions in the draft convention and the amended Model Law

105. The Working Group then considered how the draft provisions as approved at its current session could be presented in a draft convention and in an amended Model Law (see annex). There was general support for the presentation provided in the annex.

106. With regard to the annex, the following suggestions were made, but not discussed:

- There should be a consistent definition of "conciliation" in the convention and in the amended Model Law (reference was made to draft article 3(4) of the draft convention and article 1(3) of the Model Law);
- The title of the amended Model Law should include the notion of international settlement agreements;
- Draft article 1(1) of the amended Model Law should read, along with the footnotes in article 1 of the Model Law: "This Law applies to international commercial conciliation or to international settlement agreements.";
- Article 1(8) of the Model Law should be placed in section 1 of the amended Model Law, and should be subject to (i) article 1(9) of the Model Law, which, if retained, should be placed in section 2 of the amended Model Law and (ii) draft articles 15(2) and 15(3) of the amended Model Law;

- Article 1(8) of the Model Law should be amended taking into account decisions reached by the Working Group;
- Article 3 of the Model Law should be placed in section 2 of the amended Model Law;
- Section 2 of the amended Model Law should be titled “international conciliation” and section 3 should be titled “international settlement agreement”; and
- Noting that article 14 of the Model Law also used the term “settlement agreement”, the interaction between that article and article 15 of the amended Model Law, which addressed international settlement agreements, should be considered.

Annex

Draft convention and draft amended Model Law on International Commercial Conciliation

The texts below illustrate how draft provisions 1 to 3, as revised by the Working Group (see paras. 14–73), could possibly appear in the draft convention and in the amended Model Law.

1. Draft convention

Title: [*to be determined*]

Article 1. Scope of application

1. This Convention applies to international agreements resulting from conciliation and concluded in writing by parties to resolve a commercial dispute ("settlement agreements").

2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or have been concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2. General principles

1. Each Contracting State shall enforce a settlement agreement in accordance with its rules of procedure, and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Contracting State shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has been already resolved.

Article 3. Definitions

[For the purposes of this Convention:]

1. A settlement agreement is "international" if, at the time of the conclusion of that agreement:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

2. For the purposes of this article:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

3. A settlement agreement is in "writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

4. "Conciliation" means a process, regardless of the expression used and irrespective of the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the conciliator") lacking the authority to impose a solution upon the parties to the dispute.

Article 4. Application

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Contracting State where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from conciliation, such as:

(i) The conciliator's signature on the settlement agreement;

(ii) A document signed by the conciliator indicating that the conciliation was carried out;

(iii) An attestation by an institution that administered the conciliation process; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the conciliator, is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the conciliator and to indicate the parties' or conciliator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in the official language(s) of the Contracting State where the application is made, the competent authority may request the party making the application to supply a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the conditions of the Convention have been complied with.

5. When considering the application, the competent authority shall act expeditiously.

[...]

2. Draft amended Model Law on International Commercial Conciliation

Title: UNCITRAL Model Law on International Commercial Conciliation (2002) With amendments as adopted in 201*

Section 1 – General provisions

Article 1. Scope of application and definitions

1. This Law applies to […].

2. For the purposes of this Law, "conciliator" means a sole conciliator or two or more conciliators, as the case may be. [*Article 1(2) of the Model Law*]

3. For the purposes of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute. [*Article 1(3) of the Model Law*]

[*Placement of Article 1 (6) to (9) of the Model Law to be determined*]

Article 2. Interpretation

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Variation by agreement [*placement to be determined*]

Except for the provisions of [*article 2, article 6, paragraph 3 – numbering to be adjusted and consideration whether any other articles to be included*] the parties may agree to exclude or vary any of the provisions of this Law.

Section 2 – Conciliation

Article aa. Scope and definitions

1. This section applies to international[4] commercial[5] conciliation. [*Article 1(1) of the Model Law*]

2. A conciliation is international if:

(a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

[4] Footnote 1 in the Model Law.
[5] Footnote 2 in the Model Law.

(ii) The State with which the subject matter of the dispute is most closely connected. [*Article 1(4) of the Model Law*]

3. For the purposes of this article:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence. [*Article 1(5) of the Model Law*]

Articles 4 to 13 of the Model Law would remain unchanged.

Article 14. [*title to be determined*]

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable.

[*Footnote 4 in the Model Law to be considered in conjunction with articles 1(7) and 3*]

Section 3 – Enforcement of international settlement agreements[6]

Article 15. Scope and definitions

1. This section applies to international agreements resulting from conciliation and concluded in writing by parties to resolve a commercial dispute ("settlement agreements").

2. This section does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This section does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or have been concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

4. A settlement agreement is international if, at the time of conclusion of the settlement agreement [*or at the time of the conclusion of the agreement to conciliate*]:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

5. For the purposes of this article:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the

[6] *Footnote to be considered.* [A State may consider enacting this section to apply to agreements settling a dispute, irrespective of whether they resulted from conciliation. Adjustments would then have to be made to relevant articles.]

settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

6. A settlement agreement is in writing if its content is recorded in any form. The requirement that a settlement agreement be "in writing" is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

Article 16. General Principles

1. A settlement agreement shall be enforced in accordance with the rules of procedure of this State and under the conditions laid down in this Law.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State and under the conditions laid down in this Law in order to prove that the matter has been already resolved.

Article 17. Application

1. A party relying on a settlement agreement under this section shall supply to the competent authority of this State:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from conciliation, such as:

(i) The conciliator's signature on the settlement agreement;

(ii) A document signed by the conciliator indicating that the conciliation was carried out;

(iii) An attestation by an institution that administered the conciliation process; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the conciliator, is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the conciliator and to indicate the parties' or conciliator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in the official language(s) of this State, the competent authority may request the party making the application to supply a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the conditions of this law have been complied with.

5. When considering the application, the competent authority shall act expeditiously.

[...]

B. Note by the Secretariat on settlement of commercial disputes: international commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation

(A/CN.9/WG.II/WP.202 and Add.1)

[Original: English]

Contents

I. Introduction

1. At its forty-seventh session, in 2014, the Commission considered a proposal to undertake work on the preparation of a convention on the enforceability of settlement agreements reached through international commercial conciliation (A/CN.9/822).[1] It requested the Working Group to consider the feasibility and possible form of work in that area.[2] At its forty-eighth session, in 2015, the Commission took note of the consideration of the topic by the Working Group at its sixty-second session[3] and agreed that the Working Group should commence work at its sixty-third session to identify relevant issues and develop possible solutions. The Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.[4] At its forty-ninth session, in 2016, the Commission confirmed that the Working Group should continue its work on the topic.[5] At its fiftieth session, in 2017, the Commission took note of the compromise reached by the Working Group at its sixty-sixth session, which addressed five key issues as a package (referred to as the "compromise proposal", see A/CN.9/901, para. 52) and expressed support for the Working Group to continue pursuing its work based on that compromise.[6]

2. At its sixty-third to sixty-sixth sessions, the Working Group undertook work on the preparation of an instrument on enforcement of international settlement agreements resulting from conciliation.[7]

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[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 123–125.

[2] Ibid., para. 129.

[3] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 135–141; see also A/CN.9/832, paras. 13–59.

[4] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 142.

[5] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162–165.

[6] Report of the Commission on the work of its fiftieth session, under preparation.

[7] The reports of the Working Group on the work of its sixty-third, sixty-fourth, sixty-fifth and sixty-sixth sessions are contained in documents A/CN.9/861, A/CN.9/867, A/CN.9/896 and A/CN.9/901, respectively.

3. This note, which consists of document A/CN.9/WG.II/WP.202 and its addendum, outlines the issues considered so far by the Working Group. Document A/CN.9/WG.II/WP.202 contains annotations to draft provisions to be included in an instrument on enforcement of international settlement agreements resulting from conciliation (referred to as the "instrument") and highlights provisions that were included in the compromise proposal. The addendum illustrates how the draft provisions would be adjusted where the instrument takes the form of a convention and of a complement to the UNCITRAL Model Law on International Commercial Conciliation ("Model Law on Conciliation" or "Model Law").

II. Draft instrument on enforcement of international commercial settlement agreements resulting from conciliation

A. Annotated draft provisions

1. Scope of the instrument

4. The Working Group may wish to consider the following formulation regarding the scope of the instrument:

Draft provision 1 (Scope of application)

"1. This [instrument] applies to international agreements resulting from conciliation and concluded in writing by parties to resolve a commercial dispute ('settlement agreements').

"2. This [instrument] does not apply to settlement agreements:

"(a) Concluded for personal, family or household purposes by one of the parties (a consumer); or

"(b) Relating to family, inheritance or employment law.

"3. This [instrument] does not apply to settlement agreements that[, prior to any application under article 3]:

"(a) have been approved by a court, or have been concluded before a court in the course of proceedings, either of which are enforceable [in the same manner] as a judgment [according to the law of the State of that court]; or

"(b) have been recorded and are enforceable as an arbitral award [legislative provision: *according to the law of this State] [*convention: *according to the law of the Contracting State where enforcement is sought]."*

Comments on draft provision 1

Paragraph 1

5. Paragraph 1, which was addressed under issue 1 of the compromise proposal (A/CN.9/901, para. 52), reflects the discussion of the Working Group that the objective of the instrument would need to be clearly spelled out, preferably in draft provision 1 (A/CN.9/896, paras. 151–155 and 200–203 and A/CN.9/901, para. 56). The Working Group may wish to consider whether to move draft provisions 3(1) and 3(2) after draft provision 1(1) where the instrument takes the form of a convention in order to indicate in the scope provision the key obligations of the contracting States (see below, para. 33).

6. The term "settlement agreement" is defined under paragraph 1 (see A/CN.9/896, paras. 32, 64, 117, 145, 146 and 152), in line with the understanding of the Working Group that (i) the written requirement for the settlement agreement should be contained in draft provision 1 (1), with draft provision 2 (3) defining how that requirement is met, in particular in relation to electronic communications (see A/CN.9/896, para. 66); and (ii) the instrument should apply to "commercial" settlement agreements, concluded by

parties to resolve a "commercial" dispute, without providing for any limitation as to the nature of the remedies or contractual obligations (see A/CN.9/896, para. 16).

Paragraph 2

7. Paragraph 2 contains draft formulation on exclusion of settlement agreements dealing with consumer, family and employment law matters, in accordance with the discussion of the Working Group (A/CN.9/896, paras. 55–60).

Paragraph 3(a)

- *General comments*

8. Paragraph 3(a), which was addressed under issue 2 of the compromise proposal (A/CN.9/901, para. 52), deals with the exclusion from the scope of the instrument of agreements concluded in the course of judicial proceedings (A/CN.9/896, paras. 48–54, 169–176, 205–210 and A/CN.9/901, paras. 25–34, 58–71). The manner in which paragraph 3(a) is meant to operate had been described by the Working Group as follows: (i) the competent authority where enforcement was sought would determine both the application of the instrument and the enforceability of the settlement agreement; (ii) whether a settlement agreement was enforceable in the same manner as a judgment would be determined in accordance with the law of the State where the settlement agreement was approved or court proceedings took place; and (iii) the more-favourable-right provision would allow States to apply the instrument, for example, to a settlement agreement approved by a court and enforceable in the same manner as a judgment (A/CN.9/901, para. 71).

9. Paragraph 3(a) should be considered in light of its objective, which is to avoid possible gaps or overlap with existing and future conventions, namely the Convention on Choice of Court Agreements (2005) (the "Choice of Court Convention"), and the draft convention on judgments, under preparation by The Hague Conference on Private International Law ("draft convention on judgments"). The Working Group may wish to consider that the risk of gaps or overlap exists mainly in relation to the provisions of the draft convention on judgments that would apply to "judicial settlements".[8] The draft convention on judgments aims at establishing a system among contracting States whereby judgments in the contracting State of origin would be recognized and enforced as such in the contracting State where enforcement is sought. The Working Group may wish to consider that excluding from the scope of the instrument settlement agreements that would be considered as judicial settlements and are enforceable as judgments at the place of origin would avoid overlap, but may create gaps until the draft convention on judgments is concluded, and adopted by a sufficient number of States. Indeed, under paragraph 3(a), a settlement agreement that is enforceable as a judgment at the place of origin, but cannot be enforced as a judgment at the place of enforcement would be excluded from the scope of the instrument, thereby depriving parties of recourse for enforcement (see below, paras. 15 and 16).

10. On a practical note, the determination of enforceability in reference to other mechanisms poses some questions that the Working Group may wish to consider. First, it creates a hierarchy among the possible options for parties because parties can rely on the instrument only when the settlement agreement is not enforceable under other instruments. If a similar provision were to be inserted in the draft convention on judgments (for example, excluding from its scope settlement agreements that are enforceable under this instrument), it could pose a circular problem where potential

[8] Article 13 of the draft convention on judgments (as of February 2017) provides that: "Judicial settlements (transactions judiciaires) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment[, provided that such settlement is permissible under the law of the requested State]." Draft article 14 (1)(d) provides that: "The party seeking recognition or applying for enforcement shall produce – (d) in the case referred to in Article 13, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin."

enforceability in different regimes would need to be considered prior to enforcement. Further, complications may arise from the fact that the determination by competent authorities may differ if enforcement is sought in more than one jurisdiction.

- *"approved by a court" – "concluded before a court in the course of proceedings"*

11. The Working Group may wish to consider the meaning of, and the difference between, the notions of a settlement agreement being "approved" by a court, and being "concluded before a court" (A/CN.9/901, para. 58). The involvement of a judge might vary from merely recording the parties' settlement agreement to taking an active role in the settlement process and whether the intention is to exclude from the scope of the instrument a wide range of circumstances would need to be confirmed (A/CN.9/901, para. 69). For example, it should be clarified whether situations where court proceedings begin but parties are able to settle through conciliation without any court involvement would be excluded from the scope of the instrument, and whether any formal act by a court would be required (A/CN.9/901, para. 61).

12. The Working Group may wish to recall its understanding at previous sessions that: (i) settlement agreements reached during judicial proceedings but not recorded as judicial decisions should fall within the scope of the instrument (A/CN.9/867, para. 125, A/CN.9/896, para. 48 and A/CN.9/901, para. 25); and (ii) the mere involvement of a judge in the conciliation process should not result in the settlement agreement being excluded from the scope of the instrument (A/CN.9/867, para. 131 and A/CN.9/896, para. 54, and A/CN.9/901, para. 25). The Working Group may wish to consider the extent to which paragraph 3(a) remains consistent with that understanding, in particular as it does not refer to the notion of a settlement agreement being "recorded".

- *Meaning of "enforceable [in the same manner] as"*

13. The Working Group may wish to further consider whether the bracketed phrase "[in the same manner]" should be retained. This phrase may be understood broadly to cover situations where a settlement agreement approved by a court or concluded before a court is considered to "be" a judgment or "has the same effect as" a judgement in that jurisdiction. Possible different interpretations might create uncertainty.

14. The Working Group may wish to confirm its understanding that the phrase "enforceable as" refers to the possibility of enforcement. The competent authority would only determine whether an approved settlement agreement, or a settlement agreement concluded before a court may be potentially enforceable, and would not inquire whether there is the possibility of such an enforcement being granted or refused.

- *According to the law of the State of the court that approved the settlement agreement or before which the settlement agreement was concluded*

15. The Working Group may wish to confirm that the intention of referring to a settlement agreement "approved by a court" or "concluded before a court" is to exclude those settlement agreements from the scope of the instrument because they would be subject to a separate enforcement mechanism. For instance, if a settlement agreement has been approved by a court, but is not enforceable as a judgment, the competent authority would determine that the settlement agreement fall within the scope of the instrument and would proceed to enforcement under the instrument.

16. The determination whether a settlement agreement approved by a court or concluded before a court is enforceable in the same manner as a judgment is to be made in accordance with the law of the State where court proceedings took place (A/CN.9/901, paras. 59 and 71). For example, if a party applies for enforcement in State B of a settlement agreement which was approved by a court (or concluded before a court) in State A, the competent authority in State B would examine whether the approved settlement agreement is enforceable in the same manner as a judgment in State A. If it finds that this is the case, the competent authority would determine that

the underlying settlement agreement does not fall within the scope of the instrument and would not proceed with the enforcement of the settlement agreement under the instrument (due to it being outside the scope). The competent authority in State B would decide so, even if State B does not have an enforcement regime for foreign judgments. In other words, the settlement agreement would be denied enforcement, and this would be regardless of whether the approved settlement agreement (or the settlement agreement concluded before a court) is enforceable in the same manner as a judgement in State B. In confirming this understanding, the Working Group may wish to take into account the view that requiring the competent authority to inquire about the enforceability in a different jurisdiction could be an additional burden, costly and potentially lead to complications and delays (A/CN.9/901, paras. 28 and 63). By comparison, the draft convention on judgments aims at establishing a mechanism whereby the State of origin would issue a certificate stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin. This mechanism would only operate among contracting States because the purpose of the draft convention on judgments is to include judicial settlements within its scope, and to provide a mechanism for mutual recognition and enforcement of judgments.[9]

Paragraph 3(b)

17. Paragraph 3(b), which was addressed under issue 2 of the compromise proposal (A/CN.9/901, para. 52), deals with the exclusion from the scope of the instrument of agreements concluded in the course of arbitral proceedings (A/CN.9/896, paras. 48–54, 169–176, 205–210 and A/CN.9/901, paras. 25–34, 58–71). This provision should be considered in light of its objective, which is to avoid possible gap or overlap with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention").

18. The Working Group may wish to confirm its understanding that: (i) if the arbitral award recording the settlement agreement falls outside the scope of the relevant enforcement regime (such as the New York Convention) at the place where enforcement is sought, the settlement agreement would be considered for enforcement under the instrument (A/CN.9/901, para. 71 (v)); and (ii) the word "enforceable" refers only to the possibility of enforcement as the competent authority would only determine whether the award may be potentially enforceable, and not inquire whether there is the possibility of such an enforcement being granted or refused.

Other comments on paragraph 3

- *Determination by the court at the place of enforcement ex officio or upon request, burden of proof*

19. The Working Group may wish to clarify whether the determination that the settlement agreement cannot be enforced through the regime available for judgments and arbitral awards is to be made by the competent authority on its own initiative. If so, it may be appropriate to provide the parties an opportunity to be heard particularly as the competent authority may not necessarily have all relevant information on the matter.

20. If the burden of proof would be on the parties, the party seeking enforcement of the settlement agreement would need to indicate that there is no other mechanism to enforce the settlement agreement; the party against whom the application is being invoked would need to indicate that there exists such a mechanism (A/CN.9/901, para. 70). If it is the latter, the Working Group may wish to further consider whether paragraph 3 could be instead formulated as a ground to refuse enforcement under draft provision 4 (A/CN.9/901, para. 67), as follows.

Option for draft provision 4

"*1. The competent authority of [*legislative provision*: this State][* convention*: the Contracting State where the application [under article 3] is made] may*

[9] Ibid.

refuse to grant relief [under article 3] at the request of the party against whom the application is made, only if that party furnishes to the competent authority proof that: (...)

"(f) The settlement agreement has been approved by a court [prior to any application under article 3] and is enforceable [in the same manner] as a judgment under the law of the State of that court;

"(g) The settlement agreement has been concluded before a court in the course of proceedings [prior to any application under article 3] and is enforceable [in the same manner] as a judgment under the law of the State of that court; or

*"(h) The settlement agreement has been recorded as an arbitral award [prior to any application under article 3] and that award is enforceable under the law of [*legislative provision*: this State][* convention*: the Contracting State where enforcement is sought]."*

- *Invoking a settlement agreement in accordance with draft provision 3(2)*

21. The instrument not only addresses enforcement but also the possibility for a party to invoke a settlement agreement in accordance with draft provision 3(2). The Working Group may wish to consider whether this notion needs to be covered and, if so, whether it would be considered as covered under the term "enforceable as".

- *"[prior to any application under article 3]"*

22. The Working Group may wish to confirm that paragraph 3 shall not allow a party against whom the enforcement of a settlement agreement is sought to, at that stage, seek a consent award or apply to a court for the approval of a settlement agreement as a means to resist enforcement of the underlying settlement agreement. The Working Group may wish to consider inserting the bracketed words "[prior to any application for relief under article 3]" to clarify this point. In addition, this language would make it clear that consideration by a court of an application under draft provision 3 would not fall under paragraph 3(a).

- *Alternative approaches*

23. Some of the alternative approaches discussed at the sixty-sixth session of the Working Group were to (i) include settlement agreements reached during judicial or arbitral proceedings recorded as judicial decisions or arbitral awards within the scope of the instrument to the extent that they were not enforceable under the specific enforcement regime applicable to them (A/CN.9/901, para. 30); (ii) leave it to contracting States to determine the application of the instrument regarding such settlement agreements (A/CN.9/901, paras. 31 and 32); or (iii) leave it to the enforcing authority to determine the applicable enforcement regime (A/CN.9/901, para. 64).

2. Definitions

24. The Working Group may wish to consider the following formulation regarding the definitions:

Draft provision 2 (Definitions)

"1. A settlement agreement is 'international' if:

"(a) At least two parties to the settlement agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

"(b) The State in which the parties to the settlement agreement have their places of business is different from either: (i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or (ii) The State with which the subject matter of the settlement agreement is most closely connected.

"2. For the purposes of this article:

"(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

"(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

"3. A settlement agreement is 'in writing' if its content is recorded in any form. The requirement that a settlement agreement be 'in writing' is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

"4. 'Conciliation' means a process, regardless of the expression used and irrespective of the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the conciliator') lacking the authority to impose a solution upon the parties to the dispute."

Comments on draft provision 2

Paragraphs 1 and 2

25. Paragraphs 1 and 2 contain a definition of "international" settlement agreement and are modelled on article 1(4) and (5) of the Model Law on Conciliation (A/CN.9/896, paras. 17–31 and 161). Upon considering whether the international nature of settlement agreements should be derived from the international nature of the conciliation (as defined in article 1(4) of the Model Law), the Working Group agreed that the instrument should instead refer to the internationality of "settlement agreements" (A/CN.9/896, paras. 19 and 158–163).

26. Paragraph 1 does not include a provision similar to that found in article 1(6) of the Model Law on Conciliation that "*This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law*". The Working Group agreed that the instrument should not contain a similar provision where it takes the form of a convention, but that the matter might need to be considered further where it takes the form of a complement to the Model Law (A/CN.9/896, para. 26).

Paragraph 3

27. Paragraph 3 addresses the requirement found in draft provision 1(1) that settlement agreements should be in writing (A/CN.9/896, paras. 33–38 and 64–66). It may be recalled that the definition of the written requirement incorporates the principle of functional equivalence embodied in UNCITRAL texts on electronic commerce.

Paragraph 4

28. Paragraph 4 contains a definition of "conciliation", based on article 1, paragraphs (3) and (8) of the Model Law (A/CN.9/896, paras. 39–47 and 164–168).

3. Application requirements

29. The Working Group may wish to consider the following formulation regarding the application to the competent authority.

Draft provision 3 (Application)

"1. [Legislative provision:] *A settlement agreement shall be enforced in accordance with the rules of procedure of this State and under the conditions*

laid down in this Law. [Convention:] *Each Contracting State shall enforce a settlement agreement in accordance with its rules of procedure, and under the conditions laid down in this Convention.*

"2. [Legislative provision:] *If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State and under the conditions laid down in this Law[, in order to conclusively prove that the matter has been already resolved.]* [Convention:] *If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Contracting State shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention[, in order to conclusively prove that the matter has been already resolved].*

*"3. A party relying on a settlement agreement under this [instrument] shall supply to the competent authority of [*legislative provision: *this State] [*convention: *the Contracting State where relief is sought]:*

"(a) The settlement agreement signed by the parties;

"(b) [Evidence][Indication] that the settlement agreement resulted from conciliation, such as by including the conciliator's signature on the settlement agreement, by providing a separate statement by the conciliator attesting to the involvement of the conciliator in the conciliation process or by providing an attestation by an institution that administered the conciliation process; and

"(c) Such other necessary document as the competent authority may require.

"4. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the conciliator, is met in relation to an electronic communication if:

"(a) A method is used to identify the parties or the conciliator and to indicate the parties' or conciliator's intention in respect of the information contained in the electronic communication; and

"(b) The method used is either: (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or (ii) Proven in fact to have fulfilled the functions described in article 2(3) above, by itself or together with further evidence.

*"5. If the settlement agreement is not in an official language of [*legislative provision: *this State][* convention: *the Contracting State where the application is made], the competent authority may request the party making the application to supply a translation thereof into such language.*

"6 When considering the application, the competent authority shall act expeditiously."

Comments on draft provision 3

Paragraphs 1 and 2

30. Paragraph 1 reflects the principle that the instrument should provide a mechanism whereby a party to a settlement agreement would be able to seek enforcement directly in the State of enforcement without a review or control mechanism in the State where the settlement agreement originated from as a precondition (see A/CN.9/896, para. 83).

31. Paragraph 2, which was addressed under issue 1 of the compromise proposal (A/CN.9/901, para. 52), reflects the understanding of the Working Group that the instrument should address situations where a party might not necessarily be seeking enforcement of a settlement agreement but instead would be seeking to rely

on the settlement agreement in different procedural contexts, including when a settlement agreement might be raised in defence against a claim (A/CN.9/901, para. 54).[10] The Working Group may wish to consider whether there is a need to address set-off claims using a settlement agreement and if so, whether paragraph 2 is broad enough to cover such claims. Regarding drafting, the Working Group may wish to consider whether the last square bracketed text "[in order to conclusively prove that the matter has been already resolved]" could be deleted so as to avoid narrowing the scope of the application (A/CN.9/901, para. 55).

32. It is suggested that, where the instrument takes the form of a convention, paragraphs 1 and 2 should be drafted as an obligation to a contracting State rather than a right of party to invoke a settlement agreement.

33. Regarding placement, the Working Group may wish to consider whether paragraphs 1 and 2 which address contracting States' obligations would be better placed under draft provision 1 where the instrument takes the form of a convention (see above, para. 5), and under a new article provisionally titled "General principles" where the instrument takes the form of a complement to the Model Law (see A/CN.9/WG.II/WP.202/Add.1, para. 6, article 14 of the draft Model Law, as amended).

Paragraphs 3 to 6

34. Paragraphs 3 and 4 deal with the requirements for an application under the instrument. Paragraph 3(a) provides that a settlement agreement shall be signed by the parties (A/CN.9/896, para. 64), and paragraph 4 determines how that requirement would be met in relation to a settlement agreement concluded through electronic communication, in line with UNCITRAL texts on electronic commerce.

35. Paragraph 3(b) corresponds to the understanding of the Working Group that the instrument would need to require, in some fashion, that the settlement agreement indicate that a conciliator was involved in the process and that the settlement agreement resulted from conciliation (A/CN.9/896, paras. 70–75 and 186–190). It was generally felt by the Working Group that such an indication would distinguish a settlement agreement from other contracts and provide for legal certainty, facilitate the enforcement procedure and prevent possible abuse. However, it was also emphasized that the additional requirement should not be burdensome, should be kept simple to the extent possible (see A/CN.9/896, paras. 40 and 70), and that the means of proving that a conciliator was involved should not be construed as an exhaustive list (A/CN.9/896, para. 188).

36. Paragraphs 3(c) and 6 correspond to suggestions that the competent authority should have the ability to require additional documents that would be necessary and should act expeditiously (A/CN.9/896, paras. 82 and 183). By way of background, the Working Group considered whether the instrument should provide that the settlement agreement should be in one single document, or in a complete set of documents. After discussion, there was general support for not including such a requirement in the instrument, but instead providing that the competent authority should have, at the stage of the application, the ability to require from the parties documents that would be strictly necessary (A/CN.9/896, paras. 67–69 and 177–185).

Additional matter – Informal processes

37. The Working Group may wish to consider whether the form requirements of settlement agreements in draft provisions 1(1) and 2, as well as the application process in draft provision 3, sufficiently ensures that settlement agreements resulting from

[10] The Working Group may wish to note the following alternative drafting proposal discussed at its sixty-fifth session: "*A settlement agreement shall be enforced in accordance with the rules of procedure of [*legislative provision: *this State][*convention: *the State where enforcement is sought] and shall be given effect in defence against any claim to the same extent as in enforcement proceedings*" (A/CN.9/896, para. 152).

informal processes are excluded (A/CN.9/867, paras. 117 and 121; A/CN.9/896, paras. 42–44 and 164–167).

38. The Working Group may wish to consider further the suggestion that flexibility should be provided to States to broaden the scope of the instrument to include agreements between the parties not necessarily reached through conciliation. For example, a reservation (where the instrument takes the form of a convention), or a footnote (where it takes the form of model legislative provisions) could indicate that the application of the instrument extends to agreements settling a dispute reached without the assistance of a third person (A/CN.9/896, paras. 40 and 41). A reservation could read as follows: "*A Contracting State may declare that it shall apply this Convention to international agreements concluded in writing by parties to resolve a commercial dispute regardless of whether [a conciliator assisted the parties in resolving their dispute][the agreements resulted from conciliation]. As a result, articles 2(4), 3(3)(b), 4(1)((d) and (e) would not apply*" A footnote in the model legislative text could read as follows: "*A State may consider applying this Section to international agreements concluded in writing by parties to resolve a commercial dispute, irrespective of whether such agreements resulted from conciliation. Adjustments would need to be made to relevant articles*".

4. Defences

39. The Working Group may wish to consider the following formulation regarding the defences:

Draft provision 4 (Grounds for refusing to grant relief)

"*1. The competent authority of [*legislative provision*: this State][*convention*: the Contracting State where the application [under article 3] is made] may refuse to grant relief [under article 3] at the request of the party against whom the application is made, only if that party furnishes to the competent authority proof that:*

"(a) A party to the settlement agreement was under some incapacity; or

"(b) The settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement; or the obligations in the settlement agreement have been subsequently modified by the parties or have been performed; or the conditions set forth in the settlement agreement have not been met for a reason other than a failure by the party against whom the settlement agreement is invoked and, therefore, have not yet given rise to the obligations of that party; or

*"(c) The settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of [*option 1, legislative provision*: this State][*option 2, convention*: the Contracting State where the application under draft provision 3 is made]; or*

"(d) There was a serious breach by the conciliator of standards applicable to the conciliator or the conciliation, without which breach that party would not have entered into the settlement agreement; or

"(e) There was a failure by the conciliator to disclose circumstances to the parties that raise justifiable doubts as to the conciliator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party, without which failure that party would not have entered into the settlement agreement.

*"2. The competent authority of [*legislative provision*: this State] [*convention*: the Contracting State where the application [under article 3] is made] may also refuse to grant relief [under article 3] if it finds that:*

"(a) Granting relief would be contrary to the public policy of that State; or

"(b) The subject matter of the dispute is not capable of settlement by conciliation under the law of that State."

Comments on draft provision 4

- *Chapeau*

40. The chapeau to draft provision 4 (1) and (2) was addressed under issue 1 of the compromise proposal (A/CN.9/901, para. 52). The phrase "grant relief" intends to encompass both the right of a party to seek enforcement and to invoke a settlement agreement under draft provision 3 (A/CN.9/901, para. 57). The Working Group may wish to consider whether the phrase "under article 3" needs to be repeated in the chapeau.

- *Paragraph 1, subparagraph (a)*

41. Subparagraph (a) reflects the agreement in substance by the Working Group (A/CN.9/896, para. 85).

- *Paragraph 1, subparagraph (b)*

42. Subparagraph (b) refers to various grounds that relate to the settlement agreement. Regarding the ground that the settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement, the Working Group agreed to retain that ground, in particular to avoid situations where parties would submit a draft agreement, or a text that would not be a final resolution between the parties of the dispute (A/CN.9/896, paras. 88 and 89). Regarding the ground that the settlement agreement had been subsequently modified by the parties, the Working Group generally agreed that that ground should be retained, and could possibly be merged with the ground that the obligations in the settlement agreement have been performed (A/CN.9/896, paras. 90 and 98). Regarding the last ground that the conditions stipulated in the agreement were not met, it is clarified that the ground would apply only if the conditions were not met or if the obligations had not been performed or complied with by the applicant (A/CN.9/896, paras. 91 and 98).

- *Paragraph 1, subparagraph (c)*

43. Subparagraph (c) is based on article II (3) and article V (1)(a) of the New York Convention. It seeks to reflect the understanding of the Working Group that the instrument should not give the competent authority the ability to interpret the validity defence to impose requirements in domestic law, and that consideration of the validity of settlement agreements by the competent authority should not extend to form requirements (A/CN.9/896, paras. 99–102).

- *Paragraph 1, subparagraphs (d) and (e)*

44. Subparagraph (d) addresses the impact of serious breach by the conciliator of standards applicable to the conciliator or the conciliation at the enforcement stage (A/CN.9/896, paras. 103–109 and 191–194, A/CN.9/901, paras. 41–50 and 72–88). Subparagraph (e) addresses the impact of failure by the conciliator to disclose information on circumstances likely to give rise to justifiable doubts regarding impartiality or independence at the enforcement stage (A/CN.9/896, paras. 104, 105, 108 and 194, A/CN.9/901, paras. 41–50 and 72–88). Both provisions, which were addressed under issue 4 of the compromise proposal (A/CN.9/901, para. 52), reflect the understanding of the Working Group that the defences should be limited to instances where the conciliator's breach or failure had a direct impact on the party's decision to enter into the settlement agreement (A/CN.9/896, paras. 107 and 194).

45. The Working Group may wish to consider the views expressed that subparagraphs (d) and (e) would run contrary to the objective of the instrument and

were not necessary (A/CN.9/901, paras. 46–50 and 76), on the basis that: (i) those matters were covered under other grounds for refusing enforcement in subparagraph (c) and paragraph 2(a) and any material accompanying the instrument could clarify that point; (ii) subparagraphs (d) and (e) would require the enforcing authority to take into account relevant domestic standards on conduct of the conciliator and the conciliation process, and to inquire about a breach or a failure which did not necessarily take place in that jurisdiction; (iii) including non-disclosure by a conciliator as a defence to resist enforcement would run contrary to the approach adopted in the Model Law on Conciliation (see paragraph 52 of the Guide to Enactment and Use of the Model Law on Conciliation); (iv) inclusion of subparagraphs (d) and (e) may deter the utility of the instrument, as it could create ancillary disputes; and (v) conciliators were bound by ethical duties and professional standards and subparagraphs (d) and (e) would be superfluous.

46. Subparagraphs (d) and (e) reflect a compromise among the divergence in views and the drafting proposal that the Working Group agreed to consider further (A/CN.9/901, paras. 52, 72, 79, and 81–88). The proposal had been made on the basis that there was merit in retaining subparagraphs (d) and (e), which were essentially an extension of subparagraph (c). They dealt with a situation where a conduct by the conciliator had an impact on the parties entering into the agreement, which could lead to the settlement agreement being null and void. It was explained that subparagraphs (d) and (e) would not impact the confidential nature of conciliation and that the enforcing authority would generally not be expected to inquire into the details of the process (A/CN.9/901, paras. 82). It was further explained that subparagraphs (d) and (e) provided for an objective threshold by limiting the grounds to when a breach or a failure to disclose had an impact on the parties entering into the agreement (A/CN.9/901, para. 84).

47. With respect to subparagraph (d), the Working Group highlighted the need to clarify the scope and the meaning of "standards applicable" to the conciliator and the conciliation process (A/CN.9/901, paras. 87 and 88). Noting that such applicable standards might change over time, the Working Group may wish to consider clarifying that standards applicable may take different forms such as the law governing conciliation and codes of conduct, including those developed by professional associations. Such standards contain different elements such as independence, impartiality, confidentiality and fair treatment (see for instance article 6(3) of the UNCITRAL Model Law on Conciliation, paragraph 55 of the Guide to Enactment and Use of the UNCITRAL Model Law on Conciliation, article 7 of the UNCITRAL Conciliation Rules).

48. Subparagraph (e) was retained in addition to subparagraph (d), as it would allow the competent authority to refuse enforcement even when the applicable standard did not necessarily include a disclosure obligation (A/CN.9/901, paras. 78 and 85). The Working Group may wish to confirm this approach in light of questions raised about the need to retain subparagraph (e) (A/CN.9/901, paras. 49, 73 and 76) and the fact that it would, in essence, introduce a disclosure obligation for the conciliator into a conciliation process, which may be more flexible in that respect.

- *Paragraph 2*

49. Paragraph 2 covers situations where the competent authority would consider the defences on its own initiative, and reflects the agreement in substance by the Working Group (A/CN.9/896, paras. 110–112).

5. Relationship of the enforcement process to judicial or arbitral proceedings

50. The Working Group may wish to consider the following formulation regarding parallel applications or claims:

Draft provision 5 (Parallel applications or claims)

> *"If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect enforcement of that settlement agreement, the competent authority of*

*[*option 1, legislative provision*: this State][*option 2, convention*: the Contracting State where the enforcement of the settlement agreement is sought] may, if it considers it proper, adjourn the decision on the enforcement of the settlement agreement and may also, on the request of a party, order the other party to give suitable security."*

Comments on draft provision 5

51. Draft provision 5 addresses how a competent authority would treat a situation where an application (or claim), which might impact the enforcement, has been made to a court, an arbitral tribunal or any other authority. The Working Group generally agreed that it would be appropriate for the competent authority to be given the discretion to adjourn the enforcement process if an application (or claim) relating to the settlement agreement had been made to a court, arbitral tribunal or any other authority, which might affect the enforcement process (A/CN.9/896, paras. 122–125). It may be noted that draft provision 5 does not deal with applications referred to in draft provision 3(2).

6. Other matters

(a) "More-favourable-right" provision

52. The proposal for a provision mirroring article VII(1) of the New York Convention,[11] which would permit application of more favourable national legislation or treaties to enforcement, was considered by the Working Group. There was general support for including such a provision in the instrument, as a separate provision, even though reservation was expressed (A/CN.9/896, paras. 154, 156, and 204; A/CN.9/901, paras. 65, 66 and 71). The Working Group may wish to consider the following draft formulation: *"This [instrument] shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Contracting State where such settlement agreement is sought to be relied upon."*

53. The Working Group may wish to confirm the following: (i) whether a more-favourable-right provision would be required only where the instrument takes the form of a convention (because under a legislative provision, States would have the flexibility to address the issue by expanding the scope provision); and (ii) whether the more-favourable-right provision could allow State courts to apply the convention to settlement agreements explicitly excluded from the scope of the convention.

(b) States and other public entities

54. Regarding settlement agreements involving States and other public entities, the Working Group reaffirmed its decision that such agreements should not be automatically excluded from the scope of the instrument (see A/CN.9/896, paras. 61 and 62), and could be addressed through a declaration where the instrument takes the form of a convention. Where the instrument takes the form of a complement to the Model Law, it is for each State to decide the extent to which such agreements would fall under the enacting legislation. The Working Group may wish to consider the following formulation for a declaration on the application of the instrument to settlement agreements concluded by States and other public entities where the instrument takes the form of a convention (A/CN.9/862, para. 62): *"A Contracting State may declare that [*option 1: *it shall apply][*option 2: *it shall not apply] this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, only to the extent specified in the declaration."*

[11] Article VII of the New York Convention provides that: "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

(c) Declaration by contracting States on application of the Convention based on parties' agreement

55. During the previous discussions at the Working Group, it was suggested that the question whether the application of the instrument would depend on the consent of the parties to the settlement agreement need not necessarily be dealt with in the instrument, but could be left to States when adopting or implementing the instrument (A/CN.9/896, paras. 130 and 196; A/CN.9/901, paras. 39 and 40). This matter was dealt with under issue 3 of the compromise proposal (A/CN.9/901, para. 52). It may be envisaged that States that wish to incorporate such a mechanism could make a declaration to that effect. The Working Group may wish to consider the following formulation: "*A Contracting State may declare that it shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention*." Where the instrument takes the form of a complement to the Model Law, an opt-in mechanism could be included as an option for States to consider when enacting the Model Law (A/CN.9/896, para. 196, A/CN.9/901, para. 39).

56. The Working Group may wish to further clarify how the reservation would operate. For example, it may be clarified whether a State, not making this reservation upon becoming a Party to the Convention, could apply the Convention automatically even when the parties to the settlement agreement have opted-out of the Convention.

57. The Working Group may wish to consider that it would generally be in the interest of a State to make that reservation to protect its businesses' interests. It is likely that enforcement of settlement agreements involving businesses in State A would be sought in State A. By making the reservation, State A could protect the interest of those businesses, particularly those that had not agreed to the application of the convention. This might have a domino effect in almost all States making the reservation.

(A/CN.9/WG.II/WP.202/Add.1) (Original: English)

Note by the Secretariat on settlement of commercial disputes: international commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation

ADDENDUM

Contents

II. Draft instrument on enforcement of international commercial settlement agreements resulting from conciliation

B. Form of the draft instrument

1. The Working Group considered the form of the instrument at its sixty-fifth and sixty-sixth sessions (A/CN.9/896, paras. 135–143 and 211–213, and A/CN.9/901, paras. 52 and 89–93). At the sixty-sixth session of the Working Group, in a spirit of compromise and to accommodate the different levels of experience with conciliation in different jurisdictions, it was agreed that the Working Group would continue to prepare both a model legislative text complementing the Model Law on Conciliation, and a convention, on enforcement of international commercial settlement agreements resulting from conciliation (A/CN.9/901, para. 93). This suggestion was reflected in the compromise proposal, under issue 5 (A/CN.9/901, para. 52). It was further agreed that a possible approach to address the specific circumstance of preparing both a model legislative text and a convention could be to suggest that the General Assembly resolution accompanying those instruments would express no preference on the type of instrument to be adopted by States (A/CN.9/901, para. 93).

2. In that context, the Working Group may wish to consider suggesting the following wording for the resolutions:

3. *"Recalling that the decision of the Commission to prepare a draft [full title of the Convention] and an amendment to the UNCITRAL Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with conciliation in different jurisdictions, and to provide States with consistent standards to address the cross-border enforcement of international settlement agreements resulting from conciliation, without creating any preference for the instrument to be adopted."*

4. As requested by the Working Group at its sixty-sixth session, this section contains the draft uniform provisions presented in document A/CN.9/WG.II/WP.202 indicating how they are adjusted where the instrument takes the form of a convention and of a complement to the Model Law on Conciliation (A/CN.9/901, paras. 13 and 93). An annex to this note contains a table of concordance between the provisions of the two instruments.

1. Draft convention

5. The draft text of a convention on enforcement of international settlement agreements resulting from conciliation might read as follows:

"**Preamble**

"*The Parties to this Convention*,

"*Recognizing* the value for international trade of methods for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

"*Noting* that such dispute settlement methods, referred to by expressions such as conciliation and mediation and expressions of similar import, are increasingly used in international and domestic commercial practice as an alternative to litigation,

"*Considering* that the use of such dispute settlement methods results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

"*Convinced* that the establishment of a framework for international settlement agreements resulting from such dispute settlement methods that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

"*Have agreed* as follows:

"**Article 1 – Scope of application**

"1. This Convention applies to international agreements resulting from conciliation and concluded in writing by parties to resolve a commercial dispute ('settlement agreements').

"2. This Convention does not apply to settlement agreements:

"(a) Concluded for personal, family or household purposes by one of the parties (a consumer); or

"(b) Relating to family, inheritance or employment law.

[*Paragraph (3) below as alternative to article 4(1)(f) to (h)*]

"3. This Convention does not apply to settlement agreements that[, prior to any application under article 3]:

"(a) Have been approved by a court, or have been concluded before a court in the course of proceedings, either of which are enforceable [in the same manner] as a judgment [according to the law of the State of that court]; or

"(b) Have been recorded and are enforceable as an arbitral award [according to the law of the Contracting State where enforcement is sought].

"**Article 2 – Definitions**

"1. A settlement agreement is 'international' if:

"(a) At least two parties to the settlement agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

"(b) The State in which the parties to the settlement agreement have their places of business is different from either:

"(i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or

"(ii) The State with which the subject matter of the settlement agreement is most closely connected.

"2. For the purposes of this article:

"(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

"(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

"3. A settlement agreement is 'in writing' if its content is recorded in any form. The requirement that a settlement agreement be 'in writing' is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

"4. 'Conciliation' means a process, regardless of the expression used and irrespective of the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the conciliator') lacking the authority to impose a solution upon the parties to the dispute.

"**Article 3 – Application**

"1. Each Contracting State shall enforce a settlement agreement in accordance with its rules of procedure, and under the conditions laid down in this Convention.

"2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Contracting State shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention[, in order to conclusively prove that the matter has been already resolved].

"3. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Contracting State where relief is sought:

"(a) The settlement agreement signed by the parties;

"(b) [Evidence][Indication] that the settlement agreement resulted from conciliation, such as by including the conciliator's signature on the settlement agreement, by providing a separate statement by the conciliator attesting to the involvement of the conciliator in the conciliation process or by providing an attestation by an institution that administered the conciliation process; and

"(c) Such other necessary document as the competent authority may require.

"4. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the conciliator, is met in relation to an electronic communication if:

"(a) A method is used to identify the parties or the conciliator and to indicate the parties' or conciliator's intention in respect of the information contained in the electronic communication; and

"(b) The method used is either:

"(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

"(ii) Proven in fact to have fulfilled the functions described in article 2(3) above, by itself or together with further evidence.

"5. If the settlement agreement is not in the official language(s) of the Contracting State where the application is made, the competent authority may request the party making the application to supply a translation thereof into such language.

"6. When considering the application, the competent authority shall act expeditiously.

"**Article 4 – Grounds for refusing to grant relief**

"1. The competent authority of the Contracting State where the application [under article 3] is made may refuse to grant relief [under article 3] at the request of the party against whom the application is made, only if that party furnishes to the competent authority proof that:

"(a) A party to the settlement agreement was under some incapacity; or

"(b) The settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement; or the obligations in the settlement agreement have been subsequently modified by the parties or have been performed; or the conditions set forth in the settlement agreement have not been met for a reason other than a failure by the party against whom the settlement agreement is invoked and, therefore, have not yet given rise to the obligations of that party; or

"(c) The settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Contracting State where the application under article 3 is made; or

"(d) There was a serious breach by the conciliator of standards applicable to the conciliator or the conciliation, without which breach that party would not have entered into the settlement agreement; or

"(e) There was a failure by the conciliator to disclose circumstances to the parties that raise justifiable doubts as to the conciliator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party, without which failure that party would not have entered into the settlement agreement[.][; or]

[*Subparagraphs (f) to (h) below as alternative to article 1 (3)*]

"(f) The settlement agreement has been approved by a court [prior to any application under article 3] and is enforceable [in the same manner] as a judgment under the law of the State of that court;

"(g) The settlement agreement has been concluded before a court in the course of proceedings [prior to any application under article 3] and is enforceable [in the same manner] as a judgment under the law of the State of that court; or

"(h) The settlement agreement has been recorded as an arbitral award [prior to any application under article 3] and that award is enforceable under the law of the Contracting State where enforcement is sought."

"2. The competent authority of the Contracting State where the application [under article 3] is made may also refuse to grant relief [under article 3] if it finds that:

"(a) Granting relief would be contrary to the public policy of that State; or

"(b) The subject matter of the dispute is not capable of settlement by conciliation under the law of that State.

"**Article 5 – Parallel applications or claims**

"If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect enforcement of that settlement agreement, the competent authority of the Contracting State where the enforcement of the settlement agreement is sought may, if it considers it proper, adjourn the decision on the enforcement of the settlement agreement and may also, on the request of a party, order the other party to give suitable security.

"**Article 6 – Other laws or treaties**

"This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Contracting State where such settlement agreement is sought to be relied upon.

"**Article 7 – Reservations**

"1. A Contracting State may declare that:

"(a) [Option 1: It shall apply][Option 2: It shall not apply] this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, only to the extent specified in the declaration;

"(b) It shall apply this Convention to international agreements concluded in writing by parties to resolve a commercial dispute regardless of whether [a conciliator assisted the parties in resolving their dispute][the agreements resulted from conciliation]; as a result, articles 2(4), 3(3)(b), 4(1)(d) and (e) do not apply;

"(c) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

"2. No reservations are permitted except those expressly authorized in this article.

"3. Reservations may be made by a Contracting State at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Contracting State concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto shall take effect simultaneously with the entry into force of this Convention in respect of the Contracting State concerned. Reservations deposited after the entry into force of the Convention for that Party shall take effect [three] months after the date of its deposit.

"4. Reservations and their confirmations shall be deposited with the depositary.

"5. Any Contracting State that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect three months after deposit."

"**Article 8 – Depositary**

"The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

"**Article 9 – Signature, ratification, acceptance, approval, accession**

"1. This Convention is open for signature by all States in [...] on [...], and thereafter at United Nations Headquarters in New York.

"2. This Convention is subject to ratification, acceptance, or approval by the signatories.

"3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

"4. Instruments of ratification, acceptance, approval, or accession are to be deposited with the depositary.

"**Article 10 – Participation by regional economic integration organizations**

"1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve, or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the regional economic integration organization shall not count as a Contracting State in addition to its member States that are Contracting States.

"2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval, or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

"3. Any reference to a "Contracting State", "Contracting States", a "State" or "States" in this Convention applies equally to a regional economic integration organization where the context so requires.

"4. This Convention shall not prevail over conflicting rules of a regional economic integration organization if, under article 3, the application is submitted to a competent authority of a State that is a member of such an organization and all the States relevant under article 2(1) are members of any such organization.

"**Article 11 – Effect in domestic territorial units**

"1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval, or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

"2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

"3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

"4. If a Contracting State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

"**Article 12 – Entry into force**

"1. This Convention enters into force on the first day of the month following the expiration of three months after the date of deposit of the [third] instrument of ratification, acceptance, approval, or accession.

"2. When a State ratifies, accepts, approves, or accedes to this Convention after the deposit of the [third] instrument of ratification, acceptance, approval, or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval, or accession.

"**Article 13 – Amendment**

"1. Any Contracting State may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Contracting States to this Convention with a request that they indicate whether they favour a conference of Contracting States for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Contracting States favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

"2. The conference of Contracting States shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Contracting States present and voting at the conference.

"3. An adopted amendment shall be submitted by the Secretary-General of the United Nations to all the Contracting States for ratification, acceptance, or approval.

"4. An adopted amendment enters into force six months after the date of deposit of the third instrument of ratification, acceptance, or approval. When an amendment enters into force, it shall be binding on those Contracting States that have expressed consent to be bound by it.

"5. When a State ratifies, accepts, or approves an amendment that has already entered into force, the amendment enters into force in respect of that state six months after the date of the deposit of its instrument of ratification, acceptance, or approval.

"6. Any State that becomes a Contracting State after the entry into force of the amendment shall be considered as a Contracting State to the Convention as amended.

"**Article 14 – Denunciations**

"1. A Contracting State may denounce this Convention by a formal notification in writing addressed to the depositary.

"2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to applications under article 3 that have already been made before the denunciation takes effect.

"DONE at ---- this [X] day of [X] ------, in a single original, of which the Arabic, Chinese, English, French, Russian, and Spanish texts are equally authentic."

2. Draft Model Law on International Commercial Conciliation, as amended

6. The Working Group may wish to consider whether the provisions of the Model Law on Conciliation could possibly be presented in three sections, as follows: section 1 on General Provisions would contain articles 1 to 3 of the Model Law, as completed by new definitions (modifications to these provisions are underlined in the draft below); section 2 on Conciliation Procedure would contain articles 4 to 13 of the

Model Law; and section 3 on Settlement Agreements would contain the new provisions, replacing article 14. The Working Group may wish to note that additional adjustments to the Model Law might be required based on further consideration of issues that remain to be decided and that, at this stage, the presentation below may not be exhaustive regarding the amendments that might need to be made to the Model Law. Following this approach, the Model Law, as amended, would read as follows.

"**Section 1 – General provisions**

"**Article 1. Scope of application and definitions**

"1. This Law applies to international* commercial** conciliation.[1]

"2. For the purposes of this Law, 'conciliator' means a sole conciliator or two or more conciliators, as the case may be.

"3. For the purposes of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

"4. A [conciliation or a settlement agreement] is international if:

"(a) At least two parties to the conciliation have, at the time of the conclusion of the settlement agreement, their places of business in different States; or

"(b) The State in which the parties have their places of business is different from either:

"(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

"(ii) The State with which the subject matter of the dispute is most closely connected.

"5. For the purposes of this article:

"(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement; ~~the agreement to conciliate~~;

"(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

"[6. This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law.]

"7. The parties are free to agree to exclude the applicability of this Law.

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[1] Footnotes to article 1(1):

* States wishing to enact this Model Law to apply to domestic as well as international conciliation may wish to consider the following changes to the text:
- Delete the word "international" in paragraph 1 of article 1; and
- Delete paragraphs 4, 5 and 6 of article 1.

** The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

"8. Subject to the provisions of paragraph 9 of this article, this Law applies irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

"9. *Option 1*: This Law does not apply to:

(a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement;[2]

"(b) Settlement agreements concluded for personal, family or household purposes by one of the parties (a consumer);

"(c) Settlement agreement relating to family, inheritance or employment law;

"(d) Settlement agreements concluded by a State or any governmental agencies or any person acting on behalf of a governmental agency; and

"(e) […].

"9. *Option 2*:[3] This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to conciliation or may be submitted to conciliation only according to provisions other than those of this Law.

"10. A 'settlement agreement' is an international agreement resulting from conciliation and concluded in writing by parties to resolve a commercial dispute.

"11. For the purposes of this article, a settlement agreement is 'in writing' if its content is recorded in any form. The requirement that a settlement agreement be 'in writing' is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

"**Article 2. Interpretation**

"1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

"2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

"**Article 3. Variation by agreement**

"Except for the provisions of article 2 [and] article 6, paragraph 3, [and section 3][4] the parties may agree to exclude or vary any of the provisions of this Law.

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[2] Article 1(9)(a) might need to be adjusted to take account of the decision of the Working Group on the matter of settlement agreements concluded in the course of judicial or arbitral proceedings (see A/CN.9/WG.II/WP.202, paras. 8–23).

[3] A similar provision can be found in article 1(5) of the UNCITRAL Model Law on International Commercial Arbitration.

[4] The Working Group may wish to consider whether to indicate that an enacting State may consider the possibility of section 3 being mandatory. Draft provision 1 (7) would then need to be adjusted accordingly.

"**Section 2 – Conciliation Procedure**

[*Article 4 to Article 13 unchanged*]

"**Section 3 – Settlement Agreements**[***5]

"**Article 14. General principles**

"1. A settlement agreement shall be enforced in accordance with the rules of procedure of this State, and under the conditions laid down in this Law.

"2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State and under the conditions laid down in this Law[, in order to conclusively prove that the matter has been already resolved].

[*Article 14 (3) as alternative to article 16(1)(f) to (h)*]

"3. The procedure in this section does not apply to settlement agreements that[, prior to any application under article 15]:

"(a) have been approved by a court, or have been concluded before a court in the course of proceedings, either of which are enforceable [in the same manner] as a judgment [according to the law of the State of that court]; or

"(b) have been recorded and are enforceable as an arbitral award according to the law of this State.

"4. The functions referred to in this Section shall be performed by […] (referred to as the 'competent authority') [Each State enacting the Model Law specifies the court, courts or other competent authorities to perform the functions].

"**Article 15. Application**

"1. A party relying on a settlement agreement under this Section shall supply to the competent authority of this State:

"(a) The settlement agreement signed by the parties;

"(b) [Evidence][Indication] that the settlement agreement resulted from conciliation, such as by including the conciliator's signature on the settlement agreement, by providing a separate statement by the conciliator attesting to the involvement of the conciliator in the conciliation process or by providing an attestation by an institution that administered the conciliation process; and

"(c) Such other necessary document as the competent authority may require.

"2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the conciliator is met in relation to an electronic communication if:

"(a) A method is used to identify the parties or the conciliator and to indicate the parties' or conciliator's intention in respect of the information contained in the electronic communication; and

"(b) The method used is either:

[5] [Footnote to the title of section 3: "***A State may consider enacting this Section so as to apply it to agreements settling a dispute, irrespective of whether they resulted from conciliation. Adjustments would then have to be made to relevant provisions of section 3 referring to "conciliation" or "conciliator". Articles 15(1)(b) and 16(1)(d) and (e) would need to be deleted.]

"(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

"(ii) Proven in fact to have fulfilled the functions described in article 1(11) above, by itself or together with further evidence.

"3. If the settlement agreement is not in the official language(s) of this State, the competent authority may request the party making the application to supply a translation thereof into such language.

"4. When considering the application, the competent authority shall act expeditiously.

"**Article 16. Grounds for refusing to grant relief**

"1. The competent authority of this State may refuse to grant relief [under article 15] at the request of the party against whom the application is made, only if that party furnishes to the competent authority proof that:

"(a) A party to the settlement agreement was under some incapacity; or

"(b) The settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement; or the obligations in the settlement agreement have been subsequently modified by the parties or have been performed; or the conditions set forth in the settlement agreement have not been met for a reason other than a failure by the party against whom the settlement agreement is invoked, and therefore, have not yet given rise to the obligations of that party; or

"(c) The settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of this State; or

"(d) There was a serious breach by the conciliator of standards applicable to the conciliator or the conciliation, without which breach that party would not have entered into the settlement agreement; or

"(e) There was a failure by the conciliator to disclose circumstances to the parties that raise justifiable doubts as to the conciliator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party, without which failure that party would not have entered into the settlement agreement[.][; or]

[*Subparagraphs (f) to (h) below as alternative to article 14 (3)*]

"(f) The settlement agreement has been approved by a court [prior to any application under article 15] and is enforceable [in the same manner] as a judgment under the law of the State of that court;

"(g) The settlement agreement has been concluded before a court in the course of proceedings [prior to any application under article 15] and is enforceable [in the same manner] as a judgment under the law of the State of that court; or

"(h) The settlement agreement has been recorded as an arbitral award [prior to any application under article 15] and that award is enforceable under the law of this State."

"2. The competent authority of this State may also refuse to grant relief [under article 3] if it finds that:

"(a) Granting relief would be contrary to the public policy of this State; or

"(b) The subject matter of the dispute is not capable of settlement by conciliation under the law of this State."

"3. If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect enforcement of that settlement agreement, the competent authority of this State may, if it considers it proper, adjourn the decision on the enforcement of the settlement agreement and may also, on the request of a party, order the other party to give suitable security."

Annex

Table of concordance

Draft provisions	*Convention*	*Legislative provisions*
Scope and definition of "settlement agreement"	Article 1(1)	Article 1.10 for the definition of "settlement agreement" (Amendment to article 1 of the Model Law)
Exclusion of family, inheritance employment and consumer law matters	Article 1(2)	Article 1(9) (Amendment to article 1 of the Model Law)
Exclusion of settlement agreements recorded as judicial settlements and arbitral awards	Article 1(3) or 4(1) (f)–(h)	Article 14(3) or 16(1)(f)–(h) (Amendment to article 14 of the Model Law)
Determination of the competent authority	N/A	Article 14(4) (Amendment to article 14 of the Model Law)
Definitions	Article 2	Article 1
Definition of "international"	Article 2(1) and (2)	Article 1(4) and (5) (Amendment to article 1 of the Model Law)
Definition of the "written requirement"	Article 2(3)	Article 1(11) (Amendment to article 1 of the Model Law)
Definition of "conciliation"	Article 2(4)	Current article 1(3) and (8) of the Model Law
Application/General principles	Article 3(1) and (2)	Article 14(1) and (2)
Application	Article 3(3) to (6)	Article 15
Grounds for refusing to grant relief	Article 4	Article 16(1) and (2)
Parallel applications or claims	Article 5	Article 16(3)
Other laws or treaties	Article 6	N/A
Reservations	Article 7	Article 1(9)(d) on settlement agreements concluded by States/other public entities (Amendment to article 1 of the Model Law)
		Footnote to section 3 on general principles (Amendment to article 14 of the Model Law)

C. Note by the Secretariat on settlement of commercial disputes: comments by the Government of the United States of America

(A/CN.9/WG.II/WP.203)

[Original: English]

In preparation for the sixty-seventh session of the Working Group, the Government of the United States of America submitted to the Secretariat comments regarding the preparation of an instrument on enforcement of international settlement agreements resulting from conciliation (see document A/CN.9/WG.II/WP.202 and addendum). The English version of the comments was submitted to the Secretariat on 23 August 2017. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

Annex

1. The United States would like to thank the Secretariat for its continued excellent work on the conciliation project. The working papers for the October 2017 session of Working Group II will greatly aid the Working Group's deliberations, and they also demonstrate that the project is nearing completion. In particular, the compromise that was reached on five key issues during the February 2017 session has resolved the main substantive issues that had remained open. In July, the Commission endorsed the compromise approach and encouraged the Working Group to proceed on that basis. Thus, the United States believes that very little substantive work remains to be done on the draft text provided in the working papers; in general, most of the remaining points to be considered relate to drafting issues. However, we would like to highlight the following three substantive issues for other delegations' consideration:

Article 3(2)

2. In draft Article 3(2), brackets now appear around the final clause–"in order to conclusively prove that the matter has been already resolved." Document referenced A/CN.9/WG.II/WP.202 notes that the Working Group may wish to consider whether this text could be deleted. We believe that retaining this text is important in order to preserve the compromise on this issue that was developed at the February 2017 session. Based on that compromise, the word "recognition" would not be included in this article, as for some legal systems that term has consequences that are not desired here, such as the implication that a court might be precluded from opening a case at all. Instead of referring to recognition, the compromise resulted in a paragraph that would functionally describe the most relevant aspect of recognition (i.e., the use of a settlement agreement as a defence). If the bracketed phrase were omitted, Article 3(2) might be misunderstood as providing only a procedural opportunity to refer to a settlement agreement or introduce it into evidence, without any guarantee that the settlement agreement would not be ultimately disregarded by a court. By contrast, including the bracketed phrase removes the ambiguity regarding the consequences of invoking the settlement agreement as a defence and clarifies that the settlement agreement conclusively proves that the dispute was resolved (subject to the exceptions in Article 4).

Article 4(1)(b)

3. In draft Article 4(1)(b), we suggest deleting the first clause, "The settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement." Although the rest of Article 4(1)(b) should be retained, this first clause would lead to significant uncertainty regarding the scope of the exception and its relationship to other provisions. This instrument itself determines that a settlement agreement is enforceable (and, a fortiori, binding) as long as the requirements of the first few articles are met and no other Article 4 exception applies. Thus, referring separately in Article 4(1) to whether a settlement agreement is "binding" is at best redundant and at worst could generate significant litigation over what could be misunderstood as a subjective test (e.g., permitting a party to argue that it did not "intend" a settlement agreement to be binding despite its signature on the written document). Moreover, the reference to whether a settlement agreement is "final" is also redundant and unnecessary. The following clause in Article 4(1)(b) already addresses the situation in which the obligations in a settlement agreement have been subsequently modified, and the signature requirement in Article 3 already sufficiently ensures that relief can be denied for settlement agreements that were only drafts.

Article 4(1)(c)

4. As explained in paragraph 43 of document A/CN.9/WG.II/WP.202, the Working Group previously determined that the exception contained in Article 4(1)(c) "should not give the competent authority the ability to interpret the validity defence to impose requirements in domestic law, and that consideration of the validity of settlement agreements by the competent authority should not extend to form requirements." We

believe that this principle is sufficiently important that it should be explicitly stated in the text of the instrument. Otherwise, courts might be tempted to use Article 4(1)(c) to find that a settlement agreement is not valid because it did not comply with pre-existing domestic law requirements regarding the formalities for settlement agreements (e.g., a requirement that a settlement agreement be notarized) or because the parties did not follow domestic procedural requirements beyond those contained in Articles 2 or 3 (e.g., domestic law that would only treat a settlement agreement as valid if the conciliation was conducted under a particular set of conciliation rules or if the conciliator met particular licensing requirements). While this instrument would not affect the ability of States to impose regulatory requirements on conciliation occurring within their territory, courts should not be able to invoke Article 4(1)(c) to deny the validity of international settlement agreements on the basis of domestic requirements that go beyond those established in this instrument.

5. Addressing this issue explicitly would also avoid the risk that Article 3(3)(c) could be interpreted to create the same problem. While Article 3(3)(c) permits a court to require submission of additional documents to demonstrate that the requirements of this instrument are met, it should not be misinterpreted to permit a court to use that authority in ways that would effectively circumvent the instrument's limited rules on formalities or the very broad definition of conciliation. (For example, a court should not be able to use Article 3(3)(c) to require a party to submit a copy of the settlement agreement that was notarized at the time of signature, nor to require a party to submit evidence that a conciliation was conducted under certain rules or conducted by a domestically-licensed conciliator.)

6. We therefore propose adding the following text as a new Article 4(3):

> "For greater certainty, nothing in Articles 3(3)(c) or 4(1)(c) or any other provision of this instrument permits a court to deny relief on the basis of domestic law requirements regarding the formalities, or conduct, of the conciliation process, such as requirements regarding notarization of a settlement agreement or use of a particular type of conciliation process or conciliator."

D. Report of the Working Group on Dispute Settlement on the work of its sixty-eighth session (New York, 5–9 February 2018)

(A/CN.9/934)

[Original: English]

Contents

I. Introduction

1. At its forty-eighth session, in 2015, the Commission mandated the Working Group to commence work on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the possible preparation of a convention, model provisions or guidance texts. The Commission agreed that the mandate of the Working Group should be broad to take into account the various approaches and concerns.[1] The Working Group commenced its consideration of that topic at its sixty-third session (A/CN.9/861).

2. At its forty-ninth session, in 2016, the Commission had before it the report of the Working Group on the work of its sixty-third and sixty-fourth sessions (A/CN.9/861 and A/CN.9/867, respectively). After discussion, the Commission commended the Working Group for its work on the preparation of an instrument dealing with enforcement of international commercial settlement agreements resulting from conciliation and confirmed that the Working Group should continue its work on the topic.[2]

3. At its fiftieth session, in 2017, the Commission had before it the report of the Working Group on the work of its sixty-fifth and sixty-sixth sessions (A/CN.9/896 and A/CN.9/901, respectively). The Commission took note of the compromise reached by the Working Group at its sixty-sixth session, which addressed five key

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 135–142.
[2] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162–165.

issues as a package (A/CN.9/901, para. 52) and expressed support for the Working Group to continue pursuing its work based on that compromise. The Commission expressed its satisfaction with the progress made by the Working Group and requested the Working Group to complete the work expeditiously.[3]

4. At its sixty-seventh session (A/CN.9/929), the Working Group requested the Secretariat to prepare a revised draft of amendments to the UNCITRAL Model Law on International Commercial Conciliation ("Model Law on Conciliation" or "Model Law") and a draft convention, reflecting the deliberations and decisions of the Working Group.

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its sixty-eighth session in New York, from 5–9 February 2018. The session was attended by the following States members of the Working Group: Argentina, Australia, Austria, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czechia, Denmark, Ecuador, El Salvador, France, Germany, Greece, Hungary, India, Indonesia, Israel, Italy, Japan, Kuwait, Lebanon, Libya, Malaysia, Mexico, Namibia, Nigeria, Philippines, Republic of Korea, Romania, Russian Federation, Sierra Leone, Singapore, Spain, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Algeria, Belgium, Benin, Cyprus, Democratic Republic of the Congo, Dominican Republic, Finland, Iraq, Morocco, Nepal, Netherlands, Norway, Saudi Arabia, Syrian Arab Republic and Viet Nam.

7. The session was also attended by observers from the European Union and the Holy See.

8. The session was also attended by observers from the following invited non-governmental international organizations: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Belgian Centre for Arbitration and Mediation (CEPANI), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), Commonwealth Secretariat (CS), Forum for International Conciliation and Arbitration (FICA), Hong Kong Mediation Centre (HKMC), Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Academy of Mediators (IAM), International Institute for Conflict Prevention & Resolution (CPR), International Law Association (ILA), International Mediation Institute (IMI), Jerusalem Arbitration Centre (JAC), Korean Commercial Arbitration Board (KCAB), Law Association for Asia and the Pacific (LAWASIA), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Club of Arbitrators (MCA), Moot Alumni Association (MAA), New York International Arbitration Center (NYCIAC), Panel of Recognised International Market Experts in Finance (P.R.I.M.E.), Regional Centre for International Commercial Arbitration, Lagos (RCICAL), Russian Arbitration Association (RAA) and The European Law Students' Association (ELSA).

9. The Working Group elected the following officers:

Chairperson: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

Rapporteur: Mr. Khory McCormick (Australia)

[3] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 236–239.

10. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.204); and (b) note by the Secretariat regarding the preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation (A/CN.9/WG.II/WP.205 and addendum).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation.
5. Future work.
6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group considered agenda item 4 on the basis of the note by the Secretariat (A/CN.9/WG.II/WP.205 and addendum). The deliberations and decisions of the Working Group with respect to item 4 are reflected in chapter IV, and deliberations and decisions with respect to item 5 are reflected in chapter V.

13. At the closing of its deliberations, the Working Group requested the Secretariat: (i) to prepare a draft convention and draft amended Model Law ("draft instruments") based on the deliberations and decisions of the Working Group and, in that respect, to make the necessary drafting adjustments to ensure consistency of language in the text of the draft instruments; and (ii) to circulate the draft instruments to Governments for their comments, with a view to consideration of the draft instruments by the Commission at its fifty-first session, to be held in New York from 25 June–13 July 2018.

IV. International commercial mediation: preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation

14. The Working Group continued its deliberations on the preparation of the draft instruments on the basis of document A/CN.9/WG.II/WP.205 and its addendum.

15. The Working Group agreed to consider issues in the order that they were raised in document A/CN.9/WG.II/WP.205, taking into account the draft text of the instruments as presented in document A/CN.9/WG.II/WP.205/Add.1 and any other drafting suggestions.

A. Terminology

16. The Working Group took note of, and approved the replacement of the term "conciliation" by "mediation" throughout the draft instruments. The Working Group further approved the explanatory text describing the rationale for that change (see A/CN.9/WG.II/WP.205, para. 5), which would be used when revising existing UNCITRAL texts on conciliation.

B. Scope and exclusions

1. Scope of application (articles 1(1) and 3(1) of the draft convention)

17. It was suggested that the use of the term "international agreements" in article 1(1) of the draft convention could raise confusion as that expression often

referred to agreements between States or other international legal persons binding under international law. Based on the shared understanding that the draft convention should avoid using the term "international agreement", it was suggested that articles 1(1) and 3(1) of the draft convention should be merged into a single paragraph, with no reference to the term "international" before the word "agreement". Those suggestions received support.

18. After discussion, the Working Group decided that article 1(1) of the draft convention could read as follows: "This Convention applies to agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute ('settlement agreements') if, at the time of the conclusion of that agreement: (a) at least two parties to the settlement agreement have their places of business in different States; or (b) the State in which the parties to the settlement agreement have their places of business is different from either: (i) the State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) the State with which the subject matter of the settlement agreement is most closely connected."

19. However, questions were raised on which terminology would be used to refer to settlement agreements that fell under article 1(1), particularly in the title of the draft convention. In addition, a concern was expressed that combining articles 1(1) and 3(1) may introduce a structural flaw as it would result in combining a provision on the scope of application with a provision on the definition of the term "international".

20. Having considered the suggested modifications further, there was general support in the Working Group to merge articles 1(1) and 3(1) of the draft convention. On the other hand, based on a preference to include the term "international settlement agreements" in the title of the draft convention (see para. 143 below), it was suggested that article 1(1) should include a reference to "international" settlement agreements in some fashion, for example, by adding the words "which are international in that" in the chapeau or by including at the end of that paragraph "(hereinafter referred to as "international settlement agreements")". With respect to the latter example, it was pointed out that caution should be taken as the remaining parts of the draft convention simply referred to "settlement agreements". Overall, there was general support for inserting the term "international" in article 1(1) and the Secretariat was requested to formulate a draft for consideration by the Commission.

21. Subject to that change, the Working Group approved in substance article 1(1) of the draft convention as reflected in paragraph 18 above.

22. With regard to the corresponding changes that might need to be implemented in the draft amended Model Law (for example, articles 1(1), 15(1), 15(4) and 15(5)), the Working Group decided to consider them separately at a later stage of its deliberations (see paras. 120–127 below).

2. Exclusions from the scope (articles 1(2) and 1(3) of the draft convention and articles 15(2) and 15(3) of the draft amended Model Law)

23. With regard to the exclusions provided in article 1(2) of the draft convention and article 15(2) of the draft amended Model Law, suggestions to move the phrase "concluded to resolve a dispute" in subparagraph (i) to the chapeau of that paragraph and to delete that phrase entirely did not receive support. It was explained that the two types of exclusion should be treated differently, which was adequately reflected in the current text. After discussion, the Working Group approved in substance article 1(2) of the draft convention and article 15(2) of the draft amended Model Law, unchanged.

24. With respect to a question whether the draft instruments should set forth how a competent authority would ascertain whether a settlement agreement fell within the scope of article 1(3) of the draft convention and article 15(3) of the draft amended Model Law, it was noted that such a procedure would largely depend on the domestic rules of procedure and, therefore, it was not necessary for the draft instruments to prescribe any particular procedure for that purpose. After discussion, the Working

Group approved in substance article 1(3) of the draft convention and article 15(3) of the draft amended Model Law, unchanged.

C. General principles

25. Subject to further deliberations on the appropriateness of using the term "Contracting States" in the draft convention (see paras. 116–118 below), the Working Group approved in substance article 2 of the draft Convention and article 16 of the draft amended Model Law, unchanged.

D. Definitions

26. The Working Group considered article 3 of the draft convention taking into consideration the suggested modification to article 1(1) (see paras. 18, 20 and 21 above). It was clarified that paragraph 1 of article 3 would be deleted resulting in the consequential change of numbering to the remaining paragraphs. It was further agreed that the current paragraph 2 (renumbered paragraph 1) would begin with the words "For the purposes of article 1, paragraph 1 (…)".

1. Notion of "place of business"

27. The Working Group then considered whether the current article 3, paragraph 2 of the draft convention should be expanded to also cover situations where parties would have their places of business in the same State, but the settlement agreement would nevertheless contain an international element, for instance, where the parties' parent company or shareholders were located in different States. It was mentioned that such an approach would reflect current global business practices as well as complex corporate structures. Nonetheless, it was generally felt that it would not be feasible to agree on a simple and clear formulation that would be generally acceptable in different jurisdictions. It was also mentioned that introducing such an expansion could unduly burden the competent authority as it would have to assess the corporate structure of the parties. Furthermore, it was mentioned that introducing such language could pose conflicts with relevant domestic laws and regulations.

28. After discussion, the Working Group approved in substance article 3(2) of the draft Convention and article 15(5) of the draft amended Model Law, unchanged (for further consideration of article 15(5) of the draft amended Model Law, see para. 127 below).

2. Definition of "writing requirement"

29. The Working Group approved in substance article 3(3) of the draft Convention and article 15(6) of the draft amended Model Law, unchanged.

3. Definition of "mediation"

30. With regard to the definition of "mediation" in article 3(4) of the draft convention and article 1(3) of the draft amended Model Law, it was noted that they were formulated slightly differently reflecting the nature of the respective instruments.

31. In that context, a concern was expressed that the phrase "lacking the authority to impose a solution upon the parties to the dispute" might be interpreted to exclude from the scope of the draft instruments circumstances where the appointed mediator was also expected to act as an arbitrator if the parties were not able to reach an amicable solution at the end of the mediation.

32. Acknowledging the growth of such "med-arb" practice, it was suggested that the phrase "at the time of mediation" could be added at the end of those paragraphs to clarify the condition that the mediator was not able to impose a solution was limited to the stage of mediation. While some support was expressed for the clarification, it was mentioned that the addition would be unnecessary as the current text applied to

med-arb situations, and a mediator in a med-arb proceeding would only be able to impose a solution once it started its functions as an arbitrator. Accordingly, the Working Group approved in substance article 3(4) of the draft convention and article 1(3) of the draft amended Model Law, unchanged.

E. Application

1. Notion of application

33. The Working Group considered article 4 of the draft convention and article 17 of the draft revised Model Law, which addressed the requirements for parties to apply to the competent authority.

34. A suggestion was made to revise the chapeau of paragraph 1 so as to include the term “application” in line with the heading of the provisions as follows. Article 4(1) of the draft convention would read: “A party relying on a settlement agreement under this Convention shall make an application to the competent authority of the Contracting State where relief is sought and supply: (…)” ; and article 17(1) of the draft amended Model Law would read: “A party relying on a settlement agreement under this section shall make an application to the competent authority of this State and supply: (...)”.

35. A further suggestion was made that the headings of article 4 of the draft convention and article 17 of the draft amended Model Law should be amended so as to refer to “requirements” for application in order to better capture their content.

36. During its consideration of article 4 of the draft convention and article 17 of the draft amended Model Law, the Working Group confirmed its understanding that those provisions should apply to both instances as provided for in article 2 of the draft convention and article 16 of the draft amended Model Law (i.e., where the request related to the enforcement of a settlement agreement and where the settlement agreement was invoked as a defence against a claim). It was said that the use of the term “application” could be understood as only referring to procedures for requesting enforcement, and not necessarily to procedures where the settlement agreement was invoked as a defence. Accordingly, the Working Group agreed that the draft instruments should avoid using the term “application”.

37. After discussion, the Working Group agreed that: (i) the heading of article 4 of the draft convention and article 17 of the draft amended Model Law should read “Requirements for reliance on settlement agreements”; (ii) the chapeau of article 4(1) of the draft convention and of article 17(1) of the draft amended Model Law should remained unchanged; (iii) the words “where the application is made” and “the party making the application” in article 4(3) of the draft convention and 17(3) of the draft amended Model Law should be replaced respectively by the words “where relief is sought” and “the party requesting relief”; and (iv) the word “the application” in article 4(5) of the draft convention and article 17(5) of the draft amended Model Law should be replaced by the words “the request for relief”.

2. Settlement agreement resulting from mediation

38. The Working Group considered article 4(1)(b) of the draft convention and article 17(1)(b) of the draft amended Model Law, which provided an illustrative and non-hierarchical list of means to evidence that a settlement agreement resulted from mediation. To highlight that the list was non-exhaustive and did not enumerate the entirety of evidence that might be provided, a suggestion was made to add the words “and/or” following each subparagraph. After discussion, the Working Group agreed that the non-exhaustive nature of the list was clearly expressed through subparagraph (iv). It was reiterated that the understanding of the Working Group was that only if the evidences mentioned in subparagraphs (i) to (iii) could not be produced, then would the requesting party be allowed to submit any other evidence.

3. Use of the terms “conditions” – “requirements”

39. In relation to article 4(4) of the draft convention and article 17(4) of the draft amended Model Law, the Working Group considered whether the word “conditions” or “requirements” should be used. After discussion, it was agreed that the word “requirements” should be used in article 4 for the sake of consistency (see articles 4(2) of the draft convention and 17(2) of the draft amended Model Law referring to “requirement”).

F. Defences

40. The Working Group considered article 5 of the draft convention and article 18 of the draft amended Model Law, which addressed grounds for refusing to grant relief.

41. The Working Group confirmed that the grounds listed for refusing to grant relief in those provisions applied both to requests for enforcement (under article 2(1) of the draft convention and article 16(1) of the draft amended Model Law) and to situations where a party invoked a settlement agreement as a defence against a claim (under article 2(2) of the draft convention and article 16(2) of the draft amended Model Law). Accordingly, the Working Group agreed that article 5 should avoid language referring only to enforcement or only to invoking a settlement agreement.

1. Chapeau of article 5(1) of the draft convention and article 18(1) of the draft amended Model Law

42. In line with the decision that the word “application” should not be used in article 4 of the draft convention and article 17 of the draft revised Model Law (see para. 36 above), the Working Group agreed to amend the chapeau of the provisions as follows. Article 5(1) of the draft convention would read: “The competent authority of the Contracting State where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought, only if that party furnishes to the competent authority proof that: (…)”; and article 18(1) of the draft amended Model Law would read: “The competent authority of this State may refuse to grant relief at the request of the party against whom the relief is sought, only if that party furnishes to the competent authority proof that: (…)”.

2. Article 5(1)(b) of the draft convention and article 18(1)(b) of the draft amended Model Law

43. Recalling a suggestion made at a previous session of the Working Group (see A/CN.9/896, para. 100), it was reiterated that the word “voidable” should be inserted after the word “void” to put it beyond doubt that subparagraph (b) covered instances of fraud, mistake, misrepresentation, duress and deceit. After discussion, the Working Group reaffirmed its understanding that the current wording of subparagraph (b) was sufficiently broad to encompass those elements and concluded that the addition of the word “voidable” was not necessary.

3. Article 5(1)(c) of the draft convention and article 18(1)(c) of the draft amended Model Law

44. The Working Group recalled that subparagraph (c) had been the subject of extensive deliberations at its previous sessions. A number of suggestions were made with a view to clarifying its drafting.

45. In relation to subparagraph (c)(ii), it was suggested to add the word “substantially” after the word “subsequently” to clarify that minor modifications should not be a ground for refusing enforcement of the modified settlement agreement. In response, it was said that the word “substantially” would introduce a discretionary or subjective assessment by the competent authority and was therefore not desirable.

46. In relation to subparagraph (c)(iii), as a matter of drafting, it was suggested to replace the words “so that” after the word “conditional” by the words “in that”. As a matter of substance, it was said that that subparagraph as currently drafted would not

properly cover situations where parties after mediation did not intend to enforce the obligations therein but rather formulated the settlement agreement as a framework to shape their future relation and clarify mutual obligations. It was suggested that the focus of the provision should be on the obligations not being intended to be performed under the given circumstances, instead of the settlement agreement itself being conditional. In that light, it was suggested that subparagraph (c)(iii) could be modified along the lines of: "contains obligations for the party against whom relief is sought that are not enforceable independent of other parts of the agreement or were not agreed to be performed at the time the relief is sought". In response, it was clarified that the purpose of the current subparagraph (c)(iii) was to encapsulate the non-fulfilment of existing preconditions. A further suggestion was made to avoid the use of the term "conditional" as that term might carry different legal meanings in different legal traditions. It was suggested that it would be preferable to draft the provision in a descriptive fashion, for instance, along the lines of "relief sought by the requesting party is related to an obligation of that party which has not been performed".

47. In relation to subparagraph (c)(iv), it was suggested that the subparagraph should be revised to state "is so unclear and incomprehensible that it is not capable of being enforced according to its terms." In support of that suggestion, it was said that such modification would make it clear to the competent authority that the focus of its assessment would be with regard to the terms of the settlement agreement. It was explained that the suggested revision aimed at providing guidance and a framework to the competent authority to implement the provision. In response, it was said that such a revision would not bring clarity to the provision, and might result in accommodating jurisprudence in certain States to the detriment of others. Another suggestion was to revise the subparagraph along the following lines: "is so unclear and incomprehensible that it is not capable of being relied upon". Yet another suggestion was that the subparagraph should focus only on the operative provisions in the settlement agreement.

48. It was also suggested that subparagraph (c)(iv) should be deleted as it was already covered in subparagraph (b) and, if retained, could pose uncertainties on how it was to be implemented by competent authorities. Along the same lines, it was pointed out that paragraph 1(c) was not necessary as the grounds contained therein were sufficiently addressed in paragraph 1(b).

Proposal

49. After discussion, the Working Group considered the following proposal (the "Proposal") regarding article 5(1)(a) to (c) of the draft convention and article 18(1)(a) to (c) of the draft amended Model Law (with the necessary adjustments): "1. The competent authority of the Contracting State where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought, only if that party furnishes to the competent authority proof that: (a) a party to the settlement agreement was under some incapacity; (b) the settlement agreement sought to be relied upon: (i) is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Contracting State where relief is sought under article 4; (ii) is not binding, or is not final, according to its terms; (iii) has been subsequently modified; or (iv) [option A: is not capable of being relied upon because its operative part is not clear or comprehensible][option B: is so unclear or incomprehensible that it is not capable of being relied upon]; (c) the obligations in the settlement agreement have been performed; (c bis) [option X: granting relief would be contrary to the terms of the settlement agreement in the circumstances then prevailing] [option Y: the obligations in the settlement agreement of the party against whom the relief is sought cannot be relied upon independent of other parts of the agreement or have not yet arisen] [option Z: the settlement agreement is conditional in that the obligations in the settlement agreement of the party against whom relief is sought have not yet arisen]; (…)".

50. The Proposal was generally considered as a drafting improvement. Suggestions were made in relation to the options provided for in subparagraphs (b)(iv) and (c bis).

Subparagraph (b)(iv) of the Proposal

51. The suggestion to delete subparagraph (b)(iv) was reiterated because the terms "clear" or "comprehensible" were not necessarily familiar in certain jurisdictions and could be interpreted differently. That suggestion did not receive support.

52. There was a general preference for option A. Various suggestions were made to clarify the words "operative part", including to replace the word "operative" by "prescriptive", or by referring to the "terms" of the settlement agreement. Yet, another suggestion, which received support, was to specify that "the obligations" in the settlement agreement were not clear or comprehensible.

53. After discussion, the Working Group agreed to merge subparagraph (b)(iv) with subparagraph (c) by adding the words "or are not clear or comprehensible" at the end of subparagraph (c).

Subparagraph (c bis) of the Proposal

54. The Working Group considered the options provided for in subparagraph (c bis). In support of option X, it was said that it avoided reference to legal terms that could be understood differently in different legal systems. It was explained that the words "in the conditions then prevailing" had been inserted in option X to provide guidance to the competent authority. It was, however, agreed that those words might introduce ambiguity and were not necessary. It was suggested that option X could be improved along the following lines: "Granting relief would be contrary to the terms of the settlement agreement, among other reasons, for not fulfilling the provisions contained in the settlement agreement or because the other party has not fulfilled its own obligations."

55. It was said that option Y was ambiguous, and if retained, it should be clarified to indicate that the obligations in the settlement agreement of the party against whom the relief was sought related to obligations of the other party that had not been, or could not be, performed or were subject to events that had not occurred or could not occur. It was noted that option Z was based on subparagraph (c)(iii) as contained in document A/CN.9/WG.II/WP.205/Add.1.

56. During the deliberation, it was pointed out that subparagraph (c bis) might overlap with the public policy exception already provided for in paragraph 2 of both article 5 of the draft convention and article 18 of the draft amended Model Law.

57. After discussion, the Working Group approved subparagraph (c bis), which would read: "Granting relief would be contrary to the terms of the settlement agreement". It was confirmed that such wording was broad enough to encompass situations in which the obligations in a settlement agreement would be conditional or reciprocal, and their non-performance could be justified for a variety of reasons. It was said that many different circumstances could affect the enforceability of obligations in settlement agreements, in particular in complex contractual arrangements, and that subparagraph (c bis) should be broadly interpreted as covering a variety of factual situations. It was further highlighted that the circumstances that had been provided for in options Y and Z would be covered.

58. Subject to the above-mentioned changes (see paras. 53 and 57 above), the Working Group approved in substance the Proposal regarding article 5(1)(a) to (c) of the draft convention and article 18(1)(a) to (c) of the draft amended Model Law.

4. Conclusions on article 5 of the draft convention and article 18 of the draft amended Model Law

59. After discussion, the Working Group approved in substance article 5 of the draft convention (and article 18 of the draft amended Model Law with the necessary adjustments), which would read along the following lines:

"Article 5. Grounds for refusing to grant relief

"1. The competent authority of the Contracting State where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought, only if that party furnishes to the competent authority proof that: (a) A party to the settlement agreement was under some incapacity; (b) The settlement agreement sought to be relied upon: (i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Contracting State where relief is sought under article 4; (ii) Is not binding, or is not final, according to its terms; (iii) Has been subsequently modified; (c) The obligations in the settlement agreement have been performed, or are not clear or comprehensible; (d) Granting relief would be contrary to the terms of the settlement agreement; (e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement; or (f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party, without which failure that party would not have entered into the settlement agreement.

"2. The competent authority of the Contracting State where relief is sought under article 4 may also refuse to grant relief if it finds that: '(a) Granting relief would be contrary to the public policy of that State;' or '(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that State.'"

60. As a drafting improvement, a suggestion was made to regroup the various grounds, in particular in light of the observations made that certain grounds were illustrations of the ground provided for in paragraph (1)(b)(i). In that context, the following drafting suggestion was made: "(1) The competent authority of the Contracting State where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought, only if that party furnishes to the competent authority proof that: (a) a party to the settlement agreement was under some incapacity; (b) the settlement agreement sought to be relied upon is null and void, inoperative or incapable of being performed [under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Contracting State], including when: (i) the settlement agreement (1) is not binding, or is not final, according to its terms; or (2) has been subsequently modified; (ii) the obligations in the settlement agreement (1) have been performed; or (2) are not clear or comprehensible; (iii) granting relief would be contrary to the terms of the settlement agreement; (…)".

61. While there was some support for that drafting improvement (in particular, to make the text of article 5 of the draft convention and article 18 of the draft amended Model Law simpler and for the purposes of promoting the adoption of the draft instruments by States), it was considered that regrouping of grounds posed practical challenges, in particular, with regard to the application of the party's freedom to choose the applicable law in paragraph 1(b). Therefore, it was agreed to retain the structure of the provisions as found in paragraph 59 above.

62. In so doing, the Working Group took note of extensive consultations among delegations aimed at clarifying the various grounds provided for in paragraph 1, in particular the relationship between subparagraph (b)(i), which mirrored a similar provision of the New York Convention and was considered to be of a generic nature, and subparagraphs (b)(ii), (b)(iii), (c) and (d), which were deemed to be illustrative in nature. It was noted that various attempts for regrouping the grounds had been unsuccessful.

63. A further suggestion was made to add a new paragraph in article 5 aimed at providing guidance to competent authorities when considering the different grounds. One of the drafting suggestions read: "3. The competent authority, in interpreting and applying the various grounds for refusing requested relief under paragraph 1, may

take into account that the grounds for such refusal identified under paragraph 1(b) may overlap with other grounds for refusal in paragraph 1." The Working Group took note that attempts at clarifying and possibly providing guidance on paragraph 1 had also not been successful.

64. It was further noted that such attempts represented serious efforts at avoiding overlap in light of the importance of the issue. However, difficulties arose because of the need to accommodate the concerns of different domestic legal systems, which resulted in the failure of such attempts to gain consensus.

65. Therefore, the Working Group expressed a shared understanding that there might be overlap among the grounds provided for in paragraph 1 and that competent authorities should take that aspect into account when interpreting the various grounds.

66. After discussion, the Working Group reiterated its approval of article 5 of the draft convention and article 18 of the draft amended Model Law (see para. 59 above) subject to the following editorial modifications. First, the word "or" should be added between subparagraphs (b)(ii) and (b)(iii) and second, subparagraph (c) should be revised as follows: "The obligations in the settlement agreement (i) have been performed; or (ii) are not clear or comprehensible."

67. In relation to the notion of public policy in article 5(2)(a) of the draft convention and article 18(2)(a) of the draft amended Model Law, it was said that it would be up to each Contracting State to determine what constituted public policy. In that context, it was agreed that public policy could include, in certain cases, issues relating to national security or national interest.

G. Parallel applications or claims

68. A number of suggestion were made with respect to article 6 of the draft convention and article 18(3) of the draft amended Model Law, which dealt with parallel proceedings which may affect the enforcement of a settlement agreement. It was recalled that the text was based on article VI of the New York Convention.

69. One suggestion was that the provision should apply to both when enforcement of a settlement agreement was sought and when a settlement agreement was invoked as a defence. Accordingly, it was suggested that wording such as "relief being sought" should be used instead of "enforcement". Another suggestion was that the words "if it considers proper" should be deleted as they might be considered as providing too much discretion to the competent authority in making a decision on whether to adjourn the decision to grant relief. The latter suggestion did not receive support.

70. After discussion, the Working Group approved in substance article 6 of the draft convention and article 18(3) of the draft amended Model Law which would read as follows (see also para. 139 below): "If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Contracting State where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security."

H. Issues regarding the draft convention

1. Article 7 – Other laws or treaties

71. The Working Group approved in substance article 7 of the draft convention, unchanged.

2. Article 8 – Reservations

States and other public entities (article 8(1)(a))

72. With respect to article 8(1)(a) of the draft convention, a suggestion was made to replace it with a provision along the following lines: "Nothing in this Convention shall affect privileges and immunities of States or of international organizations, in respect of themselves and of their property." That suggestion did not receive support. It was further recalled that the Working Group had agreed that a State should be given certain flexibility in excluding from the scope of the draft instruments settlement agreements to which it was a party or which its government agencies or any person acting on behalf of a governmental agency was a party (see A/CN.9/896, para. 62).

73. It was generally noted that the objective of permitting a reservation was to allow a State to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. In that context, it was noted that the draft convention did not contain any explicit provision that it applied to such settlement agreements. However, it was explained that the broad scope of application as provided in article 1(1) of the draft convention should be interpreted to encompass such settlement agreements.

74. It was further explained that the inclusion of a reservation along the lines of article 8(1)(a) would give flexibility to States and thus make it possible for more States to consider becoming a party to the draft convention.

75. With respect to the two options provided for in article 8(1)(a), there was general support for option 2 as it clearly indicated that the State making that reservation would be limiting the scope of application of the draft convention. In that context, it was suggested that the word "only" should be deleted.

76. However, based on the perspective that the draft convention should not apply to such agreements, a view was expressed that option 1 should be retained in the draft convention and that the provision as a whole could be included in the scope provision. That view was not supported.

77. After discussion, the Working Group approved in substance the following text for article 8(1)(a): "1. A Contracting State may declare that: (a) it shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration."

Opt-in and opt-out by parties (article 8(1)(b))

78. With regard to how article 8(1)(b) of the draft convention would operate in practice, the Working Group confirmed its understanding that even without an explicit provision in the draft convention, parties to a settlement agreement would be able to exclude the application of the draft convention. It was further mentioned that such an agreement between the parties excluding the application of the draft convention would be given effect by the competent authority, because if a party were to seek relief relying on such an agreement, it would be refused as being contrary to the terms of the settlement agreement as provided for in article 5(1)(d) of the draft convention and article 18(1)(d) of the draft amended Model Law (see para. 59 above).

79. With that understanding, the Working Group approved in substance article 8(1)(b), unchanged.

Heading of article 8

80. With the understanding that paragraph 1(a) and (b) constituted reservations, the Working Group agreed that the heading of article 8 should remain unchanged.

No other reservations permitted (article 8(2))

81. A suggestion to include a reciprocal reservation in the draft convention similar to that found in article I(3) of the New York Convention did not receive support.

82. A further suggestion was made to delete article 8(2) in order to allow States to make additional reservations. It was stated that even without article 8(2), States would not be able to make reservations that were incompatible with the object and purpose of the draft convention according to article 19 of the Vienna Convention on the Law of Treaties (the "Vienna Convention").

83. In response, it was stated that because article 8(3) allowed for reservations set out in article 8(1) to be made at any time, there was a need to retain a balance by restricting additional reservations. It was further noted that a number of private international trade law instruments included provisions that did not permit unauthorized reservations (for instance article 98 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and article 22 of the United Nations Convention on the Use of Electronic Communications in International Contracts). Concerns were expressed that if article 8(2) were to be deleted, a wide range of reservations could be made, particularly with regard to the scope of application of the convention, thus making the regime envisaged by the convention potentially confusing for commercial parties and creating legal uncertainties. As an example, it was mentioned that if a State were to formulate a reciprocity reservation along the lines of article I(3) of the New York Convention, parties would not be certain whether the convention would be applicable as it would not necessarily be feasible to identify a country of origin of the settlement agreement.

84. With a view to address the above-mentioned concerns, another proposal was made that reservations not expressly authorized in the draft convention would be permitted only at the time of signature, ratification, acceptance or approval, with the withdrawal of reservations being possible at any time, and entering into force six months after deposit. That suggestion did not receive support.

85. Based on the understanding that the draft convention would operate in the context of international trade law and that there was a need to provide legal certainty on its application, the Working Group agreed to retain article 8(2) unchanged.

Reservations to be made "at any time" (article 8(3))

86. With respect to the fourth sentence of article 8(3), it was suggested that the words "or at the time of making a declaration under article 12" should be added after the word "accession", which received support.

87. In response to an observation that the possibility to make a reservation at any time as provided for in article 8(3) was not usual in treaty practice, it was explained that that approach had been adopted in treaties dealing with international trade law and private law matters. In addition, it was said that the flexibility provided would be an incentive for States considering to join the convention. It was further indicated that reservations might need to be made at any time for the purposes of article 12 of the draft convention.

88. In order to enhance legal certainty for parties to settlement agreements, the following text was suggested for addition in article 8(3): "A reservation made after the time of signature, ratification, acceptance or approval shall not affect applications under article 4, which have been made before that reservation entered into force." It was explained that the purpose of the suggested text was to avoid parties from being deprived of the possibility of enforcing a settlement agreement due to a later reservation. In that context, it was mentioned that the last sentence of article 8(3) already provided a grace period during which parties could initiate the procedure under article 4 and thus there was no need for an additional text.

89. In relation to the suggested text in paragraph 88 above, it was said that the words "applications under article 4" should be replaced by "settlement agreements". However, it was highlighted that it might not be easy to verify when a settlement agreement was concluded and, therefore, it would be preferable to retain the reference to "applications". A further suggestion was that the draft convention should not only address the effect of reservations on settlement agreements but more generally the effect of entry into force of the convention as well as any reservation.

90. Thereafter, the Working Group considered the following text to be placed as a separate provision in the draft convention: "The Convention and any reservation, or withdrawal of a reservation shall apply only to settlement agreements concluded after the date when the Convention, reservation, or withdrawal of reservation enters into force for the Contracting State." It was further suggested that the last sentence of article 15(2) should be revised as follows: "The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect."

91. While it was noted that the New York Convention did not have such a temporal scope provision, the draft additional provision in paragraph 90 above as well as the revision to article 15(2) received general support. A suggestion to delete the reference to "withdrawal of a reservation" to facilitate enforcement of settlement agreements that were not enforceable before the withdrawal of the reservation did not gain support as it could lead to uncertainty about the application of the draft convention to such settlement agreements.

92. After discussion, the Working Group approved in substance the draft provision as outlined in paragraph 90 above for insertion in the draft convention along with the corresponding revision to article 15(2).

Conclusion on article 8

93. Subject to the modifications reflected in paragraphs 77 and 86 above, the Working Group approved in substance article 8 of the draft convention.

3. Articles 9 and 10

94. After discussion, the Working Group approved in substance articles 9 and 10 of the draft convention, unchanged. In that context, the delegation of Singapore expressed an interest in hosting a ceremony for the signing of the convention, once adopted. That proposal was welcomed and supported by the Working Group and it was agreed to make the corresponding recommendation to the Commission.

4. Article 11 – Regional economic integration organizations

95. With respect to article 11 of the draft convention, it was explained that inclusion of that article would facilitate a regional economic integration organization and its member States becoming party to the draft convention.

96. It was suggested that article 11(4) could be revised along the following lines: "This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought to a competent authority of a State that is member of such an organization and all the States relevant under article 1(1) are members of any such organization; or (b) as concerns the recognition or enforcement of judgments as between member States of the regional economic integration organization."

97. In response to a question on how article 11(4)(b) as proposed in paragraph 96 above would operate, it was explained that subparagraph (b) would ensure that when a party invoking a settlement agreement in a court of a member State of the regional economic integration organization was not granted relief under the convention, such a judgment by the court would circulate within the regional economic integration organization, while that party would no longer be able to rely on the settlement agreement in a court of another member State of the regional economic integration organization. It was pointed that, in practice, this would require a party to seek relief in only one member State of the regional economic integration organization.

98. Subject to the proposed revision to paragraph 4 (see para. 96 above), the Working Group approved in substance article 11 of the draft convention.

5. Article 12 – Non-unified legal systems

99. The Working Group considered article 12, which would permit a Contracting State, at the time of signature, ratification, acceptance, approval or accession, to declare that the convention would extend to all its territorial units or only to one or more of them and to amend its declaration by submitting another declaration at any time. That provision was said to be a well-established standard provision in private international law instruments.

100. The Working Group agreed that the heading of article 12 should read "Non-unified legal systems".

101. A suggestion to delete article 12(3)(b) did not receive support, as that provision was said to clarify the notion of "place of business" in States having different territorial units.

102. Another suggestion was made to clarify that a Contracting State making a declaration under article 12 would have the discretion to make different reservations over time for different territorial units. In response, it was said that the practice of making or withdrawing reservations in relation to different territorial units was established, and it would not be necessary to include a provision for that purpose in the draft convention.

103. After discussion, the Working Group approved in substance article 12 of the draft convention, unchanged, with the heading "Non-unified legal systems".

6. Article 13 – Entry into force

104. Divergent views were expressed on paragraph 1 which provided that the draft convention would enter into force after the deposit of the third instrument of ratification, acceptance, approval or accession.

105. One view was that the number of ratifications required for the entry into force of the convention should be higher (for example, ten) for the reasons that: (i) there was no urgency for the draft convention to enter into force; (ii) a higher threshold would result in more confidence in the regime envisaged therein; and (iii) States would be encouraged to promote the convention more widely in order to ensure its coming into force.

106. Another view was that requiring three ratifications would be appropriate for the purposes of the draft convention as that: (i) had been the general practice and trend for private international law treaties, and there was no compelling reasons for providing for a higher threshold; (ii) would ensure the earlier entry into force of the convention, which would allow for relevant practice to develop for the benefit of other States that would consider becoming parties to the convention; and (iii) would send a positive signal for the users of mediation that an international legal framework for the enforcement of settlement agreements would soon be in place.

107. While some hesitation was expressed, after discussion and for the purposes of achieving consensus, it was agreed that the draft convention should enter into force after the deposit of the third instrument of ratification, acceptance, approval or accession.

108. While a suggestion was made to add the phrase "or regional economic integration organization" after the word "State" in the first sentence of article 13(2), it was agreed that article 11(3) sufficiently addressed the underlying concern.

109. The Working Group agreed that six months would be an appropriate period for the purposes of article 13. Therefore, it was agreed that the word "six" should be kept outside square brackets in paragraphs 1 and 2.

110. As a drafting point, it was agreed that the words "on the first day of the month following the expiration of" and the words "date of" should be deleted in paragraphs 1 and 2. It was also agreed that the words "enters into force" would be replaced by "shall enter into force".

111. Subject to the above-mentioned changes (see paras. 109 and 110 above), the Working Group approved in substance article 13 of the draft convention.

7. Article 14 – Amendment

112. The Working Group agreed that the references to "four" months in paragraph 1 and to "six" months in paragraphs 4 and 5 were appropriate and therefore, it agreed that those words should be retained outside square brackets. The Working Group further agreed that the word "Secretary-General of the United Nations" in paragraph 3 should be replaced by the word "depositary" in line with article 9 of the draft convention.

113. A concern was raised regarding paragraph 6, in that it established a difference of treatment between States. As per paragraph 4, States that were Contracting States prior to the entry into force of the amendment had a choice whether to be bound or not by the amendment. On the contrary, under paragraph 6, States that became Contracting States after the entry into force of the amendment would have no choice but to adopt the convention as amended. In response to the observation that paragraphs 4 and 6 would result in two different regimes for Contracting States before and after an amendment to the convention, the Working Group agreed to consider the issue further. It was generally felt that amendments should enter into force for States only when they expressly consented to it.

114. Having considered various options, the Working Group agreed that the draft convention should provide that amendments would enter into force only for States that had expressed their consent to be bound by them, and that this would also be the case for States adopting the convention after the amendment. Accordingly, the Working Group agreed that paragraph 6 of article 14 should be deleted and that paragraphs 3 to 5 would read as follows: "3. An adopted amendment shall be submitted by the depositary to all the Contracting States for ratification, acceptance, or approval. 4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance, or approval. When an amendment enters into force, it shall be binding on those Contracting States that have expressed consent to be bound by it. 5. When a Contracting State ratifies, accepts, or approves an amendment following the deposit of the third instrument of ratification, acceptance, or approval, the amendment enters into force in respect of that Contracting State six months after the date of the deposit of its instrument of ratification, acceptance, or approval."

8. Article 15 – Denunciation

115. The Working Group agreed that "twelve" months would be an appropriate period for the purposes of article 15 and therefore agreed to retain that word outside square brackets. It was further agreed that the words "on the first day of the month following the expiration of" should be deleted. Subject to those changes, as well as the agreed modification reflected in paragraph 90 above, the Working Group approved in substance article 15 of the draft convention.

9. "Contracting States"

116. With regard to the use of the term "Contracting States" in the draft convention, the attention of the Working Group was drawn to the fact that that term was referred to in article 2(1)(f) of the Vienna Convention to mean a State which had consented to be bound by the treaty, whether or not the treaty had entered into force. In that light, a suggestion was made to replace the term "Contracting States" by the words "Parties" or "State Parties" to mean a State which had consented to be bound by the treaty and for which the treaty was in force in accordance with article 2(1)(g) of the Vienna Convention.

117. In response, it was noted that the use of the term "Parties" could be confusing as the draft convention often referred to "parties" to the settlement agreement and thus, it was suggested that the term "States Parties" might be more appropriate. Another suggestion was to use the term "Contracting Parties", while it was noted that

that term might be more confusing and not known in the treaty law context. The Working Group also noted that the term "Contracting States" had been used in existing conventions in the field of international trade law.

118. After discussion, the Working Group agreed that the draft convention could tentatively use the terms "Parties to the Convention" or "a Party to the Convention". It was further clarified that the draft convention would continue to refer to "States" where appropriate.

I. Issues regarding the draft amended Model Law

119. The Working Group noted that the presentation of the provisions of the draft amended Model Law in three sections in document A/CN.9/WG.II/WP.205/Add.1 reflected the suggestions made at its sixty-seventh session (A/CN.9/929). There was general support for that structure. In its deliberations of the draft amended Model Law, the Working Group generally agreed that the guiding principles would be to ensure a level of consistency with the draft convention and at the same time to preserve the existing text of the Model Law to the extent possible.

1. Scope

120. The Working Group approved in substance article 1(1) (in section 1) of the draft amended Model Law, which set forth the expanded scope of the draft amended Model Law, applying to both international commercial mediation and international settlement agreements. It also approved article aa(1) and 15(1), which provided the scope of application of sections 2 and 3, respectively.

2. "Internationality" of the mediation and of settlement agreements

121. The Working Group noted that the draft amended Model Law included two separate provisions on the notion of internationality: (i) articles aa(2) and aa(3) (definition of international mediation), which mirrored articles 1(4) and 1(5) of the Model Law, and (ii) articles 15(4) and 15(5) (definition of international settlement agreement), which mirrored the corresponding provision in the draft convention.

122. The Working Group considered whether the internationality of a settlement agreement should be assessed at the time of the conclusion of the agreement to mediate or at the time of the conclusion of the settlement agreement.

123. In favour of the latter, it was said that assessment of the internationality of the settlement agreement at the time of its conclusion would be more in line with the approach taken in the draft convention. Further, that would also cater for situations where there might not necessarily be an agreement to mediate between the parties. It was further suggested that assessment of internationality as provided for in article 15(4)(b) (referring to the obligations of the parties under the settlement agreement), would not be feasible at the time of the conclusion of the agreement to mediate as the place of performance of such obligation would not be known at that time.

124. Whilst the benefit of consistency with the draft convention was acknowledged, it was also pointed out that parties to international mediation might expect the settlement agreement resulting from that process to be subject to enforcement under section 3 of the draft amended Model Law. Therefore, caution was expressed about entirely disconnecting the internationality of the settlement agreement from the mediation process itself. A view was expressed that an international mediation would rarely result in a purely domestic settlement agreement not falling under the scope of section 3. It was noted that referring to agreement to mediate would also make it possible to determine the applicability of the law at the time mediation was initiated, thereby providing more legal certainty to the parties.

125. However, it was reiterated that the regime for enforcement of international settlement agreements as provided for in section 3 should not be made applicable to purely domestic settlement agreements. It was observed that article 14 of the Model

Law referred to the enforceability of settlement agreement, without requiring such agreements to be international. It was therefore suggested that article 14 of the Model Law in section 2 could govern enforcement of settlement agreements resulting from international mediation, whereas section 3 should be strictly applicable to settlement agreements that were international at the time of their conclusion. Such an approach was said to preserve the existing approach under the Model Law.

126. It was therefore suggested that options should be provided in the draft amended Model Law regarding whether section 3 would also apply to settlement agreements that were not international under article 15(4), but resulted from international mediation under article aa(2). The first option would suggest that section 3 should only apply to international settlement agreements that were international at the time of their conclusion according to article 15(4). The second option would suggest that States might also apply section 3 to settlement agreements resulting from international mediation as defined in article aa(1). It was noted that, for the purpose of consistency, referring to "international mediation" would be preferable than referring to the "agreement to mediate", which was not a defined term in the Model Law nor in the draft amended Model Law.

127. After discussion, the Working Group approved in substance articles 15(4) and 15(5) with the deletion of the square-bracketed text. It further agreed that section 3 would include a footnote incorporating the second option, in which a State could provide in article 15(4) an additional paragraph stating that a settlement agreement was "international" if it resulted from international mediation as defined in article aa(2) and (3).

3. Article 1(6) of the Model Law

128. The Working Group had agreed not to include a provision similar to article 1(6) of the Model Law in the draft convention. In that light, the Working Group considered whether article 1(6) should be retained in the draft amended Model Law and, if so, whether it should be placed in section 1 or 2 of the draft amended Model Law. Suggestions to delete article 1(6) entirely or to make it applicable to section 3 only did not receive support.

129. After discussion, it was agreed that article 1(6) of the Model Law should be placed in section 2 of the draft amended Model Law and revised as follows: "This section also applies to commercial mediation when the parties agree that the mediation is international or agree to the applicability of this section."

4. Articles 1(7) to 1(9) of the Model Law

130. The Working Group considered whether articles 1(7) to 1(9) of the Model Law should be retained in the draft amended Model Law and, if so, in which section. After discussion, it was agreed that those articles should be placed in section 2 with the replacement of the word "Law" by "Section".

5. Article 3 of the Model Law

131. After discussion, it was agreed that article 3 of the Model Law should be placed in section 2 with appropriate cross-references to relevant articles and with the replacement of the word "Law" by "Section".

6. Article 14 of the Model Law

132. While some concerns were expressed about retaining article 14 in section 2 of the draft amended Model Law (as the term "settlement agreement" was defined in section 3 and grounds for refusing enforcement of a settlement agreement included the settlement agreement not being binding), it was generally felt that article 14 should be retained in section 2 as it dealt with the outcome of the mediation process, which should be binding and enforceable. It was further said that article 14 provided a natural link to the provisions in section 3. The Secretariat was requested to revise

article 14 (including its title) as a provision in section 2 of the draft amended Model Law.

7. Agreements settling disputes not reached through mediation

133. The Working Group then considered the possible expansion of the scope of section 3 of the draft amended Model Law to apply to agreements not reached through mediation as provided for in footnote 4 of the draft amended Model Law. Diverging views were expressed.

134. One was that the draft amended Model Law should include a footnote in section 3 that would indicate that States might wish to consider that possibility. It was suggested that a footnote in the draft amended Model Law would promote harmonization which was one of the objectives of the instrument, while providing sufficient flexibility to States that might wish to broaden the scope of section 3.

135. Another view was that the draft amended Model Law should not include such a footnote as the draft instruments focused on "mediated" settlement agreements and that even without such an indication as provided for in footnote 4, States would be able to broaden the scope of the draft amended Model Law if they wished to do so.

136. After discussion, it was agreed that footnote 4 in the draft amended Model Law would be retained in its current form outside square brackets.

137. In addition, it was agreed that section 3 would include an additional footnote, reflecting the reservation provided for in article 8(1)(b) of the draft convention, which would read as follows: "A State may consider enacting this section to apply only where the parties to the settlement agreement agreed to its application."

J. Other issues relating to the draft instruments

1. Translation issues

138. The Working Group took note of drafting issues that might arise from ensuring consistency among the various linguistic versions of the draft instruments, which would require further adjustments to the text. It was pointed out that, for instance, the words "granting relief" might need to be adjusted in certain language versions of the draft instruments.

2. Structural suggestions

139. During the deliberation, the following drafting suggestions were made: (i) to align article 18 of the draft amended Model Law with articles 5 and 6 of the draft convention, which would result in paragraph 3 of article 18 becoming article 19 (see para. 70 above); (ii) to align the structure of the draft convention to follow the structure of the draft amended Model Law, which would result in reversing the order of articles 2 and 3 in the draft convention; and (iii) to revise the title of section 3 of the draft amended Model Law to better reflect its contents. All those suggestions were approved.

3. Draft General Assembly resolution

140. With respect to the proposed wording for the General Assembly resolution provided in paragraph 3 of document A/CN.9/WG.II/WP.205/Add.1, it was suggested that the following words should be inserted at the end: "nor any expectation to sign, ratify or accede or implement one instrument or the other." Another proposal was made to replace the phrase "without creating any preference for the instrument [that interested States may adopt][to be adopted]" by the words "without creating any expectations for which of the instruments interested States would adopt". Doubts were expressed about the need for the additional language, as States would in any case retain the freedom to adopt any of the draft instruments.

141. While it was mentioned that resolution 69/116 of the General Assembly adopting the United Nations Convention on Transparency in Treaty-based

Investor-State Arbitration contained the phrase "without creating any expectation", it was also recalled that the rationale for inserting such a phrase was quite different.

142. After discussion, it was agreed that the word "concurrently" would be inserted after the words "decision of the Commission to" and that the last part of the paragraph would read as follows: "without creating any expectation that interested States may adopt either instrument."

4. Title of the draft instrument

143. The Working Group tentatively approved the title of the draft convention as: "United Nations Convention on International Settlement Agreements Resulting from Mediation".

144. With respect to the provisional title of the draft amended Model Law, the Working Group approved the following: "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)."

5. Preamble to the draft convention

145. The Working Group approved the preamble of the draft convention as provided for in paragraph 5 of document A/CN.9/WG.II/WP.205/Add.1 subject to replacing the words "such dispute settlement methods" by "mediation".

6. Materials accompanying the draft instruments

146. The Working Group turned its attention to the question of materials that could be prepared to accompany the draft instruments. The suggestion to supplement the Guide to Enactment of the Model Law with information on the revised and additional provisions of the amended Model Law received support. Regarding the material accompanying the draft convention, it was suggested that the reports of the sessions of the Working Group and of the Commission devoted to the preparation of the draft convention, which encompassed a vast amount of information that was shared during the negotiation process, should be compiled and presented in a user-friendly manner on the UNCITRAL website.

147. The suggestion to prepare additional reports or interpretative guidelines on the draft convention did not receive support.

148. After discussion, the Working Group agreed that, resources permitting, the *travaux preparatoires* should be compiled by the Secretariat, so that they could be easily accessible and user-friendly. It was further agreed that the Secretariat should be tasked with the preparation of a text to supplement the Guide to Enactment of the Model Law.

V. Future work

149. Having completed its work on the draft instruments, the Working Group considered agenda item 5 on possible future work. Various suggestions were made.

1. Possible revision of the UNCITRAL Conciliation Rules (1980) and preparation of notes on mediation

150. The Working Group considered whether the Conciliation Rules would need to be updated as they did not necessarily reflect recent developments in the field (see para. 5 of document A/CN.9/WG.II/WP.205). Possible areas of work included: providing a comprehensive definition of mediation; defining the effect of the agreement to refer a dispute to mediation; elaborating on the appointing authority mechanism; providing additional elements regarding the content of the request for mediation, and further statements; and adding provisions on preparatory meetings. It was suggested that the Conciliation Rules, if revised, could include provisions aimed

at strengthening due process aspects in mediation and elaborating on the impartiality and independence of mediators, their role and expected conduct.

151. It was further suggested to consider preparation of notes, akin to the UNCITRAL Notes on Organizing Arbitral Proceedings, with the aim of having a complete set of mediation instruments including an explanation for practitioners. Such notes would be intended to be used in a general and universal manner, taking account of works undertaken by other relevant organizations.

2. Expedited arbitration procedure and adjudication

152. A proposal was made to examine the issue of expedited dispute resolution and to develop a set of tools to address different aspects. It was suggested that that could have two components, which could be handled simultaneously: (i) the development of model rules, model contractual clauses, or similar tools facilitating the use of expedited arbitration procedures for reducing the cost and time of arbitration; and (ii) the development of model legislative provisions or model contractual clauses facilitating the use of adjudication in the context of long-term projects, in particular construction projects.

153. With respect to the first component, it was explained that expedited arbitration procedures had been a focus of many arbitral institutions in recent years, in part as a response to concerns among users about rising costs and lengthier timelines making arbitration more burdensome and similar to litigation. The usefulness of having a common international expedited procedure framework was highlighted, as there was an increasing demand to resolve simple, low value cases by arbitration but there was a lack of international mechanisms to cope with such disputes.

154. With respect to the second component, it was pointed out that adjudication could be useful in the context of long-term projects where work must continue despite disagreements regarding quality or payment. It was noted that adjudication clauses were used and a number of jurisdictions had enacted legislation on adjudication. It was suggested that model legislative provisions and contractual clauses could be developed to facilitate the broader use of adjudication.

155. It was highlighted that the two components would fit together well, as one would provide generally applicable tools for reducing the cost and time of arbitration, while the other would facilitate use of a particular tool that has demonstrated its utility in efficiently resolving disputes in a specific sector.

3. Uniform principles on the quality and efficiency of arbitral proceedings

156. Another proposal, which would build on the above-mentioned proposal (see para. 152 above), was to develop uniform principles on the quality and efficiency of arbitral proceedings. Those principles would build on existing norms and practices and take the form of soft law instruments or legislative provisions. It was highlighted that the principles would address concerns raised in relation to commercial arbitration procedure. The following sub-topics were identified: emergency arbitration; arbitration clauses and non-signatory parties; legal privileges and international arbitration; basic uniform principles for arbitral institutional rules; expedited arbitration procedure; and adjudication. It was stressed that the principles would contribute to strengthening the arbitration framework.

4. General discussion

157. As a general point, it was suggested that the recommendations of the Working Group on future work should be based on the needs of the users, particularly those of the business community, and on the feasibility of the work. It was also emphasized that any work should focus on promoting arbitration as an efficient method and avoid possible over-regulation. It was further mentioned that any decision should also respond to the request of developing States that were in their initial stages of implementing a legislative framework for dispute resolution.

158. It was also suggested that any future work should not impact work currently being conducted by other Working Groups, particularly Working Group III on investor-State dispute settlement reform. It was generally mentioned that any future work should not overlap with those being planned at other international organizations.

159. There was general support for the future work topics mentioned above (see paras. 150–156).

160. There was general support for giving priority to work on expedited arbitration procedure, which would maximize the benefits of arbitration. Considering the criticism that arbitration was a lengthy and costly process, it was said that that work would be timely and reflect the needs of the businesses. In that context, it was noted that caution should be taken so that family and consumer law issues should be excluded from that work and its focus should be on commercial arbitration. It was also suggested that the topic could be expanded to address more comprehensively expedited procedures as a means to ensure efficient resolution of disputes.

161. There was also some support for work on adjudication. It was explained that such work should focus on adjudication as a mechanism to accelerate proceedings and to provide a provisional enforcement of decisions, which would be subject to review by the same tribunal or another arbitral tribunal. Nonetheless, there was some hesitation about undertaking work on adjudication as it would mainly concern a specific industry and as it required a more detailed assessment of the legislative framework surrounding adjudication as well as the practice that governed adjudication clauses. It was also questioned whether it would be feasible to undertake such work concurrently with work on expedited arbitration procedure. It was thus suggested that a gradual approach could be taken by first taking stock of relevant practice and assessing feasibility of any work in that area. In so doing, it was suggested that the focus could be on (i) adjudication as an efficient means to solve disputes in long-term contracts generally, as well as (ii) the means to ensure provisional enforcement of decisions.

162. As to the preparation of principles on quality and effectiveness, it was emphasized that there could be benefit in assessing the current status of arbitration and to further develop principles to ensure that arbitration continued to be an efficient method for resolving disputes. It was further noted that quality and effectiveness would in any case form the basis of any work on arbitration. It was suggested that the scope of work being suggested was quite broad. Thus, it was suggested that efforts should be made to narrow down the scope of work to those matters that would require more urgent work. Some interest was expressed for engaging in work on non-signatories and on group enterprises. It was further pointed out that the work might not necessarily result in soft law instruments and might result in legislative texts.

5. Conclusion

163. After discussion, the Working Group agreed to recommend to the Commission that the Secretariat be mandated (i) to work on updating the Conciliation Rules to both reflect current practice and be consistent with the contents of the draft instruments to be finalized by the Commission in 2018 and (ii) to prepare notes on organizing mediation proceedings. It was suggested that such further work on mediation should be conducted by the Secretariat in consultation with experts and relevant organizations in the field of mediation and that the final product could be presented to the Commission at a future session.

164. The Working Group also agreed to recommend to the Commission that work on expedited arbitration procedure should be given priority for future work, together with the suggestion to work on the preparation of uniform principles, which could serve as an umbrella for other topics. Regarding adjudication, the Working Group agreed to bring that topic to the attention of the Commission, taking into account that more information might need to be provided as highlighted above (see para. 161 above).

E. Note by the Secretariat on settlement of commercial disputes: international commercial mediation: preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation

(A/CN.9/WG.II/WP.205 and Add.1)

[Original: English]

Contents

I. Introduction

1. At its forty-seventh session, in 2014, the Commission considered a proposal to undertake work on the preparation of a convention on the enforceability of settlement agreements reached through international commercial conciliation (A/CN.9/822).[1] It requested the Working Group to consider the feasibility and possible form of work in that area.[2] At its forty-eighth session, in 2015, the Commission took note of the consideration of the topic by the Working Group[3] and agreed that the Working Group should commence work at its sixty-third session to identify relevant issues and develop possible solutions. The Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.[4] At its forty-ninth session, in 2016, the Commission confirmed that the Working Group should continue its work on the topic.[5] At its fiftieth session, in 2017, the Commission took note of the compromise reached by the Working Group at its sixty-sixth session, which addressed five key issues as a package (referred to as the "compromise proposal", see A/CN.9/901, para. 52) and expressed support for the Working Group to continue its work based on that compromise.[6]

2. At its sixty-third to sixty-seventh sessions, the Working Group undertook work on the preparation of instruments on enforcement of international settlement agreements resulting from conciliation, consisting of a draft convention and draft amendments to the UNCITRAL Model Law on International Commercial

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 123–125.
[2] Ibid., para. 129.
[3] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 135–141; see also A/CN.9/832, paras. 13–59.
[4] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 142.
[5] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162–165.
[6] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 236–239.

Conciliation (the "Model Law").[7] For ease of reference, this note refers to the "draft convention" and "draft amended Model Law"; jointly, they are referred to as the "instruments".

3. This note outlines the main matters for consideration by the Working Group, and its addendum contains the text of the instruments.

II. Annotations

A. Terminology

4. At its sixty-fourth session, the Working Group considered whether the term "mediation" should replace the term "conciliation" throughout the instruments and, if so, the possible implications on existing UNCITRAL texts, which were prepared using the term "conciliation". At that session, a view was expressed that the instruments should refer to "mediation" instead of "conciliation", as it was a more widely used term (A/CN.9/867, para. 120). At its sixty-seventh session, the Working Group reached a shared understanding that the terms "conciliation", "conciliator" and other similar terms should be replaced with the terms "mediation", "mediator" and corresponding terms in the instruments as well as in the UNCITRAL Conciliation Rules (1980) (A/CN.9/929, paras. 102–104). These changes have been implemented in this note for further consideration by the Working Group.

5. It is suggested that explanation about the change of terminology be provided in material accompanying the draft convention, if any, as well as in a footnote to the draft amended Model Law (see footnote 3 in document A/CN.9/WG.II/WP.205/Add.1), as follows:

> "'*Mediation' is a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of, or relating to, a contractual or other legal relationship. In its previously adopted texts and relevant documents, UNCITRAL used the term 'conciliation' with the understanding that the terms 'conciliation' and 'mediation' were interchangeable. In preparing the [Convention/amendment to the Model Law], the Commission decided to use the term 'mediation' instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the [Convention/ Model Law]. This change in terminology does not have any substantive or conceptual implications.*"

6. As mentioned above (see para. 4), corresponding adjustments of terminology will need to be implemented in the UNCITRAL Conciliation Rules (1980), which could also include a similar explanatory note. In that context, the Working Group may wish to consider whether the Rules would need to be amended further to take account of developments in the field since their adoption. If so, this matter would need to be referred to the Commission for further consideration.

B. Scope and exclusions

1. Scope

7. With regard to the scope of the instruments, the Working Group approved article 1(1) of the draft convention and article 15(1) of the draft amended Model Law (A/CN.9/929, paras. 14 and 30; for consideration of the matter at previous sessions, see A/CN.9/901, paras. 52 and 56; A/CN.9/896, paras. 14–16, 113–117, 145 and 146; and A/CN.9/867, para. 94; for questions on the scope of the different sections of the draft amended Model Law, see para. 39 below).

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[7] The reports of the Working Group on the work of its sixty-third, sixty-fourth, sixty-fifth, sixty-sixth, and sessions sixty-seventh are contained in documents A/CN.9/861, A/CN.9/867, A/CN.9/896, A/CN.9/901, and A/CN.9/929, respectively.

2. Exclusions

- *Personal, family, inheritance, employment matters*

8. The Working Group approved article 1(2) of the draft convention and article 15(2) of the draft amended Model Law, excluding from the scope of the instruments settlement agreements (i) concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes; (ii) relating to family, inheritance or employment law matters (A/CN.9/929, paras. 15 and 30; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 55–60; A/CN.9/867, paras. 106–108; and A/CN.9/861, paras. 41–43; for questions on the articulation between article 15(2) of the draft amended Model Law and article 1(9) of the Model Law, see para. 43 below).

- *Settlement agreement enforceable as a judgment or as an arbitral award*

9. The Working Group approved article 1(3) of the draft convention and article 15(3) of the draft amended Model Law, excluding from the scope of the instruments (i) settlement agreements that have been approved by a court or have been concluded before a court and that are enforceable as a judgment as well as (ii) those that have been recorded and are enforceable as an arbitral award (A/CN.9/929, paras. 17–29 and 30; for consideration of the matter at previous sessions, see A/CN.9/901, paras. 25–34, 52, and 58–71; A/CN.9/896, paras. 48–54, 169–176 and 205–210; A/CN.9/867, paras. 118 and 125; and A/CN.9/861, paras. 24–28; for questions on the articulation between article 15(3) of the draft amended Model Law and article 1(9) of the Model Law, see para. 43 below).

10. The Working Group may wish to consider whether the instruments should indicate how the competent authority would ascertain whether a settlement agreement falls within or outside the scope of article 1(3) of the draft convention and article 15(3) of the draft amended Model Law. For example, the party against whom the enforcement of a settlement agreement was sought may be required to provide proof that the settlement agreement was concluded before a court and was enforceable as a judgment in the State of that court (and therefore, that it falls outside the scope of the instruments) or the party relying on a settlement agreement may be required to provide proof that the settlement agreement was not concluded before a court or that it was not enforceable as a judgment in the State of that court (and therefore, that it falls within the scope of the instruments).

C. General principles

11. The instruments address both enforcement of settlement agreements (article 2(1) of the draft convention and article 16(1) of the draft amended Model Law) and the possibility for a party to invoke a settlement agreement as a defence against a claim (article 2(2) of the draft convention and article 16(2) of the draft amended Model Law). Relevant provisions, including their placement, were approved by the Working Group at its sixth-seventh session (A/CN.9/929, paras. 44–48 and 73; for consideration of the matter at previous sessions, see A/CN.9/901, paras. 16–24, 52, 54 and 55; A/CN.9/896, paras. 76–81, 152, 153, 155 and 200–204; A/CN.9/867, para. 146; and A/CN.9/861, paras. 71–79).

D. Definitions

1. “International” settlement agreement

12. The Working Group approved article 3(1) of the draft convention on the definition of “international” settlement agreement (A/CN.9/929, paras. 31–35 and 43; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 17–24 and 158–163; A/CN.9/867, paras. 93–98 and 101; and A/CN.9/861, paras. 33–39). With respect to the draft amended Model Law, the Working Group may wish to consider whether and, if so, how to define separately the internationality of mediation (see article aa(2) of the draft amended Model Law) and of settlement agreements (see

article 15(4) of the draft amended Model Law) (A/CN.9/929, para. 39; see also para. 40 below).

2. Notion of "place of business"

13. It may be recalled that article 1(6) of the Model Law fulfilled the purpose of allowing parties to expand the notion of internationality, and that the Working Group agreed that a provision mirroring article 1(6) of the Model Law should not be included in the draft convention (A/CN.9/929, para. 36). The Working Group also agreed to further consider whether to retain article 1(6) in the draft amended Model Law (see (A/CN.9/929, para. 37; see also para. 41 below).

14. In that light, at previous sessions, suggestions were made that the definition of "international" settlement agreements might need to be expanded to also cover situations where parties would have their places of business in the same State, but the settlement agreement would nevertheless contain an international element, for instance, where the parties' parent company or shareholders were located in different States. It was suggested that such an expansion would reflect current global business practices as well as complex corporate structures (A/CN.9/929, paras. 32–35; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 27–31; and A/CN.9/861, para. 39).

15. The Working Group may wish to consider whether articles 3(1)(b) and 3(2)(a) of the draft convention and articles 15(4)(b) and 15(5)(a) of the draft amended Model Law could address such situations, or whether a provision, complementing article 3(1) of the draft convention and article 15(4) of the draft amended Model Law, should be added, along the lines of:

> "(c) *The parties to the settlement agreement have their place of business in the same State, but at least one of the parties is [wholly owned][controlled][8] by an entity having its place of business in a different State and that entity participated in the mediation process that led to the settlement agreement*."

3. "Writing" requirement

16. The Working Group approved the definition of the term "writing" as it appears in article 3(3) of the draft convention and article 15(6) of the draft amended Model Law (A/CN.9/929, para. 43; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 32–38 and 66; and A/CN.9/867, para. 133).

4. "Mediation"

17. The Working Group approved the definition of the term "mediation" as it appears in article 3(4) of the draft convention and article 1(3) of the draft amended Model Law (A/CN.9/929, para. 43). The Working Group may wish to note that the definition of "mediation" in the draft convention and the draft amended Model Law are formulated slightly differently due to the different nature of the instruments. The definition in article 1(3) of the Model Law provided the model for the definition of that term in the draft convention (A/CN.9/929, paras. 43 and 106; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 47 and 116; and A/CN.9/861, para. 21).

E. Application

18. Article 4 of the draft convention and article 17 of the draft amended Model Law, both dealing with the application process, reflect the discussion and decisions by the Working Group at its sixty-seventh session (A/CN.9/929, paras. 49–67 and 73; for

[8] The Working Group may wish to note the definition of "control" in the UNCITRAL Legislative Guide on Insolvency Law (Part three: Treatment of enterprise groups in insolvency), which reads as follows: "'Control': the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise."

consideration of the matter at previous sessions, see A/CN.9/896, paras. 67–75, 82, and 177–190; A/CN.9/867, paras. 133–144; and A/CN.9/861, paras. 51–67).

19. Article 4(1)(b) of the draft convention and article 17(1)(b) of the draft amended Model Law provide an illustrative and non-hierarchical list of means to evidence that the settlement agreement resulted from mediation (A/CN.9/929, paras. 52–59). Article 4(4) of the draft convention and article 17(4) of the draft amended Model Law address the right for the competent authority to require any additional document necessary for considering the application in light of the conditions in the instruments (A/CN.9/929, paras. 60–65). The Working Group may wish to consider whether the word "conditions" or "requirements" should be used in that provision, for the sake of consistency (for instance, article 4(2) refers to "requirement").

20. Further, the Working Group approved article 4(2) of the draft convention and article 17(2) of the draft amended Model Law, which provide a functional equivalence rule for meeting the requirement that a settlement agreement was signed by the parties (article 4(1) of the draft convention and article 17(1)(a) of the draft amended Model Law) or, where applicable, the mediator (article 4(1)(b)(i) of the draft convention and article 17(1)(b)(i) of the draft amended Model Law) in relation to electronic communication (A/CN.9/929, paras. 66 and 73; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 65–66, and 71–75; A/CN.9/867, para. 133; and A/CN.9/861, para. 53).

F. Defences

21. Article 5 of the draft convention and article 18 of the draft amended Model Law, both addressing defences, reflect the discussion and decisions of the Working Group at its sixty-seventh session (A/CN.9/929, paras. 74–101; for consideration of the matter at previous sessions, see A/CN.9/901, paras. 41–50, 52 and 72–88; A/CN.9/896, paras. 84–117 and 191–194; A/CN.9/867, paras. 147–167; and A/CN.9/861, paras. 85–102).

22. With regard to subparagraph (1)(b) (A/CN.9/929, paras. 94 and 95),[9] the Working Group may wish to note that the phrase "the obligations in the settlement agreement have been performed" has been moved from subparagraph (c) to subparagraph (b) as subparagraph (b) addresses issues relating to the performance of the settlement agreement, and in order to improve the presentation of subparagraph (c) in all United Nations languages. As agreed at its sixty-seventh session, the Working Group may wish to further consider subparagraph (1)(b) after its consideration and finalization of subparagraph (1)(c) (A/CN.9/929, para. 101).

23. Subparagraph (1)(c)[10] was agreed by the Working Group as forming the basis for further discussion (A/CN.9/929, para. 93), but not disregarding proposals and suggestions made during the sixty-seventh session (A/CN.9/929, paras. 77–92).

24. The Working Group may wish to confirm that the grounds listed in article 5 of the draft convention and article 18 of the draft amended Model Law apply also to situations where a party invoked a settlement agreement as a defence against a claim under article 2(2) of the draft convention and article 16(2) of the draft amended Model Law (A/CN.9/929, para. 74).

G. Relationship of the enforcement process to judicial or arbitral proceedings

25. The Working Group may wish to consider the formulation in article 6 of the draft convention and article 18(3) of the draft amended Model Law regarding parallel applications or claims. The Working Group generally agreed that it would be appropriate for the competent authority to be given the discretion to adjourn the enforcement process

[9] The provision was formerly numbered draft provision 4(1)(c) (see A/CN.9/929, para. 95).
[10] The provision was formerly numbered draft provision 4(1)(b) (see A/CN.9/929, para. 95).

if an application (or claim) relating to the settlement agreement had been made to a court, arbitral tribunal or any other authority, which might affect the enforcement process (A/CN.9/896, paras. 122–125; for consideration of the matter at a previous session, see A/CN.9/867, paras. 168 and 169). The Working Group may wish to confirm that article 6 of the draft convention and article 18(3) of the draft amended Model Law do not deal with procedure referred to in article 2(2) of the draft convention and article 16(2) of the draft amended Model Law.

H. Questions regarding the draft convention

1. "More-favourable-right" provision

26. The proposal for a provision mirroring article VII(1) of the New York Convention,[11] which would permit application of more favourable national legislation or treaties to matters covered by the draft convention, was considered by the Working Group and is reflected in article 7 of the draft convention. There was general support for including such a provision in the draft convention even though reservation was expressed (A/CN.9/901, paras. 65, 66 and 71; for consideration of the matter at a previous session, see A/CN.9/896, paras. 154, 156, and 204).

27. The understanding of the Working Group was that article 7 of the draft convention would not allow States to apply the draft convention to settlement agreements excluded in articles 1(2) and (3), as such settlement agreements would fall outside the scope of the draft convention. However, States would have the flexibility to enact relevant domestic legislation, which could include in its scope such settlement agreements (A/CN.9/929, para. 19).

2. Declarations

- *States and other public entities*

28. Regarding settlement agreements involving States and other public entities, the Working Group reaffirmed its decision that such agreements should not be excluded from the scope (A/CN.9/896, paras. 61 and 62; for consideration of the matter at a previous session, see A/CN.9/861, paras. 44–46). Rather, it was agreed that the treatment of such agreements could be addressed through a declaration in the draft convention. Under the draft amended Model Law, it would be for each State to decide the extent to which such agreements would fall outside the enacting legislation. The Working Group may wish to consider the formulation for a declaration on the application of the draft convention to settlement agreements concluded by States and other public entities, as formulated in article 8(1)(a) of the draft convention.

- *Application of the draft convention based on parties' agreement*

29. During previous sessions of the Working Group, it was suggested that the question whether the application of the draft convention would depend on the consent of the parties to the settlement agreement need not necessarily be addressed in the draft convention, but could be left to States when adopting or implementing the convention (A/CN.9/901, paras. 39 and 40; and A/CN.9/896, paras. 130 and 196). This matter was dealt with under issue 3 of the compromise proposal reached at the sixty-sixth session of the Working Group (A/CN.9/901, para. 52). It was envisaged that States that wish to apply the convention only to the extent that the parties to the settlement agreement have agreed to the application of the convention could make a declaration to that effect, as formulated in article 8(1)(b) of the draft convention (A/CN.9/901, para. 39; and A/CN.9/896, para. 196).

[11] Article VII of the New York Convention provides that: "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

30. The Working Group may wish to clarify how the reservation would operate. For example, it may be clarified whether a State, not making this reservation upon becoming a Party to the convention, could apply the convention automatically even when the parties to the settlement agreement have opted-out of the convention.

31. The Working Group may wish to consider that it would generally be in the interests of a State to make such a reservation to protect its businesses' interests. It is likely that enforcement of settlement agreements involving businesses in State A would be sought in State A. By making the reservation, State A could protect the interests of those businesses, particularly those that had not agreed to the application of the draft convention. This might have a domino effect, resulting in almost all States making the reservation.

- *Conditions applicable to declarations*

32. The Working Group may wish to consider the conditions applicable to the declarations, and in particular confirm that the list of declarations is exhaustive (see article 8(2) of the draft convention), and that reservations deposited after the entry into force of the draft convention for that Contracting State, as well as any withdrawal thereof, shall take effect six months after the date of deposit or withdrawal (see articles 8(3) and (5) of the draft convention).

3. Final provisions

33. Articles 9 to 15 of the draft convention are customary provisions in conventions and are not intended to create rights and obligations for private parties. However, these provisions regulate the extent to which a Contracting State is bound by the convention, including the time the convention or any declaration submitted thereunder enter into force; therefore, they may affect the ability of the parties to the settlement agreement to rely on the provisions of the convention.

34. In addition to "States", the draft convention allows participation by international organizations of a particular type, namely "regional economic integration organizations" (see article 11). Usually, the notion of "regional economic integration organizations" encompasses two key elements: the grouping of States in a certain region for the realization of common purposes, and the transfer of competencies relating to those common purposes from the members of the regional economic integration organization to the organization.

35. Article 12 permits a Contracting State, at the time of signature, ratification, acceptance, approval or accession, to declare that the convention is to extend to all its territorial units or only to one or more of them and to amend its declaration by submitting another declaration at any time. This provision, often called "the federal clause", is of interest to relatively few States – namely, those with federal systems where the central Government lacks treaty power to establish uniform law for the subject matter covered by the convention.

36. The provisions governing the entry into force of the draft convention are laid down in article 13. Three ratifications correspond to the modern trend in commercial law conventions, which promotes their application as early as possible. A six-month period from the date of deposit of the third instrument of ratification, acceptance, approval or accession is provided so as to give Contracting States to the convention sufficient time to notify all the national organizations and individuals concerned that a convention which could affect them would soon enter into force. Paragraph (2) deals with the entry into force of the draft convention as regards those Contracting States that become parties thereto after the time for its entry into force under paragraph (1).

37. Article 14 relates to the amendment process of the draft convention. Article 15 addresses the procedure of denunciation by a Contracting State to the convention.

I. Questions regarding the draft amended Model Law

1. General remark

38. The Working Group may wish to note that the presentation of the provisions of the draft amended Model Law in three sections in document A/CN.9/WG.II/WP.205/Add.1 reflects the presentation in the annex to the report of the sixth-seventh session (A/CN.9/929), which received general support.

2. Scope

39. The Working Group may wish to consider article 1(1) (in section 1) of the draft amended Model Law, which sets forth the expanded scope of the draft amended Model Law, applying to both international commercial mediation and international settlement agreements (A/CN.9/929, para. 106). The Working Group may also wish to consider article aa(1) (in section 2) of the draft amended Model Law, which provides that section 2 applies to international commercial mediation (see also above, para. 7).

3. "Internationality" of the mediation and of settlement agreements

40. The draft amended Model Law includes two separate provisions on the notion of internationality: (i) article aa(2) (definition of international mediation), which mirrors article 1(4) of the Model Law, and (ii) article 15(4) (definition of international settlement agreement), which mirrors article 3(1) of the draft convention. The Working Group may wish to consider whether the internationality of a settlement agreement should be assessed at the time of the conclusion of the agreement to mediate (which would provide consistency with the definition of international mediation and would make it possible to determine the applicability of the law when mediation was initiated, yet this would be different from the approach in article 3(1) of the draft convention) or at the time of the conclusion of the settlement agreement (which would be in line with the approach in article 3(1) of the draft convention and would cater for situations where there might not necessarily be an agreement to mediate between the parties) (A/CN.9/929, para. 39; see also, para. 12 above).

4. Article 1(6) of the Model Law

41. The Working Group agreed not to include a provision similar to article 1(6) of the Model Law[12] in the draft convention. In that light, the Working Group may wish to consider whether article 1(6) should be retained in the draft amended Model Law and, if so, whether it should be placed in section 1 or 2 of the draft amended Model Law (A/CN.9/929, paras. 36 and 37; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 25 and 26; and A/CN.9/867, para. 99; see also above, para. 13).

5. Article 1 (7) and (8) of the Model Law

42. The Working Group may wish to consider whether articles 1(7) and (8) of the Model Law should be retained in the draft amended Model Law and, if so, in which section:

- Article 1(7) of the Model Law permits parties to exclude the applicability of the law; in that respect, the Working Group may wish to consider whether the application of article 1(7) should be limited to section 2 of the draft amended Model Law;
- Article 1(8) of the Model Law clarifies that the law applies, irrespective of the basis on which the mediation is carried out; if this article is retained, it might need to be subject to exclusions from the scope of application of settlement

[12] Article 1(6) provides that: "*This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law.*"

agreements concluded before a court, or approved by a court, and subject to the provisions of article 1(9).

6. Article 1(9) of the Model Law and exhaustive list of exclusions in article 15(2) and (3) of the draft amended Model Law

43. Article 1(9) of the Model Law provides for an open list of exclusions from the scope of the law. In contrast to article 1(9) of the Model Law,[13] articles 15(2) and (3) the draft amended Model Law are presented as an exhaustive list of exclusions. The Working Group may wish to consider whether those exclusions should be retained in section 3 as an exhaustive list or be mentioned as examples under article 1(9). If the former approach is taken, the Working Group may wish to consider whether to retain article 1(9) of the Model Law, particularly as subparagraph (a) of that article is dealt with under article 15(3) of the draft amended Model Law. If the latter approach is taken, the Working Group may wish to consider the placement of article 1(9) and whether it should remain an illustrative or become an exhaustive list (A/CN.9/929, para. 106). The Working Group may wish to note that as far as the draft convention is concerned, articles 1(2) and (3) (which mirror articles 15(2) and (3) of the draft amended Model Law) provide for an exhaustive list of exclusions (A/CN.9/929, para. 16).

7. Placement of article 3 of the Model Law in the draft amended Model Law

44. The Working Group may wish to consider the placement in the draft amended Model Law of article 3 of the Model Law (on variations by agreement of the provisions of the law). It may wish to also consider whether reference to section 3 (or to specific articles therein) of the draft amended Model Law should be added to the list of exceptions contained in article 3.

8. Article 14 of the Model Law

45. The Working Group may wish to consider whether to retain in the draft amended Model Law article 14 of the Model Law, which provides that if the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable. If so, the Working Group may wish to consider whether that provision should continue to be numbered article 14 in light of the definition of the term "settlement agreement", which is contained in article 15.

46. The Working Group may wish to consider the possibility of placing the provision of article 14 in article 15, along the lines of: "A settlement agreement is binding and enforceable." As an alternative, article 14 could be combined with article 16 on general principles.

9. Agreements settling disputes not reached through mediation

47. The Working Group may wish to also consider whether the draft amended Model Law should provide flexibility to States to broaden the scope of application to agreements not reached through mediation (A/CN.9/929, paras. 68–72; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 40 and 41; and A/CN.9/867, para. 115). The Working Group may wish to consider the formulation in footnote 4 to the title of section 3 of the draft amended Model Law, which seeks to address the matter.

[13] Article 1(9) of the Model Law provides as follows: "*This Law does not apply to: (a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and (b) [. . .]]*".

(A/CN.9/WG.II/WP.205/Add.1) (Original: English)

Note by the Secretariat on settlement of commercial disputes: international commercial mediation: preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation

ADDENDUM

Contents

III. Draft text of the instruments

A. Form and title of the instruments

1. Form

1. The Working Group considered the form of the instrument at its sixty-fifth and sixty-sixth sessions (A/CN.9/896, paras. 135–143 and 211–213, and A/CN.9/901, paras. 52 and 89–93). At the sixty-sixth session of the Working Group, in a spirit of compromise and to accommodate the different levels of experience with mediation in different jurisdictions, it was agreed that the Working Group would continue to prepare both a model legislative text complementing the Model Law on International Commercial Conciliation (the "Model Law"), and a convention, on enforcement of international commercial settlement agreements resulting from mediation (A/CN.9/901, para. 93). This suggestion was reflected in the compromise proposal, under issue 5 (A/CN.9/901, para. 52). It was further agreed that a possible approach to address the specific circumstance of preparing both a model legislative text and a convention could be to suggest that the resolutions of the General Assembly accompanying those instruments would express no preference on the instrument to be adopted by States (A/CN.9/901, para. 93).

2. In that context, the Working Group may wish to consider the following wording which would be recommended to the Commission and eventually to the General Assembly for inclusion in the relevant resolution:

3. "*Recalling that the decision of the Commission to prepare a draft [full title of the Convention] and an amendment to the UNCITRAL Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions, and to provide States with consistent standards on cross-border enforcement of international settlement agreements resulting from mediation, without creating any preference for the instrument [that interested States may adopt][to be adopted].*"

2. Title of the instruments

4. The Working Group may wish to consider the possible title of the instruments, including the following options:

- *For the draft convention*

"United Nations Convention on International Settlement Agreements [resulting from mediation]"

- *For the draft amended Model Law*

"UNCITRAL Model Law on International Commercial Mediation (2002), With Amendments as adopted in 201*"

"UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements, 201* (*amending the UNCITRAL Model Law on International Commercial Conciliation (2002)*)"

B. Draft convention

5. The draft convention might read as follows:

"**Preamble**

"*The Parties to this Convention*,

"*Recognizing* the value for international trade of methods for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

"*Noting* that such dispute settlement methods, referred to by expressions such as mediation and conciliation and expressions of similar import, are increasingly used in international and domestic commercial practice as an alternative to litigation,

"*Considering* that the use of such dispute settlement methods results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

"*Convinced* that the establishment of a framework for international settlement agreements resulting from such dispute settlement methods that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

"*Have agreed* as follows:

Title: [United Nations Convention on International Settlement Agreements [resulting from mediation]]

"**Article 1. Scope of application**

"1. This Convention applies to international agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreements").

"2. This Convention does not apply to settlement agreements:

"(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

"(b) Relating to family, inheritance or employment law.

"3. This Convention does not apply to:

"(a) Settlement agreements:

"(i) That have been approved by a court or have been concluded in the course of proceedings before a court; and

"(ii) That are enforceable as a judgment in the State of that court;

"(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

"**Article 2. General principles**

"1. Each Contracting State shall enforce a settlement agreement in accordance with its rules of procedure, and under the conditions laid down in this Convention.

"2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Contracting State shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has been already resolved.

"**Article 3. Definitions**

"For the purposes of this Convention:

"1. A settlement agreement is 'international' if, at the time of the conclusion of that agreement:

"(a) At least two parties to the settlement agreement have their places of business in different States; or

"(b) The State in which the parties to the settlement agreement have their places of business is different from either:

"(i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or

"(ii) The State with which the subject matter of the settlement agreement is most closely connected.

"2. For the purposes of paragraph (1):

"(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

"(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

"3. A settlement agreement is in 'writing' if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

"4. 'Mediation' means a process, regardless of the expression used and irrespective of the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute.

"**Article 4. Application**

"1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Contracting State where relief is sought:

"(a) The settlement agreement signed by the parties;

"(b) Evidence that the settlement agreement resulted from mediation, such as:

"(i) The mediator's signature on the settlement agreement;

"(ii) A document signed by the mediator indicating that the mediation was carried out;

"(iii) An attestation by the institution that administered the mediation; or

"(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

"2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication if:

"(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

"(b) The method used is either:

"(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

"(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

"3. If the settlement agreement is not in the official language(s) of the Contracting State where the application is made, the competent authority may request the party making the application to supply a translation thereof into such language.

"4. The competent authority may require any necessary document in order to verify that the [conditions] [requirements] of the Convention have been complied with.

"5. When considering the application, the competent authority shall act expeditiously.

"**Article 5. Grounds for refusing to grant relief**

"1. The competent authority of the Contracting State where the application under article 4 is made may refuse to grant relief at the request of the party against whom the application is made, only if that party furnishes to the competent authority proof that:

"(a) A party to the settlement agreement was under some incapacity; or

"(b) The settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Contracting State where the application under article 4 is made; or the obligations in the settlement agreement have been performed; or

"(c) The settlement agreement:

"(i) Is not binding, or is not final, according to its terms;

"(ii) Has been subsequently modified;

"(iii) Is conditional so that the obligations in the settlement agreement of the party against whom the settlement agreement is invoked have not yet arisen; or

"(iv) Is not capable of being enforced because it is not clear and comprehensible; or

"(d) There was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement; or

"(e) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party, without which failure that party would not have entered into the settlement agreement.

"2. The competent authority of the Contracting State where the application under article 4 is made may also refuse to grant relief if it finds that:

"(a) Granting relief would be contrary to the public policy of that State; or

"(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that State.

"**Article 6. Parallel applications or claims**

"If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect enforcement of that settlement agreement, the competent authority of the Contracting State where the enforcement of the settlement agreement is sought may, if it considers it proper, adjourn the decision on the enforcement of the settlement agreement and may also, on the request of a party, order the other party to give suitable security.

"**Article 7. Other laws or treaties**

"This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Contracting State where such settlement agreement is sought to be relied upon.

"**Article 8. Reservations**

"1. A Contracting State may declare that:

"(a) [Option 1: It shall apply][Option 2: It shall not apply] this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, only to the extent specified in the declaration;

"(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

"2. No reservations are permitted except those expressly authorized in this article.

"3. Reservations may be made by a Contracting State at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Contracting State concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto shall take effect simultaneously with the entry into force of this Convention in respect of the Contracting State concerned. Reservations deposited after the entry into force of the Convention for that Contracting State shall take effect [six] months after the date of the deposit.

"4. Reservations and their confirmations shall be deposited with the depositary.

"5. Any Contracting State that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect [six] months after deposit.

"**Article 9. Depositary**

"The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

"**Article 10. Signature, ratification, acceptance, approval, accession**

"1. This Convention is open for signature by all States in [...] on [...], and thereafter at United Nations Headquarters in New York.

"2. This Convention is subject to ratification, acceptance, or approval by the signatories.

"3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

"4. Instruments of ratification, acceptance, approval, or accession are to be deposited with the depositary.

"**Article 11. Participation by regional economic integration organizations**

"1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve, or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the regional economic integration organization shall not count as a Contracting State in addition to its member States that are Contracting States.

"2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval, or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

"3. Any reference to a 'Contracting State', 'Contracting States', a 'State' or 'States' in this Convention applies equally to a regional economic integration organization where the context so requires.

"4. This Convention shall not prevail over conflicting rules of a regional economic integration organization if, under article 4, an application is submitted to a competent authority of a State that is a member of such an organization and all the States relevant under article 3(1) are members of any such organization.

"**Article 12. [Effect in domestic territorial units][Non-unified legal systems]**

"1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval, or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

"2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

"3. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention,

"(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

"(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

"(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

"4. If a Contracting State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

"**Article 13. Entry into force**

"1. This Convention enters into force on the first day of the month following the expiration of [six] months after the date of deposit of the third instrument of ratification, acceptance, approval, or accession.

"2. When a State ratifies, accepts, approves, or accedes to this Convention after the deposit of the [third] instrument of ratification, acceptance, approval, or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of [six] months after the date of the deposit of its instrument of ratification, acceptance, approval, or accession. The Convention enters into force for a territorial unit to which this Convention has been extended in accordance with article 12 on the first day of the month following the expiration of [six] months after the notification of the declaration referred to in that article.

"**Article 14. Amendment**

"1. Any Contracting State may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Contracting States to this Convention with a request that they indicate whether they favour a conference of Contracting States for the purpose of considering and voting upon the proposal. In the event that within [four] months from the date of such communication at least one third of the Contracting States favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

"2. The conference of Contracting States shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Contracting States present and voting at the conference.

"3. An adopted amendment shall be submitted by the Secretary-General of the United Nations to all the Contracting States for ratification, acceptance, or approval.

"4. An adopted amendment enters into force [six] months after the date of deposit of the third instrument of ratification, acceptance, or approval. When an amendment enters into force, it shall be binding on those Contracting States that have expressed consent to be bound by it.

"5. When a State ratifies, accepts, or approves an amendment that has already entered into force, the amendment enters into force in respect of that State [six] months after the date of the deposit of its instrument of ratification, acceptance, or approval.

"6. Any State that becomes a Contracting State after the entry into force of the amendment shall be considered as a Contracting State to the Convention as amended.

"**Article 15. Denunciations**

"1. A Contracting State may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

"2. The denunciation takes effect on the first day of the month following the expiration of [twelve] months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to applications under article 4 that have already been made before the denunciation takes effect.

"DONE at ---- this [X] day of [X] ------, in a single original, of which the Arabic, Chinese, English, French, Russian, and Spanish texts are equally authentic."

C. Draft amended Model Law

6. The Working Group may wish to note that additional adjustments to the draft amended Model Law might be required based on further consideration of issues that remain to be decided. At this stage, the draft amended Model Law might read as follows.

Title: [UNCITRAL Model Law on International Commercial Mediation (2002) With amendments as adopted in 201*]
[UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements, 201*,
(amending the Model Law on International Commercial Conciliation (2002)]

"**Section 1 – General provisions**

"**Article 1. Scope of application and definitions**

"1. This Law applies to international[1] commercial[2] mediation[3] and to international settlement agreements.

"2. For the purposes of this Law, 'mediator' means a sole mediator or two or more mediators, as the case may be. [*Article 1(2) of the Model Law*]

"3. For the purposes of this Law, 'mediation' means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ('the mediator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator

[1] Footnote 1 in the Model Law.

[2] Footnote 2 in the Model Law.

[3] "Mediation" is a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of, or relating to, a contractual or other legal relationship. In its previously adopted texts and relevant documents, UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. In preparing the amendment to the Model Law, the Commission decided to use the term "mediation" instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications.

does not have the authority to impose upon the parties a solution to the dispute. [*Article 1(3) of the Model Law*]

[*Placement of articles 1 (6) to (9) of the Model Law to be determined*]

"**Article 2. Interpretation**

"1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

"2. Questions concerning matters governed by this Law, which are not expressly settled in it, are to be settled in conformity with the general principles on which this Law is based.

"**Article 3. Variation by agreement [*placement to be determined*]**

"Except for the provisions of [*article 2, article 6, paragraph 3 (numbering to be adjusted) – reference to other articles to be considered*] the parties may agree to exclude or vary any of the provisions of this Law.

"**Section 2 – Mediation**

"**Article aa. Scope and definitions**

"1. This section applies to international commercial mediation. [*Article 1(1) of the Model Law, without the footnotes*]

"2. A mediation is 'international' if:

"(a) The parties to an agreement to mediate have, at the time of the conclusion of that agreement, their places of business in different States; or

"(b) The State in which the parties have their places of business is different from either:

"(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

"(ii) The State with which the subject matter of the dispute is most closely connected. [*Article 1(4) of the Model Law*]

"3. For the purposes of paragraph (2):

"(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to mediate;

"(b) If a party does not have a place of business, reference is to be made to the party's habitual residence. [*Article 1(5) of the Model Law*]

[Articles 4 to 13 of the Model Law would remain unchanged.]

["**Article 14. [*title to be determined*]**

"If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable.]

[*Footnote 4 in the Model Law to be considered in conjunction with articles 1(7) and 3*]

"**Section 3 – Enforcement of international settlement agreements**[4]

"**Article 15. Scope and definitions**

"1. This section applies to international agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute ('settlement agreements').

"2. This section does not apply to settlement agreements:

"(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

"(b) Relating to family, inheritance or employment law.

"3. This section does not apply to:

"(a) Settlement agreements:

"(i) That have been approved by a court or have been concluded in the course of proceedings before a court; and

"(ii) That are enforceable as a judgment in the State of that court;

"(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

"4. A settlement agreement is 'international' if, at the time of the conclusion of the settlement agreement [or at the time of the conclusion of the agreement to mediate]:

"(a) At least two parties to the settlement agreement have their places of business in different States; or

"(b) The State in which the parties to the settlement agreement have their places of business is different from either:

"(i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or

"(ii) The State with which the subject matter of the settlement agreement is most closely connected.

"5. For the purposes of paragraph 4:

"(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement [or at the time of the conclusion of the agreement to mediate];

"(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

"6. A settlement agreement is in 'writing' if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

[4] *Footnote to be considered.* [A State may consider enacting this section to apply to agreements settling a dispute, irrespective of whether they resulted from mediation. Adjustments would then have to be made to relevant articles.]

"**Article 16. General Principles**

"1. A settlement agreement shall be enforced in accordance with the rules of procedure of this State, and under the conditions laid down in this section.

"2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State, and under the conditions laid down in this section, in order to prove that the matter has been already resolved.

"**Article 17. Application**

"1. A party relying on a settlement agreement under this section shall supply to the competent authority of this State:

"(a) The settlement agreement signed by the parties;

"(b) Evidence that the settlement agreement resulted from mediation, such as:

"(i) The mediator's signature on the settlement agreement;

"(ii) A document signed by the mediator indicating that the mediation was carried out;

"(iii) An attestation by the institution that administered the mediation; or

"(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

"2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication if:

"(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

"(b) The method used is either:

"(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

"(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

"3. If the settlement agreement is not in the official language(s) of this State, the competent authority may request the party making the application to supply a translation thereof into such language.

"4. The competent authority may require any necessary document in order to verify that the [conditions] [requirements] of this section have been complied with.

"5. When considering the application, the competent authority shall act expeditiously.

"**Article 18. Grounds for refusing to grant relief**

"1. The competent authority of this State may refuse to grant relief at the request of the party against whom the application is made, only if that party furnishes to the competent authority proof that:

"(a) A party to the settlement agreement was under some incapacity; or

"(b) The settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the

competent authority of this State; or the obligations in the settlement agreement have been performed; or

"(c) The settlement agreement:

"(i) Is not binding, or is not final, according to its terms;

"(ii) Has been subsequently modified;

"(iii) Is conditional so that the obligations in the settlement agreement of the party against whom the settlement agreement is invoked have not yet arisen; or

"(iv) Is not capable of being enforced because it is not clear and comprehensible; or

"(d) There was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement; or

"(e) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party, without which failure that party would not have entered into the settlement agreement.

"2. The competent authority of this State may also refuse to grant relief if it finds that:

"(a) Granting relief would be contrary to the public policy of this State; or

"(b) The subject matter of the dispute is not capable of settlement by mediation under the law of this State.

"3. If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect enforcement of that settlement agreement, the competent authority of this State may, if it considers it proper, adjourn the decision on the enforcement of the settlement agreement and may also, on the request of a party, order the other party to give suitable security."

F. Note by the Secretariat on settlement of commercial disputes: international commercial mediation: draft convention on international settlement agreements resulting from mediation

(A/CN.9/942)

[Original: English]

Contents

Paragraphs

I. Introduction

1. At its forty-seventh session, in 2014, the Commission considered a proposal to undertake work on the preparation of a convention on the enforceability of settlement agreements reached through international commercial conciliation (A/CN.9/822).[1] It requested the Working Group to consider the feasibility and possible form of work in that area.[2] At its forty-eighth session, in 2015, the Commission took note of the consideration of the topic by the Working Group[3] and agreed that the Working Group should commence work at its sixty-third session to identify relevant issues and develop possible solutions. The Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.[4] At its forty-ninth session, in 2016, the Commission confirmed that the Working Group should continue its work on the topic.[5] At its fiftieth session, in 2017, the Commission took note of the compromise reached by the Working Group at its sixty-sixth session, which addressed five key issues as a package (referred to as the "compromise proposal", see A/CN.9/901, para. 52) and expressed support for the Working Group to continue its work based on the compromise proposal.[6]

2. At its sixty-third to sixty-eighth sessions, the Working Group undertook work on the preparation of instruments on enforcement of international settlement agreements resulting from mediation, consisting of a draft convention and draft amendments to the UNCITRAL Model Law on International Commercial Conciliation (the "Model Law").[7] For ease of reference, this note refers to the "draft convention" and "draft amended Model Law"; jointly, they are referred to as the "draft instruments".

3. In accordance with the request of the Working Group at its sixty-eighth session, this note contains the draft convention with annotations, based on the deliberations and decisions of the Working Group (A/CN.9/934, para. 13). The text of the draft amended Model Law with annotations is contained in document A/CN.9/943.

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[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 123–125.
[2] Ibid., para. 129.
[3] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 135–141; see also A/CN.9/832, paras. 13–59.
[4] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 142.
[5] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162–165.
[6] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 236–239.
[7] The reports of the Working Group on the work of its sixty-third to sixty-eighth sessions are contained in documents A/CN.9/861, A/CN.9/867, A/CN.9/896, A/CN.9/901, A/CN.9/929 and A/CN.9/934, respectively.

II. Draft convention on international settlement agreements resulting from mediation

A. Text of the draft convention

4. The text of the draft convention reads as follows.

"United Nations Convention on International Settlement Agreements Resulting from Mediation

"**Preamble**

"*The Parties to this Convention*,

"*Recognizing* the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

"*Noting* that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

"*Considering* that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

"*Convinced* that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

"*Have agreed* as follows:

"**Article 1. Scope of application**

"1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ('settlement agreement') which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

"2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

"3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

"**Article 2. Definitions**

"1. For the purposes of article 1, paragraph 1:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

"2. A settlement agreement is 'in writing' if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

"3. 'Mediation' means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute.

"4. 'Seeking relief' means a party to a settlement agreement requesting enforcement of a settlement agreement under article 3, paragraph 1, or invoking a settlement agreement under article 3, paragraph 2. Similarly, 'granting relief' means a competent authority enforcing a settlement agreement under article 3, paragraph 1, or allowing a party to invoke a settlement agreement under article 3, paragraph 2.

"**Article 3. General principles**

"1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

"2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

"**Article 4. Requirements for reliance on settlement agreements**

"1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

"2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

"3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

"4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

"5. When considering the request for relief, the competent authority shall act expeditiously.

"**Article 5. Grounds for refusing to grant relief**

"1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

"2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

"**Article 6. Parallel applications or claims**

"If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

"**Article 7. Other laws or treaties**

"This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

"**Article 8. Reservations**

"1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

"2. No reservations are permitted except those expressly authorized in this article.

"3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

"4. Reservations and their confirmations shall be deposited with the depositary.

"5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

"**Article 9. Effect on settlement agreements**

"The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

"**Article 10. Depositary**

"The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

"**Article 11. Signature, ratification, acceptance, approval, accession**

"1. This Convention is open for signature by all States in [...] on [...], and thereafter at United Nations Headquarters in New York.

"2. This Convention is subject to ratification, acceptance or approval by the signatories.

"3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

"4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

"**Article 12. Participation by regional economic integration organizations**

"1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

"2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

"3. Any reference to a 'Party to the Convention', 'Parties to the Convention', a 'State' or 'States' in this Convention applies equally to a regional economic integration organization where the context so requires.

"4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1(1) are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization.

"**Article 13. Non-unified legal systems**

"1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

"2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

"3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention,

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

"4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

"**Article 14. Entry into force**

"1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval, or accession.

"2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

"**Article 15. Amendment**

"1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

"2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

"3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

"4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

"5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

"**Article 16. Denunciations**

"1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

"2. The denunciation shall take effect twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take

effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

"DONE at ---- this [X] day of [X] ------, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic."

B. Annotations

1. Terminology

5. The Commission may wish to note the decision of the Working Group to replace the term "conciliation" by "mediation" throughout the draft instruments. The Working Group further approved the explanatory text describing the rationale for that change (A/CN.9/934, para. 16), which would be used with necessary adjustments when revising existing UNCITRAL texts on conciliation (for consideration of the matter at previous sessions of the Working Group, see A/CN.9/929, paras. 102–104; and A/CN.9/867, para. 120). The explanatory text reads as follows:

> "'*Mediation' is a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of, or relating to, a contractual or other legal relationship. In its previously adopted texts and relevant documents, UNCITRAL used the term 'conciliation' with the understanding that the terms 'conciliation' and 'mediation' were interchangeable. In preparing the Convention on International Settlement Agreements Resulting from Mediation and the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), the Commission decided to use the term 'mediation' instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the instruments. This change in terminology does not have any substantive or conceptual implications.*"

2. Title and preamble

6. The Working Group tentatively approved the title of the draft convention (A/CN.9/934, para. 143) as well as the preamble (A/CN.9/934, para. 145). The Commission may wish to note the adjustments made to the preamble resulting from the decision of the Working Group to use the word "mediation" instead of the generic phrase "dispute settlement methods".

3. Reference to "Party/Parties to the Convention"

7. The draft convention tentatively uses the terms "a Party to the Convention" or "Parties to the Convention", instead of referring to "Contracting State(s)" for the reason that the term "Contracting State(s)" is referred to in article 2(1)(f) of the Vienna Convention on the Law of Treaties to mean a State which consents to be bound by the treaty, whether or not the treaty has entered into force (A/CN.9/934, paras. 116–118). The Commission may wish to note that the term "Contracting States" has been used in existing conventions in the field of international trade law, with the purpose of avoiding confusions between the Parties to the convention and the parties to the contractual relation covered by the convention.[8] The Commission may wish to consider the term that should be used under this draft convention.

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[8] See, for instance, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), United Nations Convention on the Limitation Period in the International Sale of Goods (1974); United Nations Convention on Contracts for the International Sale of Goods (CISG, 1980); United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995); United Nations Convention on the Assignment of Receivables in International

4. Remarks on article 1 – Scope of application

8. Paragraph 1 introduces the generic term "settlement agreement" (A/CN.9/896, para. 146). The Commission may wish to note that reference to "international agreements" has been avoided in paragraph 1 as that expression often refers to agreements between States or other international legal persons binding under international law (A/CN.9/934, para. 17). Therefore, paragraph 1 reflects the modification agreed by the Working Group in that respect.

For approval of article 1(1) at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 18 and 21; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 14 and 30; A/CN.9/901, paras. 52 and 56; A/CN.9/896, paras. 14–16, 113–117, 145 and 146; and A/CN.9/867, para. 94; for consideration of the notion of internationality, see A/CN.9/929, paras. 31–35 and 43; A/CN.9/896, paras. 17–24 and 158–163; A/CN.9/867, paras. 93–98; and A/CN.9/861, paras. 33–39.

- *Exclusions: personal, family, inheritance, employment matters – settlement agreement enforceable as a judgment or as an arbitral award*

9. Paragraphs 2 and 3 address exclusions from the scope of the draft convention. The Commission may wish to note that paragraph 3 aims at avoiding possible overlap with existing and future conventions, namely the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), the Convention on Choice of Court Agreements (2005) and the 2016 preliminary draft convention on judgments, under preparation by the Hague Conference on Private International Law (A/CN.9/896, para. 49).

For approval of article 1(2) at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 23; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 15 and 30; A/CN.9/896, paras. 55–60; A/CN.9/867, paras. 106–108; and A/CN.9/861, paras. 41–43.

For approval of article 1(3) at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 24; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 17–29 and 30; A/CN.9/901, paras. 25–34, 52, and 58–71; A/CN.9/896, paras. 48–54, 169–176 and 205–210; A/CN.9/867, paras. 118 and 125–131; and A/CN.9/861, paras. 24–28.

5. Remarks on article 2 – Definitions

10. Paragraphs 1 to 3 of article 2 (previously numbered art. 3, see A/CN.9/934, para. 139(ii)) contain definitions approved in substance by the Working Group.

11. The Commission may wish to consider whether the definition of the terms "electronic communication" and "data message" could be deleted from paragraph 2. The purpose of the draft convention is not to address these matters in detail and definitions are contained in other United Nations and UNCITRAL instruments, which could be used as a reference in the context of the draft convention. Further, the definition of these terms may not fully reflect technological developments in this field over time, and amending the convention to reflect such developments might not be practicable.

12. As a matter of drafting, the Commission may wish to note that the words "regardless of the expression used and irrespective of the basis upon which the process is carried out" in paragraph 3 have been replaced by the words "irrespective of the expression used or the basis upon which the process is carried out".

13. The Commission may wish to consider paragraph 4, which aims at clarifying the notions of "granting relief" and "seeking relief". As these expressions may have

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Trade (2001); United Nations Convention on the Use of Electronic Communications in International Contracts (2005); United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules, 2008); HCCH Convention on Choice of Court Agreements, 2005.

a generic connotation, in particular when translated in different official languages of the United Nations, it is suggested to clarify that the expressions refer to possible actions under the draft convention as defined under article 3 (A/CN.9/934, para. 138).

For approval of the definitions under article 2, paragraphs 1 to 3, see:

- Regarding paragraph 1, at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 26 and 28; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 31–35 and 43; A/CN.9/896, paras. 17–24 and 158–163; A/CN.9/867, para. 101; and A/CN.9/861, paras. 33–39
- Regarding paragraph 2, at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 29; for consideration of the matter at previous sessions, see A/CN.9/929, para. 43; A/CN.9/896, paras. 32–38 and 66; and A/CN.9/867, para. 133
- Regarding paragraph 3, at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 30–32; for consideration of the matter at previous sessions, see A/CN.9/929, para. 43; A/CN.9/896, paras. 39–47; A/CN.9/867, para. 121; and A/CN.9/861, para. 21.

6. Remarks on article 3 – General principles

14. Article 3 (previously numbered art. 2, see A/CN.9/934, para. 139(ii)) provides for States' obligations under the draft convention regarding both enforcement of settlement agreements (para. 1) and the right for a party to invoke a settlement agreement as a defence against a claim (para. 2).

For approval of article 3 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 25; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 44–48 and 73; A/CN.9/901, paras. 16–24, 52, 54 and 55; A/CN.9/896, paras. 76–81, 152, 153, 155 and 200–203; A/CN.9/867, para. 146; and A/CN.9/861, paras. 71–79).

7. Remarks on article 4 – Requirements for reliance on settlement agreements

15. The Commission may wish to note that article 4 reflects a balance between, on the one hand, the formalities that are required to ascertain that a settlement agreement result from mediation and, on the other, the need for the draft convention to preserve the flexible nature of the mediation process (A/CN.9/867, para. 144).

16. As matters of drafting, the Commission may wish (i) to consider whether the words "such as" which appear at the end of the chapeau of paragraph 1(b) could be replaced by the words "in the form of"; and (ii) to note that, for the sake of simplification and consistency between paragraphs 3 and 4, the words "the party requesting relief to supply" which appeared after the words "may request" in paragraph 3 have been deleted.

For approval of article 4 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 37–39; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 49–67 and 73; see A/CN.9/896, paras. 67–75, 82 and 177–190; A/CN.9/867, paras. 133–144; and A/CN.9/861, paras. 51–67.

8. Remarks on article 5 – Grounds for refusing to grant relief

17. The Commission may wish to note the extensive consultations of the Working Group at its sixty-eighth session aimed at clarifying the various grounds provided for in paragraph 1, in particular the relationship between subparagraph (b)(i), which mirrored a similar provision of the New York Convention and was considered to be of a generic nature, and subparagraphs (b)(ii), (b)(iii), (c) and (d), which were deemed to be illustrative in nature. At that session, it was noted that various attempts for regrouping the grounds had been unsuccessful. It was further noted that such attempts represented serious efforts at avoiding overlap in light of the importance of the issue. However, difficulties arose because of the need to accommodate the concerns of different domestic legal systems, which resulted in the failure of such attempts to gain

consensus. Therefore, the Working Group expressed a shared understanding that there might be overlap among the grounds provided for in paragraph 1 and that competent authorities should take that aspect into account when interpreting the various grounds (A/CN.9/934, paras. 60–65).

For approval of article 5 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 59 and 66; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 74–101; A/CN.9/901, paras. 41–50, 52 and 72–88; A/CN.9/896, paras. 84–117 and 191–194; A/CN.9/867, paras. 147–167; and A/CN.9/861, paras. 85–102.

9. Remarks on article 6 – Parallel applications or claims

18. Article 6 provides the competent authority with the discretion to adjourn its decision if an application or claim relating to a settlement agreement had been made to a court, arbitral tribunal or other competent authority, which might affect the process (A/CN.9/896, para. 123). It is based on article VI of the New York Convention, which addresses the situation where a party seeks to set aside an arbitral award at the place of arbitration while the other party seeks to enforce it elsewhere. The Working Group agreed that article 6 should apply to both when enforcement of a settlement agreement was sought and when a settlement agreement was invoked as a defence (A/CN.9/934, para. 69).

For approval of article 6 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 70; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 122–125; A/CN.9/867, paras. 168 and 169; and A/CN.9/861, paras. 103–107.

10. Remarks on article 7 – Other laws or treaties

19. Article 7, which mirrors article VII of the New York Convention would permit application of more favourable national legislation or treaties to matters covered by the draft convention. The understanding of the Working Group was that article 7 would not allow States to apply the draft convention to settlement agreements excluded in article 1, paragraphs 2 and 3, as such settlement agreements would fall outside the scope of the draft convention. However, States would have the flexibility to enact relevant domestic legislation, which could include in its scope such settlement agreements (A/CN.9/929, para. 19).

For approval of article 7 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 71; for consideration of the matter at previous sessions, see A/CN.9/929, para. 19; A/CN.9/901, paras. 65, 66 and 71; and A/CN.9/896, paras. 154, 156, and 204.

11. Remarks on the final provisions

(i) Article 8 – Reservations

20. Article 8 provides for two reservations authorized under the draft convention. Regarding the first reservation on settlement agreements involving States and other public entities, the Working Group agreed that such agreements should not be excluded from the scope. Rather, it was agreed that the treatment of such agreements could be addressed through a reservation in the draft convention. Regarding the second reservation on the application of the draft convention based on the parties' consent, the Working Group agreed that that question need not be addressed in the draft convention, but should be left to States when adopting or implementing the convention.

For approval of article 8(1)(a) at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 77 and 93; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 61 and 62; and A/CN.9/861, paras. 44–46.

For approval of article 8(1)(b) at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 79 and 93; for consideration of the matter at previous sessions, see A/CN.9/901, paras. 39 and 40; and A/CN.9/896, paras. 130 and 196.

For approval of article 8, paragraphs (2) to (5) at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 81–93.

(ii) Article 9 – Effect on settlement agreements

21. Article 9 addresses the impact of the entry into force of the draft convention and of any reservations or withdrawal thereof on settlement agreements concluded before such entry into force (A/CN.9/934, para. 90). Similarly, article 16(2) addresses the effect of the denunciation of the draft convention on settlement agreements concluded before such denunciation takes effect. The purpose of the provisions is to enhance legal certainty for parties to settlement agreements.

(iii) Articles 10 to 16

22. At its sixty-eighth session, the Working Group approved in substance articles 10 to 16 (A/CN.9/934, paras. 94–115).

23. The Commission may wish to note that, as indicated in para. 94 of document A/CN.9/934, the delegation of Singapore expressed an interest in hosting a ceremony for the signing of the convention, once adopted. That proposal was welcomed and supported by the Working Group. The Commission may wish to consider this offer in relation to its consideration of article 11(1).

12. Other matters

(i) General Assembly resolution

24. The Commission may wish to note that the Working Group prepared both a draft convention and a draft amended Model Law in a spirit of compromise and to accommodate the different levels of experience with mediation in different jurisdictions. The Working Group agreed that a possible approach to address the specific circumstance of preparing both a convention and a model legislative text could be to suggest that the resolutions of the General Assembly accompanying those instruments would express no preference on the instrument to be adopted by States (A/CN.9/901, para. 93).

25. In that context, the Working Group agreed on the following wording for consideration by the Commission, and eventually recommendation to the General Assembly for inclusion in the relevant resolution: "*Recalling that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the UNCITRAL Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions, and to provide States with consistent standards on cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument.*"

For consideration by the Working Group of the form of the instruments, see A/CN.9/901, paras. 52 and 89–93; and A/CN.9/896, paras. 135–143 and 211–213;

For approval of the draft text in para. 25 above at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 140–142.

(ii) Material accompanying the draft convention

26. The Commission may wish to note the recommendation by the Working Group that, resources permitting, the *travaux preparatoires* of the draft convention should be compiled by the Secretariat, so that they could be easily accessible and user-friendly (A/CN.9/934, paras. 146–148).

G. Note by the Secretariat on settlement of commercial disputes: international commercial mediation: draft model law on international settlement agreements resulting from mediation

(A/CN.9/943)

[Original: English]

Contents

Paragraphs

I. Introduction

1. At its forty-seventh session, in 2014, the Commission considered a proposal to undertake work on the preparation of a convention on the enforceability of settlement agreements reached through international commercial conciliation (A/CN.9/822).[9] It requested the Working Group to consider the feasibility and possible form of work in that area.[10] At its forty-eighth session, in 2015, the Commission took note of the consideration of the topic by the Working Group[11] and agreed that the Working Group should commence work at its sixty-third session to identify relevant issues and develop possible solutions. The Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.[12] At its forty-ninth session, in 2016, the Commission confirmed that the Working Group should continue its work on the topic.[13] At its fiftieth session, in 2017, the Commission took note of the compromise reached by the Working Group at its sixty-sixth session, which addressed five key issues as a package (referred to as the "compromise proposal", see A/CN.9/901, para. 52) and expressed support for the Working Group to continue its work based on the compromise proposal.[14]

2. At its sixty-third to sixty-eighth sessions, the Working Group undertook work on the preparation of instruments on enforcement of international settlement agreements resulting from mediation, consisting of a draft convention and draft amendments to the UNCITRAL Model Law on International Commercial Conciliation (the "Model Law").[15] For ease of reference, this note refers to the "draft convention" and "draft amended Model Law"; jointly, they are referred to as the "draft instruments".

3. In accordance with the request of the Working Group at its sixty-eighth session, this note contains the draft amended Model Law, with annotations, based on the deliberations and decisions of the Working Group (A/CN.9/934, para. 13). The text of the draft convention with annotations is contained in document A/CN.9/942.

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[9] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 123–125.
[10] Ibid., para. 129.
[11] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 135–141; see also A/CN.9/832, paras. 13–59.
[12] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 142.
[13] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162–165.
[14] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 236–239.
[15] The reports of the Working Group on the work of its sixty-third to sixty-eighth sessions are contained in documents A/CN.9/861, A/CN.9/867, A/CN.9/896, A/CN.9/901, A/CN.9/929 and A/CN.9/934, respectively.

II. Draft model law on international commercial mediation and international settlement agreements resulting from mediation

A. Text of the draft amended Model Law

4. The text of the draft amended Model Law reads as follows.

UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)

"**Section 1 – General provisions**

"**Article 1. Scope of application of the Law and definitions**

"1. This Law applies to international commercial[1] mediation[2] and to international settlement agreements.

"2. For the purposes of this Law, 'mediator' means a sole mediator or two or more mediators, as the case may be.

"3. For the purposes of this Law, 'mediation' means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ('the mediator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.

"**Article 2. Interpretation**

"1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

"2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

"**Section 2 – Mediation**

"**Article 3. Scope of application of the section and definitions**

"1. This section applies to international[3] commercial mediation.

"2. A mediation is 'international' if:

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[1] The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

[2] In its previously adopted texts and relevant documents, UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. In preparing this Model Law, the Commission decided to use the term "mediation" instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications.

[3] States wishing to enact this section to apply to domestic as well as international mediation may wish to consider the following changes to the text:

- Delete the word "international" in paragraph 1 of articles 1 and 3; and
- Delete paragraphs 2, 3 and 4 of article 3, and modify references to paragraphs accordingly.

(a) The parties to an agreement to mediate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected.

"3. For the purposes of paragraph (2):

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to mediate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

"4. This section also applies to commercial mediation when the parties agree that the mediation is international or agree to the applicability of this section.

"5. The parties are free to agree to exclude the applicability of this section.

"6. Subject to the provisions of paragraph 7 of this article, this section applies irrespective of the basis upon which the mediation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

"7. This section does not apply to:

(a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and

(b) […].

"**Article 4. Variation by agreement**

"Except for the provisions of article 7, paragraph 3, the parties may agree to exclude or vary any of the provisions of this section.

"**Article 5. Commencement of mediation proceedings**[4]

"1. Mediation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in mediation proceedings.

"2. If a party that invited another party to mediate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to mediate.

"**Article 6. Number and appointment of mediators**

"1. There shall be one mediator, unless the parties agree that there shall be two or more mediators.

"2. The parties shall endeavour to reach agreement on a mediator or mediators, unless a different procedure for their appointment has been agreed upon.

[4] The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:

Article X. Suspension of limitation period

1. When the mediation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the mediation is suspended.

2. Where the mediation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement.

"3. Parties may seek the assistance of an institution or person in connection with the appointment of mediators. In particular:

(a) A party may request such an institution or person to recommend suitable persons to act as mediator; or

(b) The parties may agree that the appointment of one or more mediators be made directly by such an institution or person.

"4. In recommending or appointing individuals to act as mediator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial mediator and, where appropriate, shall take into account the advisability of appointing a mediator of a nationality other than the nationalities of the parties.

"5. When a person is approached in connection with his or her possible appointment as mediator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A mediator, from the time of his or her appointment and throughout the mediation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

"**Article 7. Conduct of mediation**

"1. The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

"2. Failing agreement on the manner in which the mediation is to be conducted, the mediator may conduct the mediation proceedings in such a manner as the mediator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

"3. In any case, in conducting the proceedings, the mediator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

"4. The mediator may, at any stage of the mediation proceedings, make proposals for a settlement of the dispute.

"**Article 8. Communication between mediator and parties**

"The mediator may meet or communicate with the parties together or with each of them separately.

"**Article 9. Disclosure of information**

"When the mediator receives information concerning the dispute from a party, the mediator may disclose the substance of that information to any other party to the mediation. However, when a party gives any information to the mediator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the mediation.

"**Article 10. Confidentiality**

"Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

"**Article 11. Admissibility of evidence in other proceedings**

"1. A party to the mediation proceedings, the mediator and any third person, including those involved in the administration of the mediation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings;

(b) Views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the mediation proceedings;

(d) Proposals made by the mediator;

(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator;

(f) A document prepared solely for purposes of the mediation proceedings.

"2. Paragraph 1 of this article applies irrespective of the form of the information or evidence referred to therein.

"3. The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

"4. The provisions of paragraphs 1, 2 and 3 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the mediation proceedings.

"5. Subject to the limitations of paragraph 1 of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a mediation.

"**Article 12. Termination of mediation proceedings**

"The mediation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;

(b) By a declaration of the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified, on the date of the declaration;

(c) By a declaration of the parties addressed to the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration; or

(d) By a declaration of a party to the other party or parties and the mediator, if appointed, to the effect that the mediation proceedings are terminated, on the date of the declaration.

"**Article 13. Mediator acting as arbitrator**

"Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator in respect of a dispute that was or is the subject of the mediation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

"**Article 14. Resort to arbitral or judicial proceedings**

"Where the parties have agreed to mediate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to

be regarded as a waiver of the agreement to mediate or as a termination of the mediation proceedings.

"**Article 15. Binding and enforceable nature of settlement agreements**

"If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable.

"**Section 3 – International settlement agreements**[5]

"**Article 16. Scope of application of the section and definitions**

"1. This section applies to international agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute ('settlement agreements').

"2. This section does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

"3. This section does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

"4. A settlement agreement is 'international' if, at the time of the conclusion of the settlement agreement:[6]

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

"5. For the purposes of paragraph 4:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

"6. A settlement agreement is 'in writing' if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable

[5] A State may consider enacting this section to apply to agreements settling a dispute, irrespective of whether they resulted from mediation. Adjustments would then have to be made to relevant articles. Further, a State may consider enacting this section to apply only where the parties to the settlement agreement agreed to its application.

[6] A State may consider broadening the definition of "international" settlement agreement by adding the following subparagraph to paragraph 4: "A settlement agreement is 'international' if it results from international mediation as defined in article 3, paragraphs 2, 3 and 4.

for subsequent reference; ‘electronic communication’ means any communication that the parties make by means of data messages; ‘data message’ means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

“7. ‘Seeking relief’ means a party to a settlement agreement requesting enforcement of a settlement agreement under article 17, paragraph 1 or invoking a settlement agreement under article 17, paragraph 2. Similarly, ‘granting relief’ means a competent authority enforcing a settlement agreement under article 17, paragraph 1 or allowing a party to invoke a settlement agreement under article 17, paragraph 2.

“**Article 17. General Principles**

“1. A settlement agreement shall be enforced in accordance with the rules of procedure of this State, and under the conditions laid down in this section.

“2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State, and under the conditions laid down in this section, in order to prove that the matter has already been resolved.

“**Article 18. Requirements for reliance on settlement agreements**

“1. A party relying on a settlement agreement under this section shall supply to the competent authority of this State:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator’s signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

“2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties’ or mediator’s intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

“3. If the settlement agreement is not in an official language of this State, the competent authority may request a translation thereof into such language.

“4. The competent authority may require any necessary document in order to verify that the requirements of this section have been complied with.

“5. When considering the request for relief, the competent authority shall act expeditiously.

"**Article 19. Grounds for refusing to grant relief**

"1. The competent authority of this State may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

"2. The competent authority of this State may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of this State; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of this State.

"**Article 20. Parallel applications or claims**

"If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 18, the competent authority of this State where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security."

B. Annotations

1. Title, sections and terminology

5. The Commission may wish to note that the Working Group tentatively approved the title of the draft amended Model Law (A/CN.9/934, para. 144; see also A/CN.9/929, para. 106) as well as its structure and presentation in three different sections (A/CN.9/934, para. 119; see also A/CN.9/929, para. 105 and annex). The Working Group also approved the replacement of the term "conciliation" by "mediation" throughout the draft instruments, as well as the explanatory text describing the rationale for that change reproduced in footnote 2 to the draft amended Model Law (A/CN.9/934, para. 16; for consideration of the matter at previous sessions of the Working Group, see A/CN.9/929, paras. 102–104; and A/CN.9/867, para. 120; see also below, para. 19).

6. The Commission may wish to note that in its deliberations of the draft amended Model Law, the Working Group generally agreed that the guiding principles would be

to ensure a level of consistency with the draft convention and, at the same time, to preserve the existing text of the Model Law to the extent possible (A/CN.9/934, para. 119).

2. Remarks on section 1 – General provisions

7. Section 1 of the draft amended Model Law applies to sections 2 and 3. This is reflected in article 1, paragraph 1, which provides that the law apply to both international commercial mediation and international settlement agreements. The Commission may wish to note that, in line with the decision of the Working Group, paragraphs 4 to 9 of article 1 of the Model Law have been moved to section 2 of the draft amended Model Law (see below, paras. 9 and 10).

8. Article 1, paragraphs 2 and 3 and article 2 are in substance unchanged from the Model Law.

For approval of article 1(1) at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 120; for consideration of the matter at previous sessions, see A/CN.9/929, para. 106;

For approval of article 1(3) at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 30–32; for consideration of the matter at previous sessions, see A/CN.9/929, para. 43; A/CN.9/896, paras. 39–47; A/CN.9/867, para. 121; and A/CN.9/861, para. 21.

3. Remarks on section 2 – Mediation

9. Section 2 addresses the mediation process, and includes the following provisions of the Model Law: article 1, paragraphs 1 and 4 to 9, and articles 3 to 14.

10. The Commission may wish to note the following adjustments:

- Footnote 1 of the Model Law which provides guidance to States wishing to enact the Model Law to apply to domestic and international mediation has been moved to section 2 of the draft amended Model Law (article 3(1)); this has been done in light of the disconnection between the definitions of the internationality of mediation and internationality of settlement agreements;
- Article 4 on variation by agreement refers to article 7(3) of the draft amended Model Law (numbered article 6(3) in the Model Law); the reference in article 4 to article 2 has been deleted as article 4 is placed in section 2, and applies only to provisions in that section;
- The title of article 15 of the draft amended Model Law (corresponding to article 14 of the Model Law) has been amended to read: “Binding and enforceable nature of settlement agreements” (A/CN.9/934, para. 132).

For approval of article 3(1) at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 120;

For approval of the placement of article 1, paragraphs 4 to 9 of the Model Law under article 3, paragraphs 2 to 7 of the draft amended Model Law at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 128–130; for consideration of the matter at previous sessions, see A/CN.9/929, para. 106.

4. Remarks on section 3 – International settlement agreements

11. Articles 16 to 20 address international settlement agreements in a manner consistent with the draft convention. The title of section 3 has been adjusted as agreed by the Working Group (A/CN.9/934, para. 139(iii)).

(i) Remarks on article 16 – Scope of application of the section and definitions

12. Paragraphs 1 to 6 have been approved in substance by the Working Group. Paragraph 1 introduces the generic term "settlement agreement". Paragraphs 2 to 6 are consistent with the corresponding provisions in articles 1 and 2 of the draft convention.

13. The Commission may wish to consider paragraph 7, which aims at clarifying the notions of "granting relief" and "seeking relief". As these expressions may have a generic connotation, in particular when translated in different official languages of the United Nations, it is suggested to clarify that the expressions refer to possible actions referred to under article 17 (A/CN.9/934, para. 138).

For approval of the scope of application and definitions under article 16, paragraphs 1 to 6, see:

- For approval of paragraph 1 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 120; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 14 and 30; A/CN.9/901, paras. 52 and 56; A/CN.9/896, paras. 14–16, 113–117, 145 and 146; and A/CN.9/867, para. 94;
- For approval of paragraph 2 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 23; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 15 and 30; A/CN.9/896, paras. 55–60; A/CN.9/867, paras. 106–108; and A/CN.9/861, paras. 41–43;
- For approval of paragraph 3 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 24; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 17–29 and 30; A/CN.9/901, paras. 25–34, 52, and 58–71; A/CN.9/896, paras. 48–54, 169–176 and 205–210; A/CN.9/867, paras. 118 and 125–131; and A/CN.9/861, paras. 24–28;
- For approval of paragraphs 4 and 5 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 28 and 121–127; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 31–35, 39 and 43; A/CN.9/896, paras. 17–24 and 158–163; A/CN.9/867, paras. 93–98 and 101; and A/CN.9/861, paras. 33–39;
- For approval of paragraph 6 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 29; for consideration of the matter at previous sessions, see A/CN.9/929, para. 43; A/CN.9/896, paras. 32–38 and 66; and A/CN.9/867, para. 133.

(ii) Remarks on article 17 – General principles

14. Article 17 provides for the principles regarding both enforcement of settlement agreements (paragraph 1) and the right for a party to invoke a settlement agreement as a defence against a claim (paragraph 2).

For approval of article 17 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 25; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 44–48 and 73; A/CN.9/901, paras. 16–24, 52, 54 and 55; A/CN.9/896, paras. 76–81, 152, 153, 155 and 200–203; A/CN.9/867, para. 146; and A/CN.9/861, paras. 71–79.

(iii) Remarks on article 18 – Requirements for reliance on settlement agreements

15. The Commission may wish to note that article 18 reflects a balance between, on the one hand, the formalities that would be required to ascertain that the settlement agreement resulted from mediation and, on the other, the need for the instrument to preserve the flexible nature of the mediation process (A/CN.9/867, para. 144).

16. As matters of drafting, the Commission may wish (i) to consider whether the words "such as" which appear at the end of the chapeau of paragraph 1(b) could be replaced by the words "in the form of"; and (ii) to note that, for the sake of simplification and consistency between paragraphs 3 and 4, the words "the party

requesting relief to supply" which appeared after the words "may request" in paragraph 3 have been deleted.

For approval of article 18 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 37–39; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 49–67 and 73; A/CN.9/896, paras. 67–75, 82, and 177–190; A/CN.9/867, paras. 133–144; and A/CN.9/861, paras. 51–67.

(iv) Remarks on article 19 – Grounds for refusing to grant relief

17. The Commission may wish to note the extensive consultations of the Working Group at its sixty-eighth session aimed at clarifying the various grounds provided for in paragraph 1, in particular the relationship between subparagraph (b)(i), which mirrored a similar provision of the New York Convention and was considered to be of a generic nature, and subparagraphs (b)(ii), (b)(iii), (c) and (d), which were deemed to be illustrative in nature. At that session, it was noted that various attempts for regrouping the grounds had been unsuccessful. It was further noted that such attempts represented serious efforts at avoiding overlap in light of the importance of the issue. However, difficulties arose because of the need to accommodate the concerns of different domestic legal systems, which resulted in the failure of such attempts to gain consensus. Therefore, the Working Group expressed a shared understanding that there might be overlap among the grounds provided for in paragraph 1 and that competent authorities should take that aspect into account when interpreting the various grounds (A/CN.9/934, paras. 60–65).

For approval of article 5 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 59 and 66; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 74–101; A/CN.9/901, paras. 41–50, 52 and 72–88; A/CN.9/896, paras. 84–117 and 191–194; A/CN.9/867, paras. 147–167; and A/CN.9/861, paras. 85–102.

(v) Remarks on article 20 – Parallel applications or claims

18. Article 6 provides the competent authority with the discretion to adjourn its decision if an application or claim relating to the settlement agreement had been made to a court, arbitral tribunal or other competent authority, which might affect the process (A/CN.9/896, para. 123). It is based on article VI of the New York Convention, which addresses the situation where a party seeks to set aside an arbitral award at the place of arbitration while the other party seeks to enforce it elsewhere. The Working Group agreed that article 20 should apply to both when enforcement of a settlement agreement was sought and when a settlement agreement was invoked as a defence (A/CN.9/934, para. 69).

For approval of article 6 at the sixty-eighth sessions of the Working Group, see A/CN.9/934, para. 70; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 122–125; A/CN.9/867, paras. 168 and 169; and A/CN.9/861, paras. 103–107.

(vi) Footnotes

19. The Commission may wish to note that the following additional footnotes have been inserted in the draft amended Model Law:

- Footnote 2, which addresses the decision to replace the term "conciliation" by "mediation" throughout the draft instruments; footnote 2 reflects the explanatory text that was agreed for use when revising UNCITRAL texts on conciliation (see A/CN.9/934, para. 16; A/CN.9/929, paras. 102–104; and A/CN.9/867, para. 120). The Commission may wish to note that the first sentence of the explanatory text, which reads: "*'Mediation' is a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of, or relating to, a contractual or other legal relationship.*" has not been inserted

in footnote 2 in order to avoid possible confusion with the definition of mediation provided for in article 1(3) of the draft amended Model Law.

- Footnote 5 provides States with the options of (i) broadening the scope of section 3 to agreements not reached through mediation (for approval of footnote 5 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 133–136; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 68–72; A/CN.9/896, paras. 40 and 41; and A/CN.9/867, para. 115); and (ii) applying section 3 only to the extent that the parties to a settlement agreement have agreed to its application (thereby mirroring article 8(1)(b) of the draft convention; see A/CN.9/934, para. 137).
- Footnote 6 provides States with the option of adding a subparagraph to article 16(4) so that section 3 would apply to settlement agreements that are not international at the time of their conclusion, but that result from international mediation as defined under article 3, paragraphs 2 to 4 (A/CN.9/934, para. 127).

(vii) Other matters

(i) General Assembly resolution

20. The Commission may wish to note that the Working Group prepared both a draft convention and a draft amended Model Law in a spirit of compromise and to accommodate the different levels of experience with mediation in different jurisdictions. The Working Group agreed that a possible approach to address the specific circumstance of preparing both a convention and a model legislative text could be to suggest that the resolutions of the General Assembly accompanying those instruments would express no preference on the instrument to be adopted by States (A/CN.9/901, para. 93).

21. In that context, the Working Group agreed on the following wording for consideration by the Commission, and eventually recommendation to the General Assembly for inclusion in the relevant resolution: "*Recalling that the decision of the Commission to concurrently prepare a draft convention on international settlement agreements resulting from mediation and an amendment to the UNCITRAL Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions, and to provide States with consistent standards on cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument*."

For consideration by the Working Group of the form of the draft instruments, see A/CN.9/901, paras. 52 and 89–93; and A/CN.9/896, paras. 135–143 and 211–213;

For approval of the draft text in para. 21 above at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 140–142.

(ii) Material accompanying the draft amended Model Law

22. The Commission may wish to note the recommendation of the Working Group that, resources permitting, the *travaux preparatoires* of the draft amended Model Law should be compiled by the Secretariat, so that they could be easily accessible and user-friendly. It was further recommended that the Secretariat should be tasked with the preparation of a text to supplement the Guide to Enactment of the Model Law (A/CN.9/934, paras. 146–148). In that light, the Commission may wish to consider whether the Guide to enactment should provide guidance on how sections 2 and 3 of the draft amended Model Law could each be enacted as a stand-alone legislative text.

H. Note by the Secretariat on settlement of commercial disputes: draft convention on international settlement agreements resulting from mediation – draft model law on international commercial mediation and international settlement agreements resulting from mediation

(A/CN.9/945)

[Original: English]

Contents

I. Introduction

1. At its forty-eighth session, in 2015, the Commission agreed that Working Group II (Dispute Settlement) should commence work regarding international settlement agreements resulting from mediation.[1] At its sixty-third to sixty-eighth sessions, the Working Group undertook work on the preparation of instruments on enforcement of international settlement agreements resulting from mediation, consisting of a draft convention and draft amendments to the UNCITRAL Model Law on International Commercial Conciliation (the "instruments")[2] At its sixty-eighth session, the Working Group completed its preparation of the instruments, and requested the Secretariat to circulate them to Governments for their comments, with a view to consideration by the Commission at its fifty-first session (A/CN.9/934, para. 13).

2. Further to that request, the Secretariat circulated the draft instruments in the form set out in documents A/CN.9/942 (draft convention) and A/CN.9/943 (draft amendments to the UNCITRAL Model Law on International Commercial Conciliation.) The present document reproduces comments received by the Secretariat on the draft instruments. Comments received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received.

II. Comments on the draft instruments

A. Belgium

[Original: English]
[Date: 17 May 2018]

Draft Convention

In the French version of article 3, § 1, the word "exécute" should be replaced by the words "accorde l'exécution de", in view of keeping the same French translation of the

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 142.

[2] The reports of the Working Group on the work of its sixty-third to sixty-eighth sessions are contained in documents A/CN.9/861, A/CN.9/867, A/CN.9/896, A/CN.9/901, A/CN.9/929 and A/CN.9/934, respectively.

word “enforce” as the one contained in article III of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In the French version of article 5, § 1, in the introductory sentence, the words “à l’encontre de laquelle ils ont été formés” should be replaced by the words “à l’encontre de laquelle ils ont été introduits”, in view of keeping the same French translation of the words “seeking relief” as the one in article 2, § 4.

Draft amended Model Law

In the footnote 6 under article 16, the words “A settlement agreement is ‘international’ if” should be replaced by the words “A settlement agreement is also ‘international’ if”.

In the French version of article 19, in the introductory sentence, the words “à l’encontre de laquelle ils ont été formés” should be replaced by the words “à l’encontre de laquelle ils ont été introduits”, in view of keeping the same French translation of the words “seeking relief” as the one contained in article 16, § 7.

B. Republic of Korea

[Original: English]
[Date: 8 June 2018]

1. Title of Section 2

At present, the Draft Model Law appearing in A/CN.9/943 uses the term “Mediation” as a title for Section 2. As the title of the Model Law uses the term “International Commercial Mediation” as opposed to “Mediation”, and as comparable Section 3 uses the term “International Settlement Agreement” copied from the title of the Model Law, it would be prudent, for the sake of consistency, to use the term “International Commercial Mediation” as the title for Section 2. As a matter of fact, what is provided in Section 2 is not merely “mediation” but “international commercial mediation”. Mediation is currently being used in other contexts as well, such as state-to-state mediation or investor-state mediation in lieu of ISDS proceedings. As such, it would be more accurate and appropriate to use an accurate term as the title for Section 2.

2. Ambiguity of the Term “Settlement Agreement” in Article 15

Article 15 of the Model Law uses the term “settlement agreement”. On the other hand, in Section 3, from Article 16 to Article 20, the term “settlement agreement” is then used in a specific manner as defined in paragraph 1 of Article 16. Thus, the term “settlement agreement” in Article 15 may cause confusion. In light of this, it may be prudent to use the term “agreement” rather than “settlement agreement” in Article 15 (both in the title and in the text). The article then would read as follows:

> “Article 15: Binding and enforceable nature of agreement settling disputes
>
> If the parties conclude an agreement settling a dispute, that agreement is binding and enforceable.”

3. Title of Article 17

The current title of Article 17 reads “General Principle”. As the term would be interpreted as general principle applicable to the entire text of the Model Law as in Section 1, the Secretariat might want to consider using more specific terms to describe Article 17. For instance, the title of the provision may read: “General Principles Regarding Enforcement”, or something along the line. As it currently stands, Section 1 of the Model Law already uses the term “General Provision”. So, the term “General Principles” of the Article 17 may be found to be slightly confusing to the readers.

III. INVESTOR-STATE DISPUTE SETTLEMENT REFORM (ISDS)

A. Report of the Working Group on ISDS on the work of its thirty-fourth session (Part I) (Vienna, 27 November–1 December 2017)

(A/CN.9/930/Rev.1 and Add.1/Rev.1)

[Original: English]

Contents

I. Introduction

1. At its forty-eighth session, in 2015, the Commission noted that the current circumstances in relation to investor-State arbitration posed challenges and proposals for reform had been formulated by a number of organizations. In that context, the Commission was informed that the Secretariat was conducting a study on whether the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency" or "Mauritius Convention") could provide a useful model for possible reforms in the field of investor-State arbitration, in conjunction with interested organizations, including the Centre for International Dispute Settlement (CIDS), a joint research centre of the Graduate Institute of International and Development Studies and the University of Geneva Law School. In that light, the Secretariat was requested to report to the Commission at a future session with an update on the matter.[1]

2. Pursuant to that request, at its forty-ninth session in 2016, the Commission had before it a note providing an update on a study conducted within the framework of a research project of CIDS (referred to below as the "CIDS report"),[2] and a short overview of its outcome (A/CN.9/890).

3. After discussion, the Commission requested the Secretariat to review how the project described in document A/CN.9/890 might be best carried forward, if approved as a topic of future work at the fiftieth session of the Commission. In so

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 268.

[2] Kaufmann-Kohler, Gabrielle, and Michele Potestà. "Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and road map" (2016), available via the UNCITRAL website at: http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

doing, the Secretariat was requested to conduct broad consultations,[3] and to take into consideration the views of all States and other stakeholders, including on how this project might interact with other initiatives in this area and on the format and processes that could be used.

4. The Commission also decided to retain two additional topics in the field of investment arbitration on its agenda for further consideration: possible future work on concurrent proceedings and on ethics for arbitrators.[4] It further requested that the Secretariat, within its existing resources, continue to update and conduct preparatory work on all three topics so that the Commission would be in a position to make an informed decision on whether to mandate a working group to undertake work in any or all of them.[5]

5. At its fiftieth session, the Commission had before it Notes by the Secretariat on "Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration" (A/CN.9/915); on "Possible future work in the field of dispute settlement: Ethics in international arbitration" (A/CN.9/916), and on "Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS)" (A/CN.9/917). Also before it was a compilation of comments by States and international organizations on "Investor-State Dispute Settlement Framework" (A/CN.9/918 and addenda).

6. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). In line with the UNCITRAL process, Working Group III would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and be fully transparent. The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).[6]

II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its thirty-fourth session in Vienna, from 27 November–1 December 2017. The session was attended by the following States members of the Working Group: Argentina (2022), Armenia (2019), Australia (2022), Austria (2022), Belarus (2022), Brazil (2022), Bulgaria (2019), Cameroon (2019), Canada (2019), Chile (2022), China (2019), Colombia (2022), Côte d'Ivoire (2019), Czechia (2022), Denmark (2019), Ecuador (2019), El Salvador (2019), France (2019), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2022), Indonesia (2019), Iran (Islamic Republic of) (2022), Israel (2022), Italy (2022), Japan (2019), Kuwait (2019), Malaysia (2019), Mauritius (2022), Mexico (2019), Nigeria (2022), Pakistan (2022), Panama (2019), Philippines (2022), Poland (2022), Republic of Korea (2019), Romania (2022), Russian Federation (2019), Singapore (2019), Spain (2022), Switzerland (2019), Thailand (2022), Turkey (2022), Uganda (2022), United

[3] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 187–194.
[4] Ibid., paras. 175–186.
[5] Ibid., para. 195.
[6] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), para. 264.

Kingdom of Great Britain and Northern Ireland (2019), United States of America (2022) and Venezuela (Bolivarian Republic of) (2022).

8. The session was attended by observers from the following States: Albania, Belgium, Bolivia (Plurinational State of), Bosnia and Herzegovina, Costa Rica, Croatia, Cyprus, Dominican Republic, Egypt, Estonia, Finland, Georgia, Iceland, Malta, Montenegro, Morocco, Netherlands, New Zealand, Niger, Norway, Paraguay, Peru, Portugal, Saudi Arabia, Serbia, Slovakia, South Africa, Sudan, Sweden, Uruguay and Viet Nam.

9. The session was also attended by observers from the European Union.

10. The session was also attended by observers from the following international organizations:

(a) *United Nations System*: International Centre for the Settlement of Investment Disputes (ICSID) and United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: Energy Community Secretariat, Gulf Cooperation Council (GCC), Organization for Economic Cooperation and Development (OECD) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: Arab Association for International Arbitration (AAIA), Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Association for the Promotion of Arbitration in Africa (APAA), Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Dispute Settlement (CIDS), Center for International Environmental Law (CIEL), Center for International Legal Studies (CILS), CISG Advisory Council (CISG-AC), Council of the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (CIS), Forum for International Conciliation and Arbitration (FICA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Institute for Sustainable Development (IISD), International Law Association (ILA), International Law Institute (ILI), Korean Commercial Arbitration Board (KCAB), Law Association for Asia and the Pacific (LAWASIA), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Moot Alumni Association (MAA), Queen Mary University of London School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration, Lagos (RCICAL), Russian Arbitration Association (RAA), Stockholm Chamber of Commerce Arbitration Institute (SCC Arbitration), Swiss Arbitration Association (ASA) and Vienna International Arbitration Centre (VIAC).

Election of officers

11. The Working Group proceeded to elect the chairperson for the session. The importance of transparency, neutrality and inclusiveness of the process and of the deliberations of the Working Group were emphasized. Proposals to elect a chairperson and a rapporteur, who would alternate their roles in subsequent sessions, and to elect co-chairs did not gain support.

12. In the absence of consensus on the election of a chairperson and having received more than one nomination for that position, the Working Group proceeded with the election of the chairperson by secret ballot in accordance with the Rules of Procedure of the General Assembly as applicable to UNCITRAL.

13. Forty-five ballots were cast, of which one was invalid; forty-four ballots were valid; there were three abstentions; the number of States members of the Working Group present and voting were therefore forty-one and the required majority for the election was twenty-one.

14. Mr. Shane Spelliscy (Canada) having obtained twenty-four votes and consequently the required majority in the first ballot, was elected as the Chairperson of the session.

15. The Working Group elected as Rapporteur Ms. Natalie Yu-Lin Morris-Sharma (Singapore).

Documents and adoption of the agenda

16. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.III/WP.141); and (b) notes by the Secretariat on "Possible reform of investor-State dispute settlement (ISDS)" (A/CN.9/WG.III/WP.142) and on submissions from International Intergovernmental Organizations (A/CN.9/WG.III/WP.143).

17. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Possible reform of investor-State dispute settlement (ISDS).
5. Adoption of the report.

III. Deliberations and decisions

18. The Working Group considered agenda item 4 on the basis of the notes by the Secretariat (A/CN.9/WG.III/WP.142 and A/CN.9/WG.III/WP.143). The deliberations and decisions of the Working Group with respect to item 4 are reflected in chapter IV.

IV. Possible reform of Investor-State Dispute Settlement

A. General remarks

19. It was recalled at the outset that the mandate given to the Working Group contained three stages: (i) to identify and consider concerns regarding ISDS; (ii) to consider whether reform was desirable in light of any identified concerns; and (iii) if the Working Group were to conclude that reform was desirable, to develop any relevant solutions to be recommended to the Commission.[7]

20. It was also recalled that ISDS provided a method to enforce the substantive obligations of States. It was noted that critical questions on possible ISDS reform involved the underlying substantive rules. Nonetheless, it was clarified that the mandate given to the Working Group focused on the procedural aspects of dispute settlement rather than on the substantive provisions.

21. There was general agreement on the importance and sensitivity of the work to be undertaken by the Working Group. It was said that work should be based on a thorough analysis of all relevant issues. It was added that a full and candid exchange of views would support the consensus-driven approach.

22. Considering that the mandate consisted of three stages, it was agreed that each stage would be considered in sequence. It was also agreed that the Working Group should take a gradual and cautious approach, without undue haste, but would proceed efficiently. Consequently, it was generally felt that the second and third stages of the mandate should be considered in due course, once the Working Group has had sufficient opportunity to consider the concerns.

23. Nonetheless, it was said that it might not be practicable to separate a discussion of concerns and whether or not they were valid concerns justifying reform. From this perspective, it was said that the first two stages of the mandate could be considered together, if the element of ISDS concerned so warranted. In addition, an indication of whether the issues might warrant reforms, and whether the reforms might be

[7] Ibid.

incremental or systemic, might be made. Any such indications would be recorded to allow the Working Group to prepare for any future discussions on the second and third stages of the mandate. It was emphasized that the Working Group would respect the order of the mandate and allow sufficient time for discussion of all issues.

24. It was also stated that the objective of the Working Group was to identify and address the core concerns in relation to ISDS, and that an exhaustive consideration of all issues would not be desirable.

25. In discharging the mandate of the Working Group, the cooperation between UNCITRAL and other relevant international bodies was welcomed.

26. In addition, it was stated that ISDS reform raised complex issues of public international law, highlighting that the process should be government-led, as recognized in the mandate of the Working Group. Nonetheless, it was noted that the contributions from observer organizations, and the transparent nature of the UNCITRAL process, would assist the Working Group in its deliberations on ISDS reform.

ISDS under investment treaties, laws and contracts

27. The Working Group proceeded to consider whether work should be limited to ISDS under investment treaties or should encompass all forms of ISDS regardless of the instrument upon which cases arose. It was reported that 75 per cent of investment claims before ICSID (which comprised over 70 per cent of all ISDS claims) were treaty-based, and the remaining 25 per cent were divided between claims based on investment contracts and those arising as a matter of domestic investment law. It was further reported that 46 per cent of ICSID claims with African States as respondent were based on or related to investment contracts.

28. In response to a suggestion that the focus of the Working Group should be confined to treaty-based ISDS cases, it was said that the level and apparent increase in the number of cases based on contractual provisions was such that the door should be left open to investment law- and contractual-based ISDS cases. In addition, it was mentioned that, as a matter of procedure, the concerns arising in the different underlying instruments were not dissimilar, even if there were policy differences between the instruments themselves. However, it was suggested that such an approach might extend the scope of the Working Group's tasks to include what might be difficult issues on investment contracts.

29. On the other hand, it was said that the broader approach would also allow parties to a variety of instruments to apply the eventual results of possible reform. It would also allow the Working Group to consider all concerns as envisaged by its mandate, would avoid unnecessary definitional difficulties, and would not require the Working Group to engage in an unnecessary exhaustive analysis. In addition, it was pointed out that excluding investment contracts completely might have the potential to undermine the results of possible reform, if investors chose to negotiate contractual mechanisms instead of relying on treaty provisions.

30. In light of the above, it was agreed that the Working Group would focus on treaty-based ISDS and would later consider the possibility of extending the results of its work to contract and investment law based ISDS. That said, it was understood that delegations continue to raise concerns and views on contract and investment law based ISDS.

Investment arbitration and other types of ISDS mechanisms

31. The Working Group then considered whether work should be limited to arbitration or should include other types of existing ISDS mechanisms. Recalling its earlier discussion, there was a generally-shared view that alternative dispute resolution methods, including mediation, ombudsman, consultation, conciliation and any other amicable settlement mechanisms, could operate to prevent the escalation of disputes to arbitration and could alleviate concerns about the costs and duration of arbitration. In that context, the Working Group recalled the work done by the

Commission in the field of conciliation and the current work being undertaken by Working Group II on enforcement of mediated settlement agreements.

32. One view was that such alternative methods were an integral part of ISDS, might be mandatory under some investment treaties, might assist in identifying concerns and possible procedural solutions to concerns about arbitration in ISDS and so should be considered by the Working Group.

33. In response, it was recalled that the mandate of the Working Group related to identifying concerns about ISDS and that concerns about ISDS had generally focused on arbitration. While some potential concerns were mentioned regarding mediation, it was widely felt that work should focus on arbitration and the concerns it raised. Accordingly, it was said that the work should first concentrate on identifying concerns regarding arbitration, and that other types of ISDS mechanisms could subsequently be considered as part of a holistic approach to addressing those concerns. From this perspective, States' experience in domestic court mechanisms and sequencing issues, the relationship between arbitration, alternative dispute resolution mechanisms and court procedures, and State-to-State mechanisms, might inform the Working Group's considerations of solutions at the third stage of its mandate.

B. Consideration of the arbitral process and outcomes

1. Procedural aspects

34. The Working Group undertook its consideration of concerns relating to the arbitral process and outcomes based on document A/CN.9/WG.III/WP.142, paras. 22–41. In that context, the Working Group took note that, as indicated in paragraph 19 of that document, the issues listed therein were not exhaustive, and that any additional issues might be raised, and considered, by the Working Group at a later stage of its deliberations.

(a) Duration and cost

Overall levels of duration and cost

35. During the discussion, the experience of States and of intergovernmental organizations in connection with ISDS was shared. The Working Group was informed that the Secretariat had consulted extensively with key international organizations involved in ISDS and in the wider reform of investment treaties, including UNCTAD, ICSID, OECD and PCA, as reflected in the documents available to the Working Group. The Secretariat had also taken into account data made available by relevant arbitration institutions.

36. The Working Group took note of analyses based on limited available information suggesting that 80 to 90 per cent of costs in ISDS were associated with fees for legal representation and for experts and that the amount of costs per proceeding averaged US$ 8 million.

37. It was widely felt that lengthy and costly ISDS proceedings under some approaches raised concerns and practical challenges to respondent States as well as to claimant investors. Highlighting the resource-intensive nature of the proceedings, it was mentioned that the very inclusion of ISDS provisions in investment treaties could have financial implications for respondent States.

38. There was a shared understanding that the duration and cost of the proceedings were interlinked, as lengthy proceedings were likely to result in higher costs.

39. It was mentioned that there was little doubt about the negative impact of duration and costs on respondent States, but that the Working Group could design a model to relate duration and the level of costs to the benefits of investment to the investors, as a practical tool to prevent such disputes.

40. Particular attention was drawn to the fact that the high costs of ISDS paid with public funds were difficult to justify for developing States, whose financial resources were scarce. In that context, it was stated that such costs and awards made against

those States could compete with urgent developmental needs. It was added that responding to an ISDS claim posed a disproportionately heavy burden on the officials of smaller States.

41. It was further stated that the high costs of ISDS under some approaches could limit the access of small and medium-sized enterprises to the ISDS mechanism, thus depriving them of the protection provided to them under investment treaties.

42. The Working Group was cautioned that deliberations relating to duration and cost should be fact-based. At the same time, it was noted that perceptions were also relevant in terms of maintaining the legitimacy of ISDS. Furthermore, it was emphasized that notions of duration and cost were relative in nature, and whether the process was excessively lengthy and/or costly should be determined on a case-by-case basis and taking into account the need for effective administration of justice.

43. It was emphasized that the duration and costs of ISDS proceedings should not be examined in isolation, but by reference to suitable comparators, which might include other international dispute settlement bodies (such as the International Court of Justice and the Dispute Settlement Body of the World Trade Organization), and domestic court procedures. The costs of ISDS might need to be further assessed from that perspective, even if it were acknowledged that the costs had risen over time.

44. It was pointed out that the implications of the duration and cost of the procedures were also derived from the fact that the ISDS regime lacked a rule of binding precedent and a consequent lack of predictability. As a result, it was said, legal counsel would be under a duty to press all available arguments, whether or not those arguments had been accepted or rejected by earlier tribunals.

45. The following items were noted as contributing to the levels of costs: complexities of the case, the underlying treaties and the proceeding; large volume of evidence; quality of factual records; conduct of the proceedings; ineffective case management; the need for States to have time to develop their defences and to ensure the best possible representation; the need for parties to expend considerable sums in appointing tribunals; and the need to translate numerous documents and evidence into the language of the arbitration. In addition, a lack of organization, tribunal dynamics leading to lengthy deliberations and sometimes dissenting opinions, and excessive numbers of hearings also contributed to the levels of cost. In that relation, concerns were expressed about the negative effects on case management due to fears of challenges and annulment of awards.

46. It was also stated, however, that excess costs could be attributed under some approaches in part to abusive practices, parallel proceedings, the absence of clear procedures, and the absence of a mechanism to dismiss frivolous claims at an early stage. In addition, it was pointed out that the increase in costs was related to systemic issues and the structure of the ISDS regime, or, alternatively, the lack of a system. These issues, it was added, had led to a lack of consistency and, importantly for States as respondents in particular, a lack of predictability of outcome. A further issue was that the same arbitrators were commonly appointed in a number of cases, resulting in further delays, extended durations and leading to further increases in costs.

47. It was suggested that the increasing complexities of the underlying treaties was an additional cause of increased costs.

48. With regard to the duration, it was mentioned that the appointment of the tribunal, disclosure or discovery and the deliberations when drafting the award were the three time-intensive stages. In addition, concerns were expressed with regard to the lengthy period of time that might elapse between the final hearing and the rendering of the award. An additional stage that contributed to the overall duration of ISDS proceedings was noted to be enforcement action, which was reported in some cases to have exceeded the original arbitration proceedings in length.

49. On the other hand, it was also mentioned that disputing parties as well as States parties to the treaty under which the dispute arose had a role to play in determining the overall duration of an ISDS proceeding.

50. It was added that States generally required more time to respond to claims, as they were required to coordinate among a number of authorities, and to engage legal counsel and experts to defend their case. In that context, the need for States to be given sufficient time to respond to claims was emphasized.

51. It was observed that States had the opportunity to take steps to control both duration and cost through effective case management and their decisions as respondents, including in selecting counsel and experts, in considering their choices of arbitrators and of arbitration institutions to administer the case, in agreeing on the procedural timetable, in deciding to bifurcate proceedings, and in seeking early dismissal where possible. All these steps, it was noted, had the potential to shorten the duration.

52. In addition, it was stated that the States could use tools in their investment treaties to reduce duration and cost proceedings, including using forms of dispute settlement other than arbitration (negotiation, consultations, diplomatic efforts or mediation). It was further added that some treaties allowed for early dismissal of frivolous claims and provided for consolidation, might address allocation of costs, and might provide for effective means of constituting tribunal, for example, requiring the claimant to nominate its arbitrator in its initial notice of claim to expedite the process.

Allocation of costs

53. The allocation of costs by arbitral tribunals in ISDS was highlighted as a concern that merited further consideration. It was explained that arbitral tribunals in ISDS had historically followed the default rule under public international law and in inter-State cases that each party would bear its own costs. It was pointed out that the respondent State might find itself in the position of not being able to recover a substantial part or any of its costs in defending an unsuccessful, frivolous or bad faith claim by investors. In addition, it was stated that in the absence of allocation of costs, there was no incentive for the parties to limit their arguments and submissions.

54. In that context, an institution reported that costs had been allocated among parties in approximately half of recently issued arbitral awards, and therefore that a trend in favour of departing from the traditional public international law default rule mentioned above could be identified. In the awards concerned, arbitral tribunals had ordered that the costs of the arbitration should be borne by the unsuccessful party, or costs had been apportioned between the parties. Article 42 of the UNCITRAL Arbitration Rules (2010, as revised in 2013) was given as an example of a rule providing for allocation of costs among the parties.

55. As regards cost allocation, it was suggested that the Working Group might take note of an emerging approach based on a proportional allocation of costs. It was explained that an award of costs might reflect the relative success of the winning party in terms of the proportion of successful limbs of its claims.

Security for costs

56. A further area of concern mentioned related to difficulties faced by successful respondent States in recovering costs from claimant investors. It was said that investors might use shell companies, or might be impecunious, which left States with no possibility of recovery. That was highlighted as another area of imbalance as States had a permanent and financial standing, which investors did not. It was said that that situation was aggravated by the fact that the possibility of obtaining security for costs was not provided for under investment treaties or in certain arbitration rules.

Third-party funding

57. It was observed that investors sometimes resorted to third-party funding, and to other forms of external financing, which were not available to States. It was suggested that the development of that practice raised concerns that might require further consideration.

(b) Other procedural issues

58. Further, it was highlighted that arbitral institutions had sought to implement a number of measures to tackle certain procedural issues, in particular to streamline the process. Such efforts were also made with regard to the revision of the UNCITRAL Arbitration Rules in 2010/2013. By way of example, it was reported that the ICSID Arbitration Rules had provided for an early dismissal mechanism since 2006. Over 20 applications for such dismissal had been made, leading to the conclusion that where such an application was successful, time and costs were saved. (On the other hand, where the application failed, additional time and costs clearly arose.) A further example of efforts to streamline the process was the consolidation of claims, whether formal or informal.

(c) Holistic approach to procedural reform

59. Comments were made that concerns regarding duration and costs had to be examined as a whole; its constituent parts interacted in different ways, so that once the various concerns had been identified, it would be necessary to consider them from a systemic viewpoint. In particular, attention was called on the need to consider the issues of duration and costs in the broader context of (a) innovations in arbitration rules and investment treaties (such as early dismissal of frivolous, unmeritorious claims, preliminary objections, security for costs); (b) the need to ensure correctness of decisions; and (c) enhancing the predictability of decisions by reducing unnecessary submissions. It was added that a comprehensive analysis would require nuanced and not merely simple solutions.

60. The extent to which experience from international commercial arbitral tribunals should guide an analysis of ISDS concerns was discussed. In that regard, it was stated that arbitrators might take an overly narrow view of the issues concerned, and so pay insufficient attention to the public international law context, that they might be reluctant to manage concurrent proceedings through consolidation and to limit the submission of documents and discovery. On the other hand, it was said that developments in arbitration practice regarding case management including matters such as time limits, cost ceilings and transparency, as well as encouraging mediation and other alternative dispute resolution mechanisms, could be taken into account by the Working Group at a later stage in its deliberations.

2. Summary of the deliberations

61. After discussion, the Working Group summarized its deliberations on duration and costs in ISDS proceedings, as follows.

(a) The overall duration and costs of ISDS proceedings

62. The Working Group recalled the need to ensure that it had the appropriate facts before it, and in that light, that it should consider carefully the appropriate comparators when assessing whether costs were in fact excessive (see para. 36 above), or durations unnecessarily long. In addition, the Secretariat was requested to seek further information on appropriate comparative information from States and other organizations. It was also noted, however, that document A/CN.9/WG.III/WP.142 was prepared taking into consideration the available information and data, much of which was already in the public domain. In addition, it was mentioned that the Working Group had had the benefit of (a) data from States, drawn from their direct experiences as respondents, on the duration and costs of ISDS proceedings, and (b) data provided by international organizations and other bodies involved in investment treaty policymaking and reform in ISDS.

63. While the importance of a fact-based analysis was generally accepted, it was also said that the Working Group should not lose sight of perceptions on the issues under discussion, in light of the overall concerns about the legitimacy of the system. In that context, it was observed that perceptions were indeed relevant to States in making policy decisions.

64. It was added that the costs of ISDS had risen to a level where they could be seen as imposing a barrier to accessing the system to some investors, particularly small and medium-sized enterprises (see para. 34 above). Investors were resorting to third-party funding, a mechanism that caused significant concern and created a structural imbalance between States and investors.

65. In addition, the Working Group took note that the most time-consuming stages of ISDS cases included the appointment of the tribunal members, discovery or document production, and the issuance of awards.

(b) Allocation of costs

66. There was a widely shared view that allocation of costs in ISDS warranted detailed consideration. A key concern was that the costs to the State in defending claims were significant, and that even where the State was successful in its defence and notwithstanding recent trends, it was not always awarded its costs (see para. 46 above).

67. It was mentioned that a consideration of the topic should include the possibility of specific and clear rules on the allocation of costs, including on awards of costs proportionate with results, and reflecting the conduct of the parties, among other things (see para. 48 above).

(c) Security for costs

68. It was highlighted that States often encountered difficulties in recovering awards of costs. That issue exemplified an imbalance between the parties, because States, given their permanence, were in a different position from investors, who might be unable to pay. The link between this question and the lack of rules allowing orders for security for costs was emphasized (see para. 49 above).

(d) Third-party funding

69. It was observed that third-party funding had become a significant concern, in that it created a systemic imbalance and did not ensure a level playing field. It was added that issues of third-party funding related not just to costs, but also had an impact on other issues, such as conflicts of interest, collection and enforcement of costs awards.

(e) Indications of possible solutions on procedural issues

70. Without prejudice to future work by the Working Group, some preliminary indications of issues that the Working Group might wish to include in its discussions of possible solutions at a later stage were given.

71. It was highlighted that it would be important to draw a distinction between what could be termed “excessive” or “unjustified” time and costs, on the one hand, and “necessary” or “justified” time and costs on the other. In that regard, it was recalled that the quality of outcomes should be balanced with the desire to reduce duration and cost. With respect to “unjustified” time and costs, a number of procedural mechanisms were mentioned, including bifurcation of claims, expeditious dismissal of frivolous claims, consolidation of concurrent claims, and clear and definitive rules on cost allocation that took into account proportionality as well as party conduct. With respect to “justified” time and costs, it was said that the use of tools such as procedural timetables, of arbitral institutions and of modern technologies could be considered. In addition, fixed tariffs and time limits as well as training for arbitrators on case management were mentioned.

72. However, it was added that each case would be different in terms of the time and the costs that would be needed and so justified and thus one-size-fits-all rules would not be appropriate. Further, it was noted that for developing States even justified costs carried significant budgetary impacts. A possible support mechanism could be the establishment of a fund for defence costs or other forms of assistance such as advisory centres.

73. It was also stated that States might improve cost-effectiveness through engaging legal counsel on better contractual terms, which need not sacrifice the quality of representation.

74. The use of methods other than arbitration to resolve disputes, including mediation, were also considered as potential measures that could reduce time and costs in ISDS.

75. It was also noted that some of the above measures were already being implemented in recent treaties and procedural rules, and that a number of clear approaches could be implemented through treaty provisions or through case management in specific cases. However, it was said that such an approach would not address the existing treaties, of which there were over 3,000.

76. It was said that the systematic nature of the concerns identified indicated a need for systemic solutions, which would bring with them the reduction of the overall costs through enhanced predictability and a greater ability to control proceedings themselves.

77. The possibility of developing solutions that could be applied on a bilateral and a multilateral basis was mentioned. In that context, it was added that such bilateral and multilateral approaches need not be mutually exclusive, and that there could be a suite of solutions developed simultaneously on both tracks, particularly in light of the differences in experiences between States. It was observed that soft law instruments on questions such as the extent of discretionary powers of the tribunal under existing arbitral rules could support such efforts.

78. It was noted that its deliberations had explored key concerns that could be taken into account as its work progressed.

3. Transparency

79. The Working Group undertook its consideration of transparency in ISDS, based on document A/CN.9/WG.III/WP.142, paragraphs 26 and 27.

80. Throughout the deliberations, the importance of transparency in ISDS was underlined. It was also stated that transparency was a key element of the rule of law, and of access to justice as well as the legitimacy of the ISDS system. In that light, it was said that transparency was important for shedding light on ISDS, thus providing States the necessary information to respond to general criticisms of ISDS.

81. The Working Group recalled that UNCITRAL had undertaken work to address the lack of transparency in ISDS. Such work had resulted in the UNCITRAL Rules on Transparency in Treaty-based Investor-State arbitration (“Transparency Rules”), which the Commission had adopted in 2013, and the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (“Mauritius Convention”) adopted by the General Assembly in 2014. It was noted that both texts (referred to jointly as the “transparency standards”) were recommended by the General Assembly for consideration of use by States.[8]

82. It was noted that the Transparency Rules constituted a set of procedural rules that ensured transparency in the conduct of treaty-based investor-State arbitration. The Working Group was informed that the Transparency Rules had been incorporated in a large number of investment treaties concluded after 1 April 2014. In addition, a number of investment treaties had introduced elements of transparency for arbitral proceedings within its provisions. The Working Group was informed that the Mauritius Convention was signed by twenty-two States and entered into force on 18 October 2017, after having been ratified by three States.

83. While some observations were made regarding the slow rate of adoption of the transparency standards, the Working Group was informed that progress was being made through inclusion of the Transparency Rules in investment agreements

[8] General Assembly resolutions 68/109 and 69/116, respectively.

concluded after 1 April 2014, voluntary adoption by the parties and the entry into force of the Mauritius Convention.

84. The Working Group took note of comments and explanations from States on their experience with transparency in ISDS including the operation of the Transparency Rules as well as their treaty practice. It was suggested that stocktaking of efforts to enhance transparency would be advisable before proceeding to address concerns related to transparency.

85. A comment was made that transparency was a matter for each State to consider when negotiating investment treaties or as a respondent State in a specific case. It was further said that transparency was relevant to various aspects of ISDS and not necessarily limited to the conduct of the proceedings. In that light, it was suggested that additional information on how transparency operated within the broader notion of ISDS would assist the Working Group in its further consideration of the topic.

86. Recognizing that a distinction should be drawn between the transparency of the arbitral proceedings (which the Commission has already addressed through the transparency standards) and a broader notion of transparency, the Working Group heard suggestions on possible issues that could be considered at a later stage.

87. With regard to enhancing transparency of arbitral proceedings, two potential areas of work were identified. One area related to the implementation and promotion of the transparency standards, including preparation of soft law instruments that could encourage parties and tribunals to apply such standards where not explicitly prohibited by treaty or other applicable law or arbitration rules. Another area related to enhancing the public understanding of ISDS through the transparency mechanism already in place. It was highlighted that enhancing public understanding of ISDS was key in addressing the perceived lack of legitimacy of the system. In addition, the asymmetry of information available to the States and investors was highlighted.

88. With regard to the broader notion of transparency, there was shared interest in the Working Group in exploring concerns relating to third-party funding arrangements, transparency in appointment of arbitrators and transparency with respect to the compensation of arbitrators. It was noted that the broader concept of transparency was indeed cross-cutting and related to many aspects of possible ISDS reform. In consequence, transparency would be considered when addressing those issues.

(A/CN.9/930/Add.1/Rev.1) (Original: English)

Report of the Working Group on ISDS on the work of its thirty-fourth session (Part II) (Vienna, 27 November–1 December 2017)

ADDENDUM

Contents

IV. Possible reform of investor-State dispute settlement (*continued*)

4. Other procedural issues

Early dismissal mechanism

1. The Working Group recalled its discussion of concerns stemming from the lack of an early dismissal mechanism to deal with unfounded claims – that is, unmeritorious, frivolous and abusive claims (see para. 39 of A/CN.9/930). The importance of those concerns from a legitimacy perspective was highlighted. Accordingly, it was agreed that there was merit in considering the possible provision of an early dismissal mechanism in ISDS.

2. In that context, it was also noted that such consideration should take into account existing mechanisms that had been developed by States (as well as in the ICSID Arbitration Rules) to provide for early dismissal and that the focus of the work should be on addressing circumstances where such mechanisms were not yet in place. It was added that other issues should be borne in mind, including possible barriers to access to ISDS (see para. 59 of A/CN.9/930), which might increase the risk of unfounded claims. It was suggested that claims by shell companies, other abusive procedures and inflated or unsubstantiated claims, which might not be considered unfounded claims per se but had the potential to increase duration and costs, should also be brought into consideration at a later stage.

Counterclaims

3. The Working Group undertook a consideration of the question of the limited ability of respondent States to make counterclaims in ISDS. Noting that that issue was closely related to the substantive obligations in investment treaties, a suggestion was made that the Working Group should not address the topic, as it had decided that its work should focus on the procedural aspects of dispute settlement rather than on the substantive provisions in investment treaties (see para. 20 of A/CN.9/930).

4. It was added that provisions permitting counterclaims were provided for in recent investment treaties. Certain arbitration rules, such as Rule 40 of the ICSID Arbitration Rules on ancillary claims, also provided for such a possibility. It was underlined that the main issue arose from the fact that investment treaties were generally formulated to provide protection to investors. As the latter had limited reciprocal obligations, the respondent States did not have a basis to bring a counterclaim. It was further mentioned that the basis for counterclaims might be and were often included in investment contracts, which then raised other practical difficulties not only with respect to the jurisdiction of the forum but also to the applicable law (public international law/domestic law). A cautious approach was suggested, given that there might be drawbacks in undertaking work in that area.

5. A different view was that providing a mechanism for States to raise counterclaims was an important aspect of ensuring an appropriate balance between respondent States and claimant investors as well as for promoting procedural

efficiency, fairness and the rule of law. It was mentioned that allowing States to raise counterclaims could eliminate parallel proceedings and thus might have a positive impact on duration and costs as well as on a number of other procedural issues, including third-party funding.

6. While an approach taken by some arbitral tribunals happened to accept jurisdiction to address counterclaims in reliance on substantive obligations in investment treaties, it was reiterated that the nature of the substantive obligations themselves was not the focus of the Working Group. It was noted that there was a distinction between substantive obligations provided for in investment treaties and the dispute settlement mechanisms used to enforce those obligations.

7. After discussion, the general understanding was that any work by the Working Group would not foreclose consideration of the possibility that a State might bring a counterclaim where there was a legal basis (or an underlying provision) for so doing.

Account to be taken of ongoing reforms

8. It was widely felt that any reform of ISDS procedure should take into account ongoing States' reforms of the underlying treaties. Accordingly, it was suggested that provisions in more recent treaties on procedural matters in dispute settlement might inform the future deliberations of the Working Group. Such procedural matters, it was added, sought to address some concerns discussed earlier in the session. Indeed, more recent treaty provisions also included procedures to address subject-matter specific claims, and the relief that arbitral tribunals could grant.

5. Outcomes: coherence and consistency

9. The Working Group undertook its consideration of coherence and consistency in ISDS outcomes, based on document A/CN.9/WG.III/WP.142, paragraphs 31 to 38.

10. At the outset of the deliberations, it was noted that a coherent system would ensure that its components were logically related with no contradictions and that a consistent system would ensure that identical or similar situations were treated in the same manner. In that context, a distinction was made between circumstances in which inconsistent interpretations might be justified due to, for example, variations in the language of the investment treaties and circumstances in which such inconsistencies would not be justified, as the same measure and the same underlying treaty provision were being addressed. Similarly, the need to distinguish between achieving consistency of interpretation within the same investment treaty and consistency of interpretation across investment treaties was highlighted.

11. Acknowledging the importance of ensuring a coherent and consistent ISDS regime as described in paragraph 31 of A/CN.9/WG.III/WP.142, it was said that such a regime would support the rule of law, enhance confidence in the stability of the investment environment and further bring legitimacy to the regime. It was also said that inconsistency and lack of coherence, on the other hand, could negatively affect the reliability, effectiveness and predictability of the ISDS regime and, in the longer term, its credibility and legitimacy. It was mentioned that criticism of a lack of consistency and coherence was one of the reasons behind the Commission's decision to embark on work on possible ISDS reform. It was underlined that consistency was a crucial element of the rule of law and would contribute to the development of investment law. However, it was also noted that consistency and coherence were not objectives in themselves and extreme caution should be taken in trying to achieve uniform interpretation of provisions across the wide range of investment treaties.

12. Yet another view was that the discussions should fully take into account the historical background of ISDS as an effort to provide investors a neutral mechanism to resolve their disputes with States.

13. The fragmented nature of the underlying investment treaties, as well as the ad hoc nature of arbitration, in which individual tribunals were tasked with interpreting investment treaties, were mentioned as contributing to a lack of consistency and predictability in outcomes. It was further said that international rules on treaty

interpretation and customary international law were not always consistently applied by ad hoc tribunals.

14. It was added that the long-term nature of investment treaties was such that multiple disputes might be expected to arise under them. Therefore, ensuring consistent interpretation of the treaty provisions would enhance the stability of the overall investment framework. It was further mentioned that many treaties contained similar provisions on investment protection (such as fair and equitable treatment, the most favoured nation obligation, the umbrella clause and provisions on compensation for expropriation). It was reported that, in the experience of some States that had concluded a number of investment treaties with similar provisions, those investment treaties had been interpreted differently by tribunals, including in an instance of concurrent proceedings in which the facts, parties, treaty provisions and applicable arbitration rules were identical.

15. It was said that predictability of treaty interpretation was also critical to allow States to understand whether their actions, such as possible future legislative or regulatory activities, might breach their obligations, and to set their investment policies. Predictability would also allow investors to assess whether certain treatment was in accordance with treaty obligations. It was further said that the existing lack of consistency imposed significant costs because of the consequent lack of predictability, as each party could often point to differing interpretations from other cases in support of its arguments. Interpretation of certain standards in investment treaties by tribunals was further said to be important for States when negotiating their treaties, as many elements of interpretation could be drawn from disputes under different treaties.

16. It was said that other solutions that had been tried, such as seeking to address concerns about consistency through case law analysis, following quasi precedent, and through references in awards to other decisions, had not proved sufficient. Continuing uncertainties in the interpretation of key notions, such as the definition of an investment and whether investments were required to be made in or for the benefit of the host country, were cited in that regard. Consequently, it was suggested that other mechanisms were needed.

17. A different view was that the lack of coherence and consistency was a logical result of the fragmentation of existing underlying investment treaties and that seeking to achieve coherence and consistency might not be feasible nor desirable considering that the underlying investment treaty regime itself was not uniform. In that context, the possible drawbacks of a consistent and coherent regime based on unified standards of protection were mentioned.

18. In that regard, the reasons for the development of a non-uniform regime were highlighted, noting that the investment treaty regime had been developed taking into consideration elements of foreign policy, economic and trade policy as well as development strategies. It was emphasized that each investment treaty was the result of negotiation among States, with particular State interests and needs in mind and, in some cases, taking into account the interests of a particular region.

19. It was said that varied treaty practice with a wide range of differing investor protection standards as well as ISDS provisions were natural results of that process. It was noted that such divergence was a reflection of the different approaches to and peculiarities of investment protection, which were deliberate in nature and should not be overridden in the pursuit of consistency and predictability.

20. With regard to the interpretation of same or similar provisions in different investment treaties, it was recalled that, though not in the context of ISDS, certain international judicial bodies had stated in their decisions that the mere fact that provisions of a treaty were identical or similar to those of another treaty did not necessarily mean that they should be interpreted identically. From this perspective, the different interpretations by ad hoc tribunals could also be considered as not indicating a lack of consistency.

21. It was also argued that a lack of consistency and coherence as well as fragmentation might be perceptions based on anecdotal evidence. For example,

different factual situations might lead to different interpretations of the same treaty provision. It was added that there was a need for more experience sharing among States on inconsistent cases and any negative impact. Furthermore, it was stated that experience showed that domestic courts as well as international judicial bodies, permanent in nature, with an appeal mechanism and bound by precedent, had reached inconsistent decisions.

22. During the deliberations, reference was made to articles 31 and 32 of the Vienna Convention on the Law of Treaties, which provided for general and supplementary rule of interpretation of treaties respectively. It was highlighted that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Therefore, it was said that articles 31 and 32 provided a certain latitude to tribunals to interpret the same provisions in a number of investment treaties differently according to the intention of the parties to such treaties.

23. In the context of discussions of the issue of consistency and coherence, several possibilities for States to tackle the issues through provisions in their investment treaties were mentioned. Examples included clarity in substantive protection standards and in procedural provisions, the inclusion of detailed and perhaps mandatory guidance for arbitral tribunals (for example, binding interpretation) and other procedural tools (such as allowing submissions from non-disputing treaty parties). It was added that consistency in States' instructions to their own legal counsel with respect to their submissions would be critical. As a further measure to achieve consistency and coherence the possibility of issuing joint interpretations by treaty parties to be taken into account by the tribunal was mentioned.

24. In response, it was said that the above-mentioned measures might not be sufficient to provide a comprehensive solution for existing (as opposed to future) treaties. It was added that joint interpretations were rarely used in practice, as once treaties had been concluded, treaty parties might find it difficult to agree on the interpretations. It was therefore stated that a systemic solution was needed, to address both lack of consistency and coherence, which might include a system of precedent. Such a system might also promote the accountability of adjudicators. Possible systemic solutions might include an appellate mechanism or a multilateral court. In that context, the example of the Dispute Settlement Body of the World Trade Organization system, which combined an ad hoc panel and a standing appellate body was given.

6. Concluding remarks on coherence and consistency

25. Another view was that desirable consistency in ISDS should be clarified, as divergences in outcomes might be derived from legitimate distinctions, themselves arising from different facts before the tribunals and the arguments presented by counsel, as well as from differences in the underlying treaty provisions. Second, clarity was also needed on the extent to which undesirable inconsistency in ISDS raised concerns.

26. With respect to the first aspect of the question, there was discussion of two types of potential inconsistency, inconsistency in the interpretation of a single treaty, and inconsistency in the interpretation of an identical or similar provision in different treaties. There was broad agreement that inconsistent interpretations of a provision in a single treaty could be a concern.

27. On the second issue, it was pointed out that divergent outcomes did not raise concerns if they were appropriately based on the proper interpretation of the language in those treaties. However, it was noted that differences in treaty language had been exaggerated and that the vast majority of investment treaties contained very similar if not identical language, and examples were provided to the Working Group.

28. It was also stated that rigid adherence to principle of consistency between arbitral decisions could be dangerous in that it could create a jurisprudence constante that was itself inconsistent with the intentions of the parties. A further view was that consistency did not necessarily ensure accuracy.

29. It was said that the more appropriate consideration was whether decisions were correctly interpreting treaties in line with the rules of public international law, rather than whether they were ensuring consistency with decisions by other tribunals. It was added that the goal of consistency should not be to ensure that same or similar provisions were interpreted identically in all circumstances but to ensure that unjustifiable inconsistencies did not arise. One cause of inconsistency, it was added, was treaty language that was vague or in need of clarification.

30. It was also noted that there had been inconsistent decisions with respect to general rules of customary international law involving the state of necessity/emergency, the law of attribution, and the legal principles regarding damages.

31. It was suggested that inconsistencies in ISDS arose not from legitimate distinctions but rather from the nature of the system itself, and in some cases from the arbitrators.

32. It was also said that efforts of tribunals to react to concerns and to ensure consistency had not proved successful, and that revising all existing treaties would not be a feasible approach.

33. It was said that consistency and coherence in a legal system were in the interests of all stakeholders, and that a dispute settlement mechanism that issued unjustified conflicting decisions would be unpredictable, and that an unpredictable system would lack credibility and legitimacy.

34. In that light, some States suggested that the Working Group might consider, at the appropriate time, potential solutions to include some type of hierarchical system, an appellate body, an investment court, and a mechanism through which tribunals could direct questions to the treaty partners prior to the issuance of awards. Other States questioned whether such a formal structure was necessary and whether it would provide the appropriate remedy.

35. The Working Group recalled that its deliberations at the 34th session on these issues were to be continued at its 35th session.

B. Note by the Secretariat on possible reform of investor-State dispute settlement (ISDS)

(A/CN.9/WG.III/WP.142)

[Original: English]

Contents

I. Introduction

1. At its fiftieth session, in 2017, the Commission had before it notes by the Secretariat on possible future work on concurrent proceedings in international arbitration (A/CN.9/915), on ethics in international arbitration (A/CN.9/916), and on possible reform of investor-State dispute settlement (ISDS) (A/CN.9/917), together with a compilation of comments by States and international organizations (A/CN.9/918 and addenda). The Commission also had before it a research paper by the Centre for International Dispute Settlement (CIDS) on whether the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration could serve as a model for further reforms (the "CIDS report").[1]

2. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission entrusted Working Group III with a broad mandate to work on the possible reform of ISDS.[2]

3. In line with the UNCITRAL process, Working Group III, in discharging its mandate, was requested to ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be Government-led with high-level input from all Governments, consensus-based and fully transparent. The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations

[1] Geneva Centre for International Dispute Settlement (CIDS), "Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? – Analysis and roadmap" (2016), available on the UNCITRAL website at http://www.uncitral.org/uncitral/en/commission/sessions/50th.html.

[2] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 263 and 264.

and with a view to allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).[3]

4. In order to assist the Working Group in pursuing this mandate, this Note outlines certain characteristics of the ISDS regime and recent trends, and continues with a summary of issues and concerns expressed regarding ISDS. This Note was prepared with reference to a broad range of published information on the topic,[4] and does not seek to express a view on the desirability of reforms, which is a matter for the Working Group to consider. This Note also refers to documents mentioned in paragraph 2 above, which provided an outline of issues that the Working Group might wish to consider.

II. Characteristics of the ISDS regime, trends and statistics

A. Characteristics of the ISDS regime

5. By way of background, the current ISDS regime was developed to allow a foreign national (whether an individual or a company) to bring a claim directly against a sovereign State where its investment was made, in a significant break from traditional mechanisms which essentially relied on diplomatic means of protection to resolve disputes relating to investment. Importantly, the ISDS regime was intended to "de-politicize" investment disputes and effectively remove the risk of such disputes escalating into inter-State conflicts (see document A/CN.9/917, paras. 9 and 10).[5]

6. Investment treaties,[6] conceived as a means to enhance confidence in the stability of the investment environment, provide substantive guarantees to foreign investors and their investments in the form of enforceable obligations placed upon States, as States undertake to respect certain standards of investment protection (such as fair and equitable treatment, protection from expropriation, and non-discrimination). Although the specific terms vary, investment treaties follow a similar structure and contain a number of core principles. These broad similarities among investment treaties make it possible to speak of a "regime" of international investment protection.[7]

7. The Working Group may wish to note that a large number of investors' claims seek to enforce these protections under investment treaties.[8] While ISDS provisions in investment treaties vary, they normally provide for dispute settlement mechanisms based on arbitration and the following features: (i) the claimant-investor may bring a claim directly against the host State; (ii) the dispute is resolved by an arbitral tribunal constituted ad hoc for that particular dispute; and (iii) both disputing parties,

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[3] Ibid.

[4] This Note takes account of information published by the United Nations Conference on Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD), the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), the Centre for International Dispute Settlement (CIDS), a joint research centre of the Graduate Institute of International and Development Studies and the University of Geneva Law School, and the E15 Initiative on Strengthening the Global Trade and Investment System for Sustainable Development, jointly undertaken by the International Centre for Trade and Sustainable Development (ICTSD) and the World Economic Forum (WEF).

[5] See also CIDS report, paras. 8–14.

[6] The term "investment treaty" in this Note covers broadly any bilateral or multilateral treaty that contains provisions on the protection of investments or investors, including any treaty commonly referred to as a free trade agreement, economic integration agreement, or trade and investment framework or cooperation agreement.

[7] See CIDS report, para. 5.

[8] According to ICSID, as of 30 June 2017, 16.8 per cent of the cases originated from investment contracts, 9.6 per cent from national investment laws and the rest from investment treaties (see ICSID Caseload – Statistics (Issue 2017-2), p. 10, available at https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx). According to the PCA, out of the 148 cases for which the PCA provided registry services in 2016 (40 were initiated in 2016), 86 were cases arising under investment treaties and/or national investment laws, 51 were cases arising under contracts involving a State, intergovernmental organization, or other public entity (see PCA Annual Report 2016, p. 8, available at https://pca-cpa.org/wp-content/uploads/sites/175/2017/03/ONLINE-PCA-Annual-Report-2016-28.02.2017.pdf).

including the claimant-investor and the respondent-State, play an important role in the selection of the arbitral tribunal.[9]

B. Trends and statistics

1. Trends and statistics regarding ISDS provisions in investment treaties

8. A 2012 OECD survey of investment treaties showed that 96 per cent contained ISDS provisions allowing foreign investors to raise claims through international arbitration and, to a lesser degree, in domestic courts.[10] Indeed, only 7 per cent of the investment treaties surveyed did not provide for arbitration. However, they are commonly silent or contained little guidance on the conduct of ISDS proceedings, relying mainly on established sets of arbitration rules.[11]

9. Historically, such investment treaties have also tended to contain broad formulations on substantive investment protection standards, opening the door to a wide range of different interpretations and to uncertainty regarding the extent of protections in practice.[12]

10. More recently, States have made efforts to adjust their investment treaties by drafting more precise substantive investment protection standards, leaving less room for interpretation of those standards in ISDS cases.[13]

11. UNCTAD also reported that recently-concluded investment treaties have reduced the scope of access to ISDS. Some do so by specifying treaty provisions that are subject to ISDS, others by excluding certain policy areas from ISDS, or yet others by restricting the time for submission of a claim. Out of the 18 investment treaties concluded in 2016 and reviewed by UNCTAD, 13 limit access to ISDS.[14]

2. Statistics regarding ISDS cases

12. The Working Group may wish to take note of the following statistics regarding known treaty-based ISDS cases. As of 1 January 2017, there were 767 publicly known treaty-based ISDS cases. 109 States were respondents in one or more known ISDS cases. In 2016, investors initiated 62 ISDS cases against 41 States, which was higher than the 10-year average of 49 cases per year (2006–2015) but lower than 74 cases initiated in 2015. About two thirds of treaty-based ISDS cases in 2016 were brought under bilateral investment treaties, most of them dating back to the 1980s and 1990s. The remaining third were based on other treaties with investment protection. At 29 per cent, the relative share of known ISDS cases in 2016 against developed countries was lower than in 2015 (45 per cent).[15]

13. By the end of 2016, some 495 treaty-based ISDS cases had been concluded. 36 per cent of the cases have been decided in favour of States, 27 per cent in favour of investors, 2 per cent in favour of neither party, 25 per cent settled, and 10 per cent discontinued. Of the cases that ended in favour of a State, about half were dismissed for lack of jurisdiction. Among the cases where a decision was made on the merits,

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[9] CIDS report, paras. 6 and 7.

[10] Gaukrodger, David and Kathryn Gordon, “Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community”, OECD Working Papers on International Investment, 2012/03, p. 64, at http://dx.doi.org/10.1787/5k46b1r85j6f-en.

[11] A/CN.9/918/Add.7, OECD contribution. See also Pohl, Joachim, Kekeletso Mashigo and Alexis Nohen, “Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey”, OECD Working Papers on International Investment, 2012/02 available at https://www.oecd.org/investment/investment-policy/WP-2012_2.pdf.

[12] Ibid.

[13] CIDS report, para. 18.

[14] UNCTAD, World Investor Report 2017 (WIR 2017), p. 120. WIR 2017 reported that 37 new investment treaties were concluded in 2016, bringing the total to 3,324 treaties at the end of 2016 (see also UNCTAD online tool on investment treaties available at http://investmentpolicyhub.unctad.org/IIA). WIR 2017 also noted that 16 investment treaties of the 18 reviewed investment treaties omitted the umbrella clause.

[15] UNCTAD, WIR 2017, pp. 114 to 116.

60 per cent were decided in favour of investors, and 40 per cent in favour of States.[16] In cases decided in favour of investors, successful investor-claimants were awarded on average about 40 per cent of the amounts claimed.[17] The mean amount claimed was $1.4 billion and the median $100 million. The mean amount awarded was $545 million and the median $20 million.[18]

14. In 2016, ISDS cases were initiated mainly in the service sectors involving supply of electricity and gas, construction, as well as information and communication. State measures challenged included alleged direct expropriation of investments, legislative reforms in the renewable energy sector, tax-related measures, concessions, and revocation or denial of licences or permits.[19] The amounts claimed ranged from $10 million to $16.5 billion.[20]

3. Developments regarding arbitration rules

15. The Working Group may wish to note certain recent developments regarding arbitration rules used in the context of ISDS.

16. In 2006, the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) were amended to include provisions on transparency, expedited procedures for making preliminary objections to non-meritorious claims and provisional measures.[21] In October 2016, the Secretariat of ICSID initiated a consultation with its member States to identify areas where further reform of the ICSID Rules might be needed, and the consultation was extended to the public in January 2017. The preliminary outcome of the consultations indicated 16 potential areas for amendments, including arbitrator-related issues (appointment, code of conduct, challenge procedure), third-party funding, consolidation of cases, means of communication, preliminary objections proceedings, rules on witnesses, experts and other evidence, provisional measures, time frames and allocation of costs.[22]

17. The UNCITRAL Arbitration Rules were revised in 2010 and 2013. A number of provisions were updated in 2010 with a view to improving procedural efficiency and new provisions on joinder and on interim measures were included. The Permanent Court of Arbitration (PCA), the institutional rules of which are based on the UNCITRAL Arbitration Rules, has implemented similar reforms.[23]

18. The adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency") resulted in an additional revision to the UNCITRAL Arbitration Rules in 2013, with a new article 1(4) providing for the application of the Rules on Transparency. The Rules on Transparency, which came into effect on 1 April 2014, comprise a set of procedural rules that provides for transparency, and for accessibility by the public to treaty-based

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[16] Ibid., p. 117.
[17] Ibid., p. 118.
[18] Ibid.
[19] Ibid., p. 116.
[20] Ibid., p. 117.
[21] See ICSID, Amendment of ICSID's Rules and Regulations available at https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx.
[22] Information about the reform process is available at https://icsid.worldbank.org/en/Documents/about/List%20of%20Topics%20for%20Potential%20ICSID%20Rule%20Amendment-ENG.pdf.
[23] The PCA Arbitration Rules are available at https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/. Rules of other arbitral institutions administering ISDS cases have also undergone reforms to better address challenges posed by ISDS cases and improve procedural efficiency. See, for instance, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) (available at http://www.sccinstitute.com/dispute-resolution/rules/, information about the application of the Rules on Transparency in conjunction with the SCC Rules is available at http://www.sccinstitute.com/about-the-scc/news/2015/uncitral-rules-on-transparency-at-the-scc/); the Cairo Regional Centre for International Commercial Arbitration (CRCICA) (available at http://crcica.org/Arbitration.aspx); the International Chamber of Commerce (ICC) (Report of the ICC Commission on Arbitration on States, States Entities and ICC Arbitration available at https://iccwbo.org/publication/icc-arbitration-commission-report-on-arbitration-involving-states-and-state-entities-under-the-icc-rules-of-arbitration/); and the Singapore International Arbitration Centre (SIAC) (Investment Arbitration Rules of the SIAC (2017) available at http://www.siac.org.sg/our-rules/rules/siac-ia-rules-2017).

investor-State arbitration. The Rules on Transparency have been incorporated in most investment treaties concluded since their coming into force. In addition, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency"), which opened for signature in March 2015 and will enter into force in October 2017, provides a mechanism for States to consent to the application of the Rules on Transparency to investment treaties concluded before the coming into force of these Rules in April 2014.[24]

III. Concerns expressed regarding ISDS

19. This section summarizes some concerns expressed regarding the current ISDS regime for consideration by the Working Group. The treatment is not intended to be exhaustive, but seeks to highlight issues that are often set out or mentioned in commentary on ISDS. In exploring these concerns, the Working Group may wish to expand its consideration of other relevant issues.

A. General remarks

20. Concerns commonly expressed about the existing ISDS regime include (i) inconsistency in arbitral decisions, (ii) limited mechanisms to ensure the correctness of arbitral decisions, (iii) lack of predictability, (iv) appointment of arbitrators by parties ("party-appointment"), (v) the impact of party-appointment on the impartiality and independence of arbitrators, (vi) lack of transparency, and (vii) increasing duration and costs of the procedure. These concerns, further considered below, have been said to undermine the legitimacy of the ISDS regime and its democratic accountability (see document A/CN.9/917, paras. 11–12). These concerns fall within two broad categories: those concerning the arbitral process and outcomes (see section B) and those relating to arbitrators/decision-makers (see section C).

21. In identifying concerns regarding ISDS, the Working Group may wish to consider whether such work (i) should be limited to ISDS under investment treaties, or should encompass all forms of ISDS regardless of the basis upon which cases arise (investment treaty, contract, or otherwise); and (ii) should be limited to arbitration as the most commonly used ISDS mechanism, or should include other types of existing ISDS mechanisms (such as mediation or domestic courts). The Working Group may wish to note that the commentary in this Note is drawn largely from information and comments relating to ISDS under investment treaties and conducted through arbitration. The Working Group may also wish to consider the extent to which the issues identified also apply to the broader ISDS regime noted in points (i) and (ii) in this paragraph.

B. The arbitral process and outcomes

1. Procedural aspects

22. Concerns expressed regarding procedural aspects of ISDS include: (i) lengthy duration and extensive cost of ISDS; (ii) lack of transparency in the proceedings; (iii) lack of an early dismissal mechanism to address unfounded claims; and (iv) lack of a mechanism to address counter-claims by respondent States.

[24] The status of the Mauritius Convention and the Rules on Transparency is available respectively at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_ Convention_status.html and http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Rules_status.html.

(a) Duration and cost

23. Arbitration was conceived, among other things, as a relatively speedy and low-cost method of dispute resolution. However, concerns have been expressed that ISDS cases have involved increasingly high costs and lengthy proceedings.[25]

24. The costs and length of proceedings may result, at least to some degree, from the complexity of the cases themselves, the fragmented nature of investor protection provisions, the open-ended nature of many legal issues in dispute, and the consequent need to study numerous previous arbitral awards and other legal sources.

25. Certain respondent States may struggle to meet the significant resources required for defending an ISDS case. States, in general, may be criticized for the use of public funds in defending ISDS cases, particularly because arbitral tribunals have generally not ordered a losing claimant investor to pay the winning State's costs.

(b) Transparency

26. The concern over lack of transparency or justice being administered "behind closed doors" remains an important criticism levied against the current ISDS regime.[26]

27. On that point, it should be noted that transparency in, and public access to, ISDS have been the focus of some recent reforms, for example, the 2006 transparency-related amendments to ICSID Rules and the 2013 adoption of the Rules on Transparency (see para. 18 above). It is expected that such reform efforts will allow for a better understanding of the interpretations given by arbitral tribunals to investment protection standards. This, in turn, may lead to increased consistency and a meaningful opportunity for public participation in the proceedings possibly enhancing the public understanding of the process.

(c) Other procedural issues

28. The Working Group may wish to consider other procedural issues, including those mentioned in paragraph 22 (iii) and (iv) above.

29. The Working Group may wish to note that arbitral institutions have sought to implement a number of measures to tackle certain procedural issues, in particular to streamline the process. For example, such measures have aimed at addressing frivolous claims where jurisdiction is doubtful and making it possible to reach preliminary decisions with regard to jurisdictional issues and early dismissals of non-meritorious claims. Arbitral institutions have introduced strict timelines and other measures to streamline the procedure. This approach is also reflected in the revised UNCITRAL Arbitration Rules 2010/2013.

30. When assessing the procedural issues of ISDS, the Working Group may wish to bear in mind that arbitration offers the flexibility to adjust the proceedings to meet the needs of the parties, to the extent that the contractual or other documents governing their relationship so permit.

2. Outcomes: coherence and consistency

(a) Investment protection standards

31. A coherent system ensures that its components are logically related with no contradictions. A consistent system would ensure that identical or similar situations

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[25] Since 2010, ICSID has published details of the average duration of arbitrations in its annual reports, a period typically "between three to four years". OECD reported that the largest cost component of costs is the fees and expenses incurred by each party for its legal counsel and experts, which are estimated to average about 82 per cent of the total costs. Arbitrator fees average about 16 per cent of total costs. And institutional costs payable to organizations that administer the arbitration and provide secretariat services (such as ICSID, PCA, and SCC) amount to about 2 per cent of total costs.

[26] UNCTAD, Transparency in IIAS: A Sequel, UNCTAD Series on Issues in International Investment Agreements (2012), p. 36, and UNCTAD, World Investment Report 2015, p. 148.

are treated in the same manner. An ISDS regime that is coherent and consistent could support the rule of law and enhance confidence in the stability of the investment environment. Inconsistency and lack of coherence, on the other hand, could negatively affect the reliability, effectiveness and predictability of the ISDS regime and, in the long run, its credibility (see document A/CN.9/915).[27]

32. This lack of coherence and consistency in the ISDS regime may arise from the fragmented nature of existing underlying investment treaties. First, the investor protection standards in these treaties vary widely; some are vaguely or broadly formulated, leaving arbitrators with wide latitude for interpretation, though recent treaties were formulated more precisely (see para. 9 above).

33. Second, ISDS provisions in investment treaties also vary. Some treaties provide for ISDS in any dispute arising from the investment concerned. Others restrict ISDS to claims arising from breach of certain treaty provisions, or to claims relating to expropriations. Recent trends may indicate that limiting ISDS to some extent is becoming more common (see para. 9 above).

34. Third, access to arbitration is often subject to a variety of conditions and procedural requirements, as reflected in treaty provisions as well as the detailed arbitration rules of the different arbitration institutions.

(b) Awards in ISDS cases

35. Even when ISDS cases relate to a single measure by a State or a similar fact pattern or are based on identical or similar treaty provisions, divergent outcomes have been observed.[28] This situation may be attributable to the fact that ISDS cases are heard by arbitral tribunals constituted ad hoc and that arbitrators have to interpret vague or broad investor protection provisions.

36. The issue of conflicting outcomes becomes more acute in situations of concurrent or multiple proceedings, which most commonly arise where a measure by a State has an impact on a number of investors and separate ad hoc tribunals are established to hear each claim (see document A/CN.9/915, paras. 5 and 6). As indicated in document A/CN.9/915, a more predictable framework for coordinating concurrent proceedings could be sought, which would be in the interest of both investors and States.

37. As there is no doctrine of stare decisis in arbitration, on many occasions, arbitral tribunals have emphasized that they are not bound by previous decisions of other arbitral tribunals. At the same time, tribunals have also taken due account of previous awards; references to other awards can be found in some arbitral decisions. Nonetheless, this has not always secured consistency among the awards themselves.

38. In this context, the Working Group may wish to consider whether the limited corrective mechanisms (also referred to as control or review mechanisms) currently available are sufficient to ensure coherence and consistency of awards (see paras. 39–40 below).

3. Finality of the award and review mechanisms

39. Arbitral awards are final and are subject to review only in set-aside or enforcement procedures in domestic courts and in the case of ICSID awards, in annulment proceedings.[29] While such review mechanisms may assist in achieving

[27] CIDS report, para. 22.

[28] CIDS report, para. 22.

[29] The domestic law of the seat of arbitration governs the setting aside of an arbitral award. National laws on setting aside have tended to be deferential towards arbitral awards, in keeping with the goal of facilitating the parties' choice of arbitration. The conditions for set-aside under article 34 of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, largely mirror the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The first four grounds for setting aside an award must be raised by the party seeking to set-aside the award, while the latter two can be decided of the court ex officio. The first four reflect concerns about due process and the scope of consent given by the parties who agreed to the arbitration, while the

some degree of coherence and consistency of awards, their main objective is to control the integrity of awards rendered by the arbitral tribunals. Moreover, the jurisdiction of ICSID annulment committees and of domestic courts at the place of arbitration or where enforcement is sought (in case of non-ICSID awards) to review the awards is often restricted.[30]

40. While the finality of an award is also considered as an element contributing to the efficiency of arbitration, the absence of an appeals mechanism means that incorrect decisions cannot be overturned and so legal correctness cannot be ensured.[31] In addition, jurisprudence with regard to ISDS cases under different investment treaties with the same or substantially similar investor protection standards is unlikely to be harmonized.[32]

41. The Working Group may consider that the objective of possible reform to promote coherence and consistency would be to enhance the predictability of ISDS cases rather than to seek uniformity. Uniformity in ISDS decisions may not be achievable, at least while the substantive investment protection standards continue to be anchored in different treaties. Further, the circumstances of the cases will continue to vary.

C. Arbitrators/decision-makers

1. Appointment and ethical requirements

42. In most ISDS cases, arbitral tribunals are composed of three arbitrators. Applicable treaty provisions or arbitration rules address the composition of the arbitral tribunal, providing the right of the disputing parties to appoint one arbitrator each, though the methods to designate the chair of the arbitral tribunal may vary.

43. Party-appointment is an important element of the arbitral process, often seen as conferring legitimacy to the arbitration procedure. It is meant to ensure appointment of individuals with experience, reputation and competence as well as to guarantee neutrality, all of which enhance parties' confidence in the process.

44. Party-appointment of arbitrators has, however, been one of the focuses of criticism expressed about ISDS, which relate to the following aspects:

- Lack of sufficient guarantee of independence and impartiality on the part of the individual arbitrators;[33]
- Limited number of individuals repeatedly appointed as arbitrators in ISDS cases;
- Absence of transparency in the appointment process;
- Some individuals act as counsel and as arbitrators in different ISDS proceedings, with the possibility of ensuing conflicts of interest and/or so-called issue conflicts;[34]

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second two reflect concerns about public policy and arbitrability in the enforcing State. The drafters of the ICSID Convention sought to create an a-national, or de-localized, process that would be removed from the control of any national courts. Article 52 of the ICSID Convention provides as follows: "(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based." The choice of an annulment, rather than an appellate, mechanism reflects the preference for the finality of awards. The ad hoc committee – i.e. the panel that oversees an annulment proceeding can either annul the award (or a part thereof), or leave it intact. It cannot substitute its judgment for that of the original tribunal.

[30] CIDS report, para. 22.

[31] Ibid. See also document A/CN.9/881, paras. 18–22.

[32] Ibid., paras. 20–24.

[33] See CIDS report, para. 20.

[34] Ibid., para. 21; see also document A/CN.9/916, paras. 16 and 23.

- Perception that arbitrators are less cognizant of public interest concerns than judges holding a public office;[35] and
- Development of third-party funding giving rise to ethical issues (such as possible conflicts of interest between the arbitrators and the funders and confidentiality duties of the funder), as well as procedural concerns (such as the possible control or influence of the funder on the arbitration process, and the allocation of costs).

D. Perceptions of States, investors and the public

45. Opinions diverge on the merits and demerits of the foreign investment protection regime and in particular, investor-State arbitration.[36] The debate has become largely public, with criticisms in leading media focusing on the use of arbitration to resolve disputes between a State and a foreign investor as opposed to the use of domestic adjudicatory systems, party-appointment, the application of international law to protect investments as opposed to domestic law, and the asymmetry of ISDS which is available only to foreign investors.

46. Awards in investment arbitration often have important implications for the general public and therefore attract regular media attention, particularly where large or controversial amounts are awarded to foreign investors (though the statistics noted in para. 13 above indicate that the mean award is significantly below the sums claimed). While ISDS may have depoliticized conflicts arising between investors and States from escalating into inter-State conflicts, it has nowadays become a political concern in a growing number of States.

47. Much of the criticism of ISDS has its roots in concerns about the democratic accountability and legitimacy of the dispute resolution process. Critics do not accept or recognize the power of individual arbitrators to decide on an ISDS case. Further, party-appointment may be contrasted unfavourably with the appointment of judges in domestic courts through processes designed to ensure integrity in upholding the rule of law and to provide public scrutiny of judicial decision-making. Finally, while States themselves have established and consented to the current ISDS regime and confirmed its legitimacy under international law, this legitimacy as such may not be accepted by their constituencies.[37]

IV. Desirability of ISDS reform

48. In light of the matters set out above, the Working Group may wish to consider whether reforms to the ISDS regime are desirable.[38]

49. If it wishes to consider to pursue reforms to the ISDS regime, the Working Group may wish to examine, among other questions:

- What would be the core policy objectives of any reforms to the ISDS regime;
- Whether reforms to address specific issues (for instance, increased length and cost, lack of consistency in arbitral awards, lack of a review mechanism, party-appointment and consequential issue relating to arbitrators' independence and impartiality) might sufficiently meet those policy objectives; and
- Whether such proposed reforms would be broad enough to be applicable to the wide range of investment treaties and proceedings under various arbitration rules.[39]

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[35] Ibid.
[36] For a summary of arguments of the proponents and opponents, see CIDS report, paras. 8–23.
[37] Ibid., para. 23.
[38] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), para. 264.
[39] See document A/CN.9/917, paras. 17–66.

50. The Working Group may wish to note that options for possible reform range from relatively minor adjustments to the existing ISDS regime to institutionalizing that regime further through the creation of a permanent adjudicatory body (such as a permanent investment court or dispute settlement body).

51. Possible adjustments to the existing ISDS regime may include:

- Alternative methods for appointing arbitrators (see document A/CN.9/917, paras. 26 and 27), such as streamlining the appointment process and designing a system with a pool of members that would form a new adjudicative body. The Working Group may wish to note that a forthcoming supplemental report by CIDS will address the matter of appointment of decision-makers (arbitrators/adjudicators) (see also document A/CN.9/917, paras. 33–39);
- Strengthening (or establishing) ethical requirements in the existing ISDS regime, for example by introducing a code of conduct. Such a code of conduct, could build on existing examples, or a code could be developed and tailored specifically for the ISDS regime (see document A/CN.9/916, paras. 19–36) (see document A/CN.9/916);[40]
- Formulating measures to address concurrent proceedings (see document A/CN.9/915);
- The introduction of a doctrine of precedent (see document A/CN.9/917);[41] and
- The creation of a permanent or stand-alone appellate body (see document A/CN.9/917).

52. A more substantive reform would be the creation of a permanent dispute settlement body, such as an international investment tribunal, whose members would be tasked with resolving ISDS cases that fall under its jurisdiction.[42]

Sequencing and ISDS reform

53. In light of the above, the Working Group may wish to commence its work by focusing on ISDS reform. However, it may also wish to consider observations to the effect that ISDS reform should be complemented with reforms to address coherence and consistency in the substantive rules of investment protection. In this regard, the Working Group may wish to note that consideration of the substantive investment protection standards may entail a more comprehensive process and may raise questions on whether and how to harmonize such standards.[43] As such, these issues might be addressed subsequently.

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[40] Local bar associations, arbitral institutions and international organizations (among others) have developed a variety of texts on ethics, which can be found in arbitration rules, in guidance texts and, more recently, in investment treaties as a complement to ISDS provisions. Such codes or standards can include procedures to identify real or perceived conflicts of interest and steps to mitigate them. Some standards have a binding effect, whereas others are meant to provide general guidance. Court decisions on challenges to arbitrators as well as on setting aside or enforcement of arbitral awards provide the parties with an opportunity to address arbitrators' conduct (for the existing legal framework on ethics, see document A/CN.9/916, paras. 4–17).

[41] The Working Group may also wish to refer to document A/CN.9/915, which outlines various other mechanisms that limit inconsistent decisions in concurrent proceedings, such as providing guidance to arbitral tribunals on stay of proceedings, on ways to address abuse of process, and on possible information-sharing. The document also refers to different types of treaty provisions available to address concurrent proceedings.

[42] See document A/CN.9/917, paras. 29–57.

[43] See document A/CN.9/917, para. 14.

C. Possible reform of investor-State dispute settlement (ISDS): submissions from International Intergovernmental Organizations

(A/CN.9/WG.III/WP.143)

[Original: English]

Contents

Submissions from International Intergovernmental Organizations

This note reproduces submissions received by the International Centre for Settlement of Investment Disputes (ISCID) and the Permanent Court of Arbitration (PCA) in preparation for the thirty-fourth session of Working Group III. These submissions are reproduced in this note in the form in which they were received by the Secretariat.

I. International Centre for Settlement of Investment Disputes (ICSID)

[Original: English]
[Date: 4 October 2017]

Update on the ICSID Rules Amendment Process

1. Introduction

1. ICSID has administered more than 70 per cent of all known ISDS cases. It is the only institution which can administer cases under the ICSID Convention and the Additional Facility Rules. In addition, ICSID also administers UNCITRAL and ad hoc cases brought under investment treaties. ICSID also offers its services as a secretariat under investment treaties. For example, ICSID is the Secretariat of the first instance tribunal under the CETA. As of September 30, 2017, ICSID had registered 638 cases under the ICSID Convention and Additional Facility Rules and has administered 54 UNCITRAL cases.[1]

2. ICSID is in the process of amending its Rules and Regulations. The launch of this process was announced in October 2016. Amendments to the ICSID Rules are ultimately adopted by the ICSID Administrative Council and must be approved by two thirds of the members of the Administrative Council. The preparation of the amendments for adoption by the Administrative Council is done in consultation with all ICSID Member States. There are currently 153 Contracting States, hence rule amendments (currently) must be approved by 102 or more members.

3. The ICSID Convention Rules and Regulations were adopted in 1967, and the Additional Facility Rules were adopted in 1978. To date, the rules have been amended three times: in 1984, 2003 and 2006. The first two amendment processes made relatively modest changes. The third amendment process took place from 2004 to 2006, and brought about some innovative changes that came into effect on April 10, 2006. Further background on these amendments can be found on the ICSID

[1] For more information about ICSID cases and statistics, please visit the ICSID website at https://icsid.worldbank.org/en/pages/default.aspx and consult its statistics at https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx.

website at https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx.

4. ICSID launched the current amendment process in October 2016 and invited Member States to suggest topics that merited consideration. In January 2017, ICSID issued a similar invitation to the public inviting suggestions for rule amendments. Submissions received from the public have been posted to the ICSID web page on amendment. The Secretariat has reviewed all comments received and is preparing working papers to inform further discussions.

2. Objectives

5. There are multiple objectives for this amendment process. These include:

- Continued modernization of ICSID procedure – the accretion of case experience and current discussion among States and the public have suggested some new provisions that might further improve the investor-State arbitration process. For example, there have been suggestions for greater elaboration of ethical obligations, consolidation of cases, criteria for bifurcation of cases, transparency, and security for awards. These types of issues will be reflected in the proposals for discussion.
- Reduce time and cost – a predominant concern is the cost of arbitration, which is directly affected by the length of proceedings. ICSID has received suggestions to add a general duty to act expeditiously and several specific rule changes to reduce the duration of cases.
- Simplification of the rules – numerous drafting changes have been proposed to streamline the rules and adopt gender-neutral language. The proposals also seek to correct any discrepancies between the English, French and Spanish versions of the rules, as they are equally authentic in the three official languages of the Centre.
- Go green – reducing the paper burden of proceedings will reduce time and cost and respect environmental concerns. Proposals for increased use of electronic transmission, fewer copies, and the like promote these goals.

6. An overarching objective for these proposals is to retain the equilibrium between disputing parties so that they are equally effective for all participants.

3. List of topics for potential ICSID Rules amendment

7. There are multiple topics that were raised by Member States and the Secretariat. These include:

- Review procedure for appointment and disqualification of arbitrators;
- Explore feasibility of code of conduct for arbitrators;
- Clarify rules on preliminary objections and bifurcation;
- Explore possible provisions on consolidation of proceedings and parallel proceedings;
- Modernize institution rules, means of communication and filing of briefs and supporting documentation, and general functions of the secretariat;
- Modernize and simplify rules concerning the first session, procedural consultation and pre-hearing conference;
- Modernize rules on witnesses and experts and other evidence;
- Explore possible provisions for suspension of proceedings and clarify rules on discontinuance when parties fail to act;
- Reflect best practices for preparation of award, separate and dissenting opinions;

- Explore presumption in favour of allocating costs to the prevailing party, possible provisions on security for costs and security for stay of enforcement of awards;
- Review provisions on provisional measures;
- Clarify and streamline procedure in annulment proceedings;
- Review and modernize provisions on costs, fees and payment of advances, and discontinuance for failure to pay advances;
- Explore possible provisions on transparency, clarify rules on non-disputing party participation;
- Improve time and cost efficiency and explore feasibility of guide for efficient conduct of process;
- Explore possible provisions on third-party funding;
- Streamline Additional Facility Rules for non-ICSID Convention cases.

4. Next steps

8. ICSID will distribute the working papers to Member States and will overview these in a meeting of State experts in Washington, D.C., on 26–27 September 2018. Thereafter, the working papers will be published on the website and ICSID will invite written comment from Member States, the legal profession and any persons interested in the topic. Feedback from the public should be submitted to icsidideas@worldbank.org by December 1, 2018. Between September and December 2018, ICSID will also undertake consultations in each region of its membership to discuss the proposals. The feedback received will be collated in early 2019 and a revised set of proposals will be released. Depending on the extent and nature of the feedback received, ICSID will propose amendments for further consideration and potential adoption by the Administrative Council in 2019 or 2020.

5. Application of the Rules

9. The rules applicable to each case are those in effect on the date on which the parties consented to the conciliation or arbitration, except as the parties otherwise agree (articles 33 and 44 of the ICSID Convention). This means that for cases based on BITs or FTAS where consent is usually given at the time of the request for arbitration, the new version of the Rules would likely apply to cases filed after the amendments are adopted. Hence, the old generation of BITs might lead to the application of the new Rules and could be subject to any new legal mechanism adopted by the Administrative Council.

II. Permanent Court of Arbitration (PCA)

[Original: English]
[Date: 10 October 2017]

1. The Permanent Court of Arbitration (PCA) is an independent intergovernmental organization established in 1899 to facilitate arbitration and other forms of dispute resolution. Having acted as registry in over 170 treaty-based investment arbitrations and numerous arbitrations under public international law, the PCA is pleased to support the discussion of Working Group III at a technical level.

1. The PCA's Docket and Hearing Venues

2. The PCA's recent experience extends to a variety of proceedings with an essential public character, including various types of arbitral proceedings between States and investor-State arbitrations.

3. Currently, the PCA's International Bureau provides registry support in 126 pending international arbitration and conciliation proceedings, involving over 50 different governments or State-controlled entities. Parties to disputes administered

by the PCA consist of various combinations of States, State entities, intergovernmental organizations, and private parties. These disputes range from maritime and boundary disputes under the United Nations Convention on the Law of the Sea and disputes under other bilateral or multilateral treaties, to investor-State disputes under investment treaties, to contract cases involving State entities or intergovernmental organizations. Moreover, the PCA's functions include registry support for alternative forms of dispute resolution (ADR), including mediation and conciliation.

4. In the past year, hearings and tribunal deliberations in PCA proceedings were held at the Peace Palace in the Netherlands and in various other locations, specifically in Canada, Colombia, Denmark, France, Malaysia, Mauritius, Nepal, Poland, New Zealand, Singapore, Switzerland, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The majority of all cases today are in fact heard outside The Hague.

5. To facilitate hearings and meetings outside The Hague, the PCA has put in place a network of host country agreements with Member States in Africa, Asia, Europe and Latin America. Such host country agreements allow the PCA to hold hearings in similar conditions as in The Hague, including in respect of privileges and immunities. In the past year, new host country agreements were concluded with Brazil, Djibouti, Malaysia and Portugal, bringing the total number of such agreements to 15.[2]

6. The PCA provides registry support in all official languages of the United Nations (and other languages agreed by the parties). In the past year, proceedings were conducted in Arabic, Chinese, English, French, Portuguese, Russian and Spanish.

2. Continuity and Change in Investment Dispute Settlement at the PCA

7. The PCA's docket of cases between the early twentieth century and today exemplifies various elements of historical continuity and change in the system of international dispute settlement.

(a) Precursors to Modern Investment Arbitration

8. Member States ratifying or acceding to one of the PCA's founding conventions – the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907 – have thereby expressed a commitment "to use their best efforts to ensure the pacific settlement of international differences", "with a view to obviating as far as possible recourse to force in the relations between States".

9. From the beginning, this commitment extended to inter-State cases relating to the treatment of foreign investors. The Japanese House Tax case of 1902,[3] for example, involved facts that bear a striking resemblance to modern investment disputes.

10. Early PCA cases also show the potential for arbitration to assist diplomatic relations where investment disputes might otherwise hinder them. In the Orinoco Steamship Corporation case between the United States and Venezuela,[4] the two States had severed diplomatic relations. The arbitration provided not only for a resolution of the legal dispute but also allowed the re-establishment of normal political relations.

11. Finally, in the 1930s, the PCA administered for the first time an arbitration opposing a private entity and a State. This case was Radio Corporation

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[2] The PCA has signed Headquarters or Host Country Agreements with the Argentine Republic, the Federative Republic of Brazil (not yet in force), the Republic of Chile, the People's Republic of China, the Republic of Costa Rica, the Republic of Djibouti, the Republic of India, the Lebanese Republic (not yet in force), the Republic of Malaysia, the Republic of Mauritius, the Kingdom of the Netherlands, the Portuguese Republic (not yet in force), the Republic of Singapore, the Republic of South Africa, and the Socialist Republic of Viet Nam.

[3] Japanese House Tax (Germany, France, and Great Britain/Japan) (PCA Case No. 1902-02).

[4] The Orinoco Steamship Company case (United States of America/Venezuela) (PCA Case No. 1909-02).

of America v. China,[5] which set a precedent for the PCA's involvement in disputes between private parties and States, including modern-day investment proceedings.

(b) Investment Arbitration under the UNCITRAL Rules

12. More recently, the PCA acquired particular expertise in the administration of investor-State arbitration proceedings under the UNCITRAL Arbitration Rules, although it continues to act as registry in a considerable number of inter-State arbitrations and conciliations, many of which are instituted under "bespoke" rules of procedure. In the past years, the PCA has consistently registered around 40 new cases per year. Around 60 per cent of these have concerned treaty-based investment arbitrations. This brings the total number of treaty-based UNCITRAL investment arbitrations administered by the PCA to over 170.

13. Moreover, the UNCITRAL Rules entrust the Secretary-General of the PCA with the role of designating the appointing authority in the event that the parties have not done so. Following the revision in 2010, the Rules also clarify that parties may request the PCA Secretary-General to act directly as appointing authority and establish a role for the PCA in the review of arbitrator fees. The PCA Secretary-General has acted on over 680 requests to designate the appointing authority or to serve as appointing authority. Almost 40 per cent of the appointing authority requests received by the PCA have concerned treaty-based investment proceedings. Such requests have typically related to the appointment of arbitrators or decisions on challenges to arbitrators.

14. The PCA would be pleased to brief the Working Group in further detail on its experience with the appointment of arbitrators or the resolution of challenges, should this be of interest to delegates.

(c) Standing and Quasi-permanent Arbitral Bodies

15. The PCA also has unique experience as registry to arbitral tribunals with a permanent or long-term character. For example, the PCA acts as secretariat for the standing arbitral tribunal of the Bank for International Settlements, which was first constituted in the 1930s. The PCA also acted as registry for the Eritrea-Ethiopia Claims Commission, which, over a period of almost a decade, issued a series of 15 awards addressing 40 different claims for loss, damage or injury by one Government against the other, and by nationals of one party against the Government of the other party, as well as two awards on damages.

16. Finally, one may mention the Iran-United States Claims Tribunal, which has been in existence for over 30 years. Although the Tribunal now disposes of its own standing registry, the PCA has supported the work of the Tribunal in various ways, including its initial organization, hosting certain hearings at PCA facilities, and acting as secretariat to the appointing authority in relation to, so far, 21 appointments and 12 challenges.

17. It may be of interest to the Commission that all three bodies – the BIS Tribunal, the EECC and the IUSCT – have adopted procedural rules inspired by the UNCITRAL Rules, proving the potential for these Rules to serve as a procedural framework for standing tribunals or hybrid mechanisms.

3. The PCA's Position regarding ISDS Reform

18. The PCA's experience suggests that "permanence" and "institutionalization" of courts and tribunals are matters of degree, falling within a spectrum of possibilities, which may provide helpful inspiration to the Working Group's discussion on ISDS reform. The PCA notes in this regard that the Commission has been mandated to "(i) first identify and consider concerns regarding ISDS; (ii) secondly consider whether reform was desirable in light of any identified concerns; and (iii) thirdly if the working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission."

[5] Radio Corporation of America v. China (PCA Case No. 1934-01).

19. The PCA takes no view as to the desirability of particular reforms in this area, given the differences of positions espoused by the PCA's membership. The PCA considers that it is the prerogative of governments to select the dispute settlement mechanism that they regard as most appropriate, taking account of their policy preferences and interests.

20. To the extent that States wish to consider new approaches to the present system of investment arbitration, however, the PCA stands ready to support any such initiatives at the technical level, including by assisting States in designing and implementing efficient and fair mechanisms for the resolution of disputes with foreign investors. While this may include targeted modifications of the present arbitration system, the PCA would also be prepared to work with the Commission in designing and implementing a permanent investment court or a permanent appeals facility, should this be the Commission's choice.

D. Report of the Working Group on ISDS on the work of its thirty-fifth session (New York, 23–27 April 2018)

(A/CN.9/935)

[Original: English]

Contents

I. Introduction

1. At its fiftieth session, the Commission had before it notes by the Secretariat on "Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration" (A/CN.9/915); on "Possible future work in the field of dispute settlement: Ethics in international arbitration" (A/CN.9/916), and on "Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS)" (A/CN.9/917). Also, before it was a compilation of comments by States and international organizations on ISDS Framework (A/CN.9/918 and addenda).

2. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission entrusted the Working Group with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). In line with the UNCITRAL process, the Working Group would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and fully transparent. The Working Group would proceed to: (i) identify and consider concerns regarding ISDS; (ii) consider whether reform was desirable in light of any identified concerns; and (iii) if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).[1]

3. At its thirty-fourth session (27 November–1 December 2017), the Working Group commenced work on consideration of possible reform of ISDS on the basis of a Note by the Secretariat (A/CN.9/WG.III/WP.142) and submissions from Intergovernmental Organizations (A/CN.9/WG.III/WP.143). The deliberations and

[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 263 and 264.

decisions of the Working Group at that session were set out in document A/CN.9/930, which contained Part I of the report. Part II of that report was adopted at the current session.

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its thirty-fifth session in New York, from 23–27 April 2018. The session was attended by the following States members of the Working Group: Argentina, Australia, Austria, Belarus, Brazil, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Colombia, Czechia, Denmark, Ecuador, El Salvador, France, Germany, Greece, Honduras, Hungary, India, Indonesia, Israel, Italy, Japan, Kenya, Kuwait, Libya, Malaysia, Mauritius, Mexico, Namibia, Nigeria, Pakistan, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Algeria, Angola, Bahrain, Belgium, Benin, Burkina Faso, Costa Rica, Croatia, Cyprus, Dominican Republic, Egypt, Finland, Gabon, Georgia, Iceland, Iraq, Kazakhstan, Morocco, Myanmar, Nepal, Netherlands, New Zealand, Norway, Peru, Portugal, Saudi Arabia, Senegal, Serbia, Slovakia, South Africa, Sudan, Sweden, Syrian Arab Republic, Togo, Uruguay and Viet Nam.

6. The session was also attended by observers from the Holy See and the European Union.

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

(a) *United Nations System*: International Centre for the Settlement of Investment Disputes (ICSID) and United Nations Industrial Development Organization (UNIDO);

(b) *Intergovernmental organizations*: Commonwealth Secretariat, Organization for Economic Cooperation and Development (OECD), Organisation Internationale de la Francophone (OIF), Permanent Court of Arbitration (PCA) and South Centre;

(c) *Invited non-governmental organizations*: African Center of International Law Practice (ACILP), American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Asociación Americana de Derecho Internacional Privado (ASADIP), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Caribbean Association of Industry and Commerce (CAIC), Center for International Dispute Settlement (CIDS), Center for International Legal Studies (CILS), Centre de Recherche en Droit Public (CRDP), Centre for International Environmental Law (CIEL), Centro de Estudios de Derecho, Economía y Política (CEDEP), China International Economic and Trade Arbitration Commission (CIETAC), CISG Advisory Council (CISG-AC), Clientearth, Columbia Center on Sustainable Investment (CCSI), European Federation for Investment Law and Arbitration (EFILA), European Federation for Transport & Environment (T&E), European Trade Union Confederation (ETUC), Forum for International Conciliation and Arbitration (FICA), Friends of the Earth International (FOEI), Institute Afrique Monde (IAM), International Bar Association (IBA), Institute for Transnational Arbitration (ITA), Institute of Commercial Law (ICL), Institutio Ecuatoriano de Arbitraje (IEA), Inter-American Bar Association (IABA), International Association for Commercial and Contract Management (IACCM), International Centre for Trade and Sustainable Development (ICTSD), International Chamber of Commerce (ICC), International Institute for Sustainable Development (IISD), International Law Association (ILA), International Law Institute (ILI), Korean Commercial Arbitration Board (KCAB), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni

Association (MAA), New York International Arbitration Center (NYIAC), Queen Mary University of London School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration, Lagos (RCICAL), Russian Arbitration Association (RAA), Stockholm Chamber of Commerce Arbitration Institute (SCC Arbitration), Swiss Arbitration Association (ASA), United States Council for International Business (USCIB) and World Economic Forum (WEF).

8. The Working Group elected the following officers:

Chairperson: Mr. Shane Spelliscy (Canada)

Rapporteur: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

9. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.III/WP.144); (b) note by the Secretariat on "Possible reform of investor-State dispute settlement (ISDS)" (A/CN.9/WG.III/WP.142); (c) submissions from International Intergovernmental Organizations (A/CN.9/WG.III/WP.143); (d) submissions from the European Union (A/CN.9/WG.III/WP.145); (e) submissions from International Intergovernmental Organizations and additional information: appointment of arbitrators (A/CN.9/WG.III/WP.146); and (f) submission by the Government of Thailand (A/CN.9/WG.III/WP.147).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Possible reform of investor-State dispute settlement (ISDS).
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group considered agenda item 4 on the basis of documents referred to in paragraph 10 above. The deliberations and decisions of the Working Group with respect to item 4 are reflected in chapter IV. The discussion of other business before the Working Group is reflected in Chapter V.

IV. Possible reform of investor-State dispute settlement

A. General remarks

12. The Working Group recalled its mandate (see para. 2 above) and continued its deliberations on identification of concerns in the field of ISDS, as contemplated in the first part of the mandate.

13. General statements made at the outset of the session emphasized the importance of the Working Group's mandate for developing States in light of the impact of investment and ISDS on sustainable development. Drawing on the national experience in several States, those statements reiterated issues and concerns about ISDS, including the lack of accountability, of transparency, of consistency and coherence, of effective review mechanism, and of mechanisms to address frivolous claims. Issues that were discussed at the thirty-fourth session of the Working Group, including cost and duration of ISDS as well as third-party funding, were also reiterated as potential concerns.

14. As a general point, the need for any ISDS reform to strike a balance between rights and obligations of the States on the one hand and of the investors on the other was stressed.

15. The statements also underlined the importance of considering the topic of possible ISDS reform at a multilateral level. It was mentioned that the consideration of the topic by UNCITRAL constituted a unique opportunity to make meaningful reforms in the field, and that active and wide participation by both developing and developed States was essential to ensure the effectiveness and legitimacy of the UNCITRAL process in implementing the mandate.

16. In that context, the Working Group was informed that the European Union as well as the Swiss Agency for Development and Cooperation had provided contributions to the UNCITRAL trust fund, in order to allow participation of developing States in the deliberations of the Working Group. Delegations were invited to consider making further contributions in order to allow for inclusive attendance at the sessions of the Working Group.

17. The Working Group recalled the work of UNCITRAL on transparency in treaty-based investor-State arbitration, which had resulted in the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency"). It was noted that such instruments demonstrated that reform of the fragmented ISDS regime was feasible. It was further pointed out that States in different parts of the world were in the process of reforming or refining their existing ISDS regime, through, inter alia, revising or terminating existing bilateral treaties, developing new models for future agreements, and engaging in multilateral processes.

18. During the deliberations, it was underlined that the mandate of the Working Group was understood to focus on the procedural aspects of ISDS rather than on the underlying investment protection standards, thereby ensuring that any proposed reform would be feasible and achievable. In that context, different reform options were mentioned, including development of soft law instruments, appeal mechanisms and the creation of a multilateral investment court. The Working Group agreed that it was premature to consider those options at this stage of its deliberations and recalled that it should first undertake a thorough analysis of issues and concerns.

19. It was acknowledged that some States had had the opportunity to consider the wide-ranging ISDS issues in detail and were ready to move the discussion in the Working Group forward. It was however noted that other States might have recently begun their consideration of the issues and might need more time to engage in the deliberations of the Working Group. The Working Group agreed that the process should be respectful of both viewpoints, and should give all delegates the opportunity to participate meaningfully, but without imposing undue delay in making progress with the discussion.

B. Consideration of the arbitral outcomes

Coherence and consistency

20. The Working Group recalled its previous discussion on the question of coherence and consistency of the ISDS outcomes. Two questions had underlined consideration of that matter: one, regarding the desirable level of consistency in ISDS outcomes and, the other, the extent to which undesirable inconsistency was perceived to be a concern.

21. It had been considered that the mere existence of divergent outcomes was not itself a concern, as treaty provisions could be interpreted correctly yet applied differently depending on the facts of the case or the evidence submitted by the parties. Furthermore, the mere fact that similar treaty provisions might be interpreted differently was not considered to be a concern, as when relying on the general principles of treaty interpretation, similar treaty language might be appropriately interpreted differently. Inconsistency was considered more of a concern where the same investment treaty standard or same rule of customary international law was interpreted differently in the absence of justifiable ground for the distinction.

22. Conflicting outcomes were said to be more acute in situations of multiple proceedings, as referred to in paragraph 36 of document A/CN.9/WG.III/WP.142. It had also been noted that coherence and consistency were not to be understood as synonyms of accuracy or correctness of ISDS outcomes. It was further recalled that lack of coherence or consistency was not necessarily a unique feature of ISDS and was also found in domestic as well as international context.

23. It was suggested that the deliberation on these issues should continue possibly linking the above-mentioned questions to the finality of the award as well as the adequacy of the existing review mechanisms. It was noted that existing review mechanisms addressed the integrity and fairness of the process rather than the correctness of the outcomes, and therefore consideration should be given as to whether they were adequate to address issues of consistency, accuracy and correctness of awards.

The notion of incoherence and inconsistency

24. There was broad agreement on the legal and economic benefits of consistency in terms of enhancing legal certainty and the predictability of the investment framework for both the State and the investor. There was also broad agreement that those characteristics, in turn, would promote efficiency in preparing for litigation, and would be helpful for States in drafting investment treaties or determining measures that could be lawfully taken.

25. Noting that there might be instances in which treaty language could appropriately be interpreted differently, the Working Group was invited to focus its deliberations on situations in which divergent interpretations were problematic, i.e. where there were unjustifiable inconsistencies. The Working Group agreed to consider the prevalence and the impact of unjustifiable inconsistencies. It was highlighted that a specific and clear diagnosis of those elements should be made at the outset, so as to ensure a meaningful and useful outcome of the discussions.

26. It was also agreed that seeking to achieve consistency should not be to the detriment of the correctness of decisions, and that predictability and correctness should be the objective rather than uniformity.

27. Considering that article 31 of the Vienna Convention on the Law of Treaties required that treaties be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose, the difficulty of achieving consistency in interpreting investment treaties negotiated by different parties, with specific objectives, was noted.

28. However, it was noted that investment standards commonly found in investment treaties were similar. As ad hoc arbitral tribunals were tasked with the interpretation of those standards, the ISDS regime was fragmented, explaining divergent interpretations to some degree. In addition, it was noted that many investment treaties before arbitral tribunals were first-generation treaties, containing vague formulations, which were more susceptible to different interpretations.

Prevalence of inconsistency

29. The prevalence of unjustified inconsistency was queried, and additional research and in-depth analyses to answer the question were recommended.

30. A view was expressed that analyses of published decisions indicated that the prevalence of unjustified inconsistency was relatively low.

31. Examples of inconsistent arbitral decisions on core aspects of investment protection were mentioned. The questions raised in those inconsistent arbitral decisions concerned general concepts and functions of the substantive investment standards that were repeatedly raised. One example was on the application of the most-favoured nation (MFN) clause. The example of the interpretation of the scope and effect of the umbrella clause was also given. Contradictory interpretations of the notions of investment and expropriation were also mentioned.

32. Further examples were given where it was said that divergent decisions could not be justified by the rules of treaty interpretation in international law or by the different facts and evidence in front of arbitral tribunals. It was said that the examples made clear that the concerns related not only to the interpretation of the substantive core protection provisions in investment treaties, but also to the identification and application of principles of customary international law, and sometimes to provisions in treaties such as the ICSID Convention. Additional examples included what were described as inconsistent decisions on whether a State was required to provide security in annulment proceedings, with respect to the treatment of awards in terms of enforcement, and on the ability of States and investors to contract out of ISDS provisions.

Impact of unjustifiable inconsistencies

33. The Working Group turned its attention to the significance of the impact of unjustifiable inconsistencies. States shared their experiences of situations when the same treaty had been inconsistently interpreted by different tribunals, including where the same arguments and evidence had been presented.

34. The following considerations on the impact of unjustifiable inconsistency were also shared.

35. First, unjustifiably inconsistent decisions could be a ground for attacks on the credibility of, and negative public opinion about, the entire ISDS mechanism.

36. Second, the lack of clarity and inconsistency in international investment jurisprudence: (i) made it difficult for States to understand how they must act in order to comply with their legal obligations; (ii) led to challenges in considering new regulations; and (iii) could contribute to regulatory chill. Nonetheless, it was recognized that this was not an issue unique to ISDS and governments always were constrained in the regulations that they adopted under their own domestic laws. The balance in the substantive obligations under investment treaties in that regard, and whether that balance was appropriate or ought to be reconsidered, was also highlighted.

37. Third, States were not the only stakeholders in that system and the interests of investors should also be taken into account. In that regard, delegations confirmed that they had undertaken consultations with their various constituents and stakeholders in preparation for the session. The outcome of the consultations as reported was that predictability was important to investors as well, in that lack of predictability could constitute a risk factor for investors and so inhibit investment. In that context, the general statement underlying the importance of investment and capital flows in the interests of continued sustainable development was recalled (see para. 13 above). It was added that investors valued a dispute settlement system that ensured predictability, given the costs involved.

38. Significant concerns were expressed that the current ISDS regime did not offer adequate guarantees that the investment treaties would be consistently and correctly interpreted and there was a broad view that the mechanisms in place were insufficient.

Review mechanisms

39. The Working Group considered whether the existing review mechanisms adequately addressed the questions raised by inconsistency and lack of correctness. It was recalled that arbitral awards were final and subject to review only in set-aside applications or enforcement procedures in domestic courts and, in the case of ICSID awards, in annulment proceedings. It was pointed out that the jurisdiction of ICSID annulment committees and of domestic courts at the place of arbitration or where enforcement was sought (in case of non-ICSID awards) to review the awards was often limited. It was said that the scope of review was narrow, and that the limited grounds for review might pose systemic problems in ensuring consistency and correctness. In addition, current mechanisms were unlikely to operate so as to harmonize jurisprudence in ISDS cases, even among investment treaties with the same or substantially similar investor protection standards.

40. It was further said that, in the absence of an appeals mechanism, incorrect decisions could not be overturned, meaning that the existing review mechanisms could not ensure legal correctness.

41. Recalling the importance of correctness as well as consistency, it was said that consistency of awards could be derived from their correctness. In that context, it was noted that concerns about consistency and predictability were tied to other concerns about the adequacy of the existing mechanisms to address the unjustifiable inconsistency.

42. The interaction between finality of arbitral awards and their correctness was raised. It was said that any solution to ensure consistency and correctness should not disrupt or undermine the finality of awards and should avoid increasing cost and duration. Other views were that the benefits of finality, including that awards were generally enforceable, meant that a balance between these considerations should be sought.

Preliminary views on possible solutions

43. The Working Group heard some preliminary views regarding how inconsistency could be addressed so that the ISDS framework would become more predictable. Suggestions included the following: (i) amending investment treaties that contained vague wording; (ii) providing solutions to give greater control by State parties to investment treaties, such as joint interpretative statements and guidelines on interpretation of standards; (iii) adopting a systemic approach through institutional solutions (appeal mechanisms or permanent adjudicatory bodies); (iv) considering reforming the domestic framework on investment; (v) introducing or implementing a system of *stare decisis*; (vi) encouraging consolidation where possible, as well as coordination among tribunals; (vii) improving the existing review mechanisms and annulment procedures; and (viii) enhancing the role of domestic courts.

Linkage with other relevant issues

44. The Working Group heard suggestions that in considering the issue further, it would be necessary to strike the right balance between different concerns, and to consider thoroughly the impact of inconsistency on core treaty provisions, and on costs and duration. It was added that other concerns and issues, such as lack of transparency, frivolous claims and issues of third party funding, should be considered as they also had an impact on the overall functioning of ISDS. In other words, these matters should be considered as elements of an overall regime. In that context, it was underlined that efficiency, flexibility and cost-effectiveness should be the guiding principles when considering any reform.

C. Consideration of the arbitrators/decision makers

45. The Working Group undertook its consideration of concerns regarding the appointment of arbitrators and decision makers in ISDS as well as ethical requirements, on the basis of paras. 42–44 of document A/CN.9/WG.III/WP.142.

46. In addition to the information contained in document A/CN.9/WG.III/WP.146, the Working Group was provided with relevant information including statistics by States as well as international intergovernmental and non-governmental organizations. This included, among other things, information about appointments made by appointing authorities, enforcement of applicable ethical requirements, the number of challenges raised against arbitrators and an overview of the profiles of arbitrators. It was suggested that other relevant information, including concerning the appointment of arbitrators in commercial arbitration and of judges in international judicial bodies, should be compiled. Delegations were invited to provide available information on the matter to the Secretariat.

Lack of sufficient guarantees of independence and impartiality

47. The Working Group turned its attention to the question of sufficiency of guarantees of independence and impartiality on the part of arbitrators.

48. As an initial matter, it was generally agreed that the independence and impartiality of arbitrators were of utmost importance and were crucial for the legitimacy of the ISDS regime.

49. In that respect, it was noted that the existing framework for guaranteeing independence and impartiality included provisions in the applicable arbitration rules, which imposed such obligations on arbitrators, required disclosure by arbitrators of potential conflicts of interest, and provided challenge procedures. The example of the UNCITRAL Arbitration Rules was given, which contained a streamlined procedure for challenges, as well as requirements for specific statements on independence and impartiality and disclosure requirements.

50. It was further pointed out that standards on independence and impartiality were the subject of existing and ongoing work by different organizations, which were frequently applied in arbitration practice. The IBA Guidelines on Conflicts of Interest in International Arbitration of 2014 were mentioned as an example. It was said that improvements aimed at ensuring independence and impartiality of arbitrators were continuously being made, including by arbitral institutions and States Parties to investment treaties. The view was expressed that the existing framework provided adequate mechanisms to ensure independence and impartiality of the arbitrators.

51. In similar vein, it was said that party-appointment conferred legitimacy on the arbitral process and was one of its key features. Party-appointment was described as presenting the parties with the flexibility to designate decision makers based on criteria such as experience and qualifications, specialized knowledge, ability to speak the language of the arbitration, availability and reputation. The appointment of a presiding arbitrator also provided that the overall mechanism would be independent and impartial, it was said.

52. In practice, disputing parties would tend to choose neutral arbitrators, of a nationality different from that of the parties. In the experience of States, the appointment process involved careful consideration, a high level of scrutiny and disclosures. In that context, it was stated that the concern was not on how arbitrators were appointed but rather on how the framework would ensure that they would remain independent and impartial.

53. However, a widely held view was that, in order to be considered effective, the framework should not only ensure actual impartiality and independence of arbitrators, but also the appearance of those qualities. The view was expressed that efforts should therefore include both elements.

54. In that context, it was said that the party appointment mechanism had attracted much criticism, reflecting a perception of bias. For example, it was said that arbitrators in ISDS cases were often characterized as favouring States or investors based on their previous appointments, further contributing to the overall perception that there was lack of impartiality. It was said that party appointment mechanism could lead to polarization in tribunals, where the ultimate responsibility for deciding the case rested with the presiding arbitrator. This contributed to a certain degree of ambiguity in the ISDS system in that it was at odds with the notion of a three-member tribunal providing a unanimous or majority decision.

55. The Working Group considered the causes of perceptions that independence and impartiality of arbitrators were not sufficiently guaranteed, so as to assist in considering possible solutions in due course.

56. It was generally expressed that the perceptions about the lack of independence and impartiality did not derive from concerns about the professionalism of individual arbitrators, but was related to party-appointment and the incentives thereby created. It was said that the asymmetric nature of ISDS could be a source of systemic bias. It was pointed out that arbitrators would be inclined to seek re-appointment, and

incentives existed for them to develop what were referred to as positions that would lead to repeat appointments. It was also said that disputing parties had an incentive to appoint arbitrators that would support their positions.

57. The remuneration of arbitrators by the parties, and lack of transparency on that remuneration, were also mentioned as causes of these perceptions. By way of comparison, it was explained that the compensation of judges was often addressed in legislation and considered over time as a core element of judicial independence whereas, by contrast, less attention had been devoted to the compensation of arbitrators. In that context, the Working Group heard a detailed explanation of the remuneration scheme for arbitrators at ICSID.

58. It was said that dissenting opinions were overwhelmingly made by the arbitrator appointed by a losing party, which also contributed to the overall perception of possible bias. The appointments were made ad hoc in a fragmented system, which aggravated the risks of lack of independence and impartiality. In addition, it was said that lack of democratic accountability of the arbitrators posed concerns.

59. While party-appointment was common in State-to-State dispute settlement, the view was expressed that it had not given rise to the same criticisms in that context.

60. It was noted that the role of the presiding arbitrator in ISDS ensured a certain level of neutrality, independence and impartiality.

61. It was also highlighted that some of the concerns about impartiality could be linked to the lack of diversity of arbitrators from the perspectives of gender, geographical distribution, ethnicity, and other matters, and to the fact that the vast majority of disputes were being handled by arbitrators from a specific region even though the cases did not necessarily involve States from that region.

Preliminary views on possible solutions

62. The Working Group heard some preliminary views on possible ways to guarantee the independence and impartiality of arbitrators. At the outset, it was mentioned that improvements to the framework aimed at ensuring the independence and impartiality of arbitrators were constantly being introduced. It was noted that when considering possible solutions at a later stage, the benefits and limitations of the existing framework and of the work carried out by other institutions should be taken into account.

63. Along the same lines, it was said that the benefits of the current system, such as its flexibility and neutrality, should be preserved. It would be likewise important to ensure that the interests of all stakeholders in ISDS were being considered. In that same regard, any solutions would have to ensure a balance of interests of stakeholders, and avoid politicization, since the de-politicization of ISDS was a primary benefit of the current system. It was also emphasized that in considering solutions there would be a need to ensure that balancing elements were appropriately employed.

64. Regarding specific approaches, there was broad agreement on the importance of codes of conduct and other ethical requirements for arbitrators. It was suggested that any improvement to ensure independence and impartiality of the arbitrators should be welcomed as it would be in the interests of both States and investors. Taking note of a number of existing texts on the conduct of arbitrators (including soft law instruments), the need for efforts at a multilateral level was mentioned. In that context, suggestions were made to the effect that UNCITRAL and ICSID might cooperate in developing such a code. Another suggestion was made that a code of conduct for counsel and experts would be useful.

65. Further suggestions included: (i) ensuring that all stakeholders understood the thresholds for when independence and impartiality would be seen to be impaired; (ii) developing requirements for qualifications of arbitrators, their roles and requirements regarding diversity or appropriate regional representation; and (iii) considering different means of appointing arbitrators, including the increased use of appointing authorities or the use of rosters established by States.

66. There were also calls for arbitral institutions to play a greater role in the selection of arbitrators, and to establish more transparent procedures regarding the appointment of arbitrators. It was pointed out that little information about selection methods resulted in limited accountability in the system. It was suggested that the selection criteria should be published along with explanation of the selections.

67. Those who considered that party appointment created systemic concerns suggested that the ISDS regime could envisage appointments/selection of decision makers not being made by the parties but by an independent body. From this perspective, it was said that without the creation of a body with permanent judges, it would be unlikely that the identified concerns could be solved. In that context, it was mentioned that mechanisms used in other international courts and bodies such as the WTO Dispute Settlement Body could be considered.

68. In response to a concern that such a system of appointment of decision makers might be to the detriment of investors, it was said that the appointment process should be designed so as to ensure diversity, quality, independence and neutrality of the mechanism and that States would bear in mind their positions as potential respondents and as home States of potential investor claimants. It was further mentioned that decision makers selected by States in international bodies do rule against States and that the comparable mechanisms of institutional appointment (by appointing authorities and in annulment committees of ICSID) had not posed such problems.

Limited number of individuals repeatedly appointed as arbitrators in ISDS cases

69. Two distinct aspects of this topic were highlighted. One was the lack of diversity in the appointment of arbitrators involved in ISDS cases and the other was that some of the arbitrators were repeatedly appointed.

70. The lack of diversity was said to be exemplified by a concentration of arbitrators from a certain region, a limited age group, one gender and limited ethnicity. Empirical data from various sources was provided. It was also stated that there was a lack of arbitrators that understood the concerns of the developing States in their policymaking. The possible impact of the lack of diversity on the correctness of decisions made and on perceptions regarding impartiality and independence of the arbitrators were underlined in that context.

71. The Working Group heard the current efforts and initiatives to remedy that situation, including measures taken by States and appointing authorities (including arbitral institutions) to promote diversity of arbitrators. Reference was also made to voluntary commitments in the arbitration community and civil society to promote more equal representation of women in arbitration. It was suggested that such efforts might inform the work of the Working Group as it proceeded to seek possible solutions, and that addressing lack of diversity might contribute to resolving concerns about conflicts of interest.

72. There was general support for diversifying and expanding the pool of arbitrators qualified to serve as arbitrators in ISDS cases. In that light, it was pointed out that States had a role to play when appointing arbitrators and some States shared their practices in that regard. However, it was noted that, as respondents in individual cases, States faced certain limitations as their primary focus would be the circumstances of cases concerned.

73. Another concern raised, connected with the lack of diversity, was that a limited number of individuals made repeated decisions in ISDS cases. However, it was said that the greater concern was the fact that those individuals were regularly being (re)appointed as arbitrators. It was said that such repeat appointments raised problems of arbitrator availability and could be the cause of lengthy (and more costly) proceedings.

74. Similar to the comments made regarding diversity, the role of States in limiting repeat appointments was mentioned, and some States shared their practices in this regard. Other suggestions were that a pool or a permanent roster of arbitrators could address the concern, and that training should be provided to expand the pool of

potential international arbitrators. Another view was that a systemic solution would be required.

75. There was a broad view that the lack of diversity and repeat appointments raised concerns. It was highlighted that any possible solution should be balanced against the need to maintain the high quality of arbitrators appointed to ISDS cases.

Absence of transparency in the appointment process

76. It was said that there was a perception of a lack of transparency in the composition of arbitral tribunal, which might be an inherent characteristic of the current party-appointment system, in that parties would not necessarily disclose their appointment strategies to the other party (in the case of a three-member tribunal). However, it was noted that States could make available to the public general criteria for selecting arbitrators as well as information about those that were appointed by the States. It was noted that dissemination of such information as well as publication of awards made by arbitrators could address the perceived lack of transparency.

77. With regard to appointments made by appointing authorities (including that of the presiding arbitrator), reference was made to initiatives by appointing authorities to provide relevant information. It was noted that efforts to increase transparency would be beneficial, as would harmonizing such efforts. There was broad agreement that ensuring transparency of the appointment process would support the credibility and legitimacy of the ISDS system. In the context of these discussion, a suggestion was made that more transparency regarding the remuneration of decision makers might be a matter for further discussion.

Some individuals act as counsel and as arbitrators in different ISDS proceedings, with the possibility of ensuing conflicts of interest and/or so-called issue conflicts

78. A number of concerns were raised with regard to this topic, often referred to as "double-hatting". Statistics provided to the Working Group indicated that the practice was prevalent in ISDS. It was generally noted that the practice posed a number of issues including potential and actual conflict of interest. It was stated that even the appearance of impropriety (for example, suspicion that arbitrators would decide in a manner so as to benefit a party it represented in another dispute) had a negative impact on the perception of legitimacy of ISDS. Some States shared their experience in this regard.

79. Other observations included that domestic legislation in general did not prohibit double-hatting. It was also noted that "triple" or even "quadruple" hatting had been observed in practice, where certain individuals acted as party-appointed experts in certain ISDS cases or advisers to third-party funders. It was consequently suggested that the scope of the issue should be clearly delineated, and that the focus should not be on the practice of double-hatting itself, but rather on the problems that the practice posed (particularly where there was an actual conflict of interest). It was noted that States had attempted to address the question of double-hatting in more recent investment treaties.

80. It was noted that, while some data was available, there was also a need to compile additional data and information about the practice for the Working Group to better understand the nature of double-hatting and to consider possible solutions.

81. There was general agreement that double-hatting to the extent that it created potential or actual conflict of interest was the main issue of concern. The need to balance a number of interests was highlighted, in that possible solutions might involve an element of tension with other issues, such as efforts to expand and diversify the pool of arbitrators. For example, allowing double-hatting might allow potential arbitrators (entrants) to gain experience of ISDS by acting first as counsel in a number of cases. The need for training of potential arbitrators in developing States was again suggested in that regard. From that perspective of inter-connection among different issues, it was said that solutions would require a holistic approach and might need to be of a systemic nature. Another view was that tools such as a code of conduct could

address the matter, and that it should not be limited to the functions of arbitrator and counsel but should cover other actors in the field of ISDS, such as experts.

Perception that arbitrators are less cognizant of public interest concerns than judges holding a public office

82. Questions were raised regarding the scope of the issue, including whether it was referring to public policy as embodied in investment treaties or to broader notions (fundamental rights including those of the investors; State's right to regulate as well as other policies). It was recalled that the mandate of the Working Group did not extend to the substantive provisions of investment treaties, and that the consideration of this question should therefore be limited to procedural aspects.

83. It was generally noted that the qualifications of arbitrators or decision makers in ISDS cases should include an ability to take into account relevant issues of public interest or public policy, which were usually at stake in ISDS cases. It was said that ISDS cases could require expertise in matters of both public and private international law, and also that arbitrators might be called upon to make findings on matters of domestic law. It was recalled that party-appointment provided the parties with the right to select arbitrators on the basis of their consideration of the desired qualifications and experience, though they did not have the same control over those of the presiding arbitrator.

84. It was noted that before the Working Group could identify a perception that arbitrators would be less cognizant of public interest concerns than judges holding a public office as a concern, it would be necessary to identify clearly the meaning of "public interest". In that regard, it was stressed that there was a need to verify whether that perception was indeed correct before considering whether it posed concerns.

85. It was mentioned that, in the experience of States, arbitrators were not necessarily cognizant of public interest and of the State's policy. Ad hoc appointments by investors or relevant appointing authorities of arbitrators with commercial arbitration background were raised as concerns in that regard. On the other hand, it was said that lack of knowledge of public international law, of experience and of understanding of public interest concerns by arbitrators should not be assumed. Another view was that, in the current regime, arbitrators might not regard themselves as under a general duty towards an international system of justice, to act in the public interest, or to take into account the rights and interest of non-parties. It was said that arbitrators might consider that their duty and power were limited to solving the dispute at hand.

86. It was suggested that in order to address the question, it might be useful to consider the impact of the design and culture of the dispute resolution framework on the manner in which cases would be handled, and how the public interest would be taken into account. In that context, a comparison was made between the fragmented ISDS regime and the WTO Dispute Settlement Body. It was said that both dispute settlement mechanisms dealt with cases where the protection of economic actors from States' measures were considered. It was said that whereas adjudicators in the WTO Dispute Settlement Body would have an in-depth knowledge of the States' positions and their negotiating positions, arbitrators in ISDS cases usually had little knowledge of States' positions and policies when they negotiated the underlying investment treaty. It was indicated that these structural issues might lead to different outcomes on the interpretation of similar investment protection standards. It was also said that a common set of obligations might also explain any different approach in the WTO.

87. It was further mentioned that that concern was closely related to the arbitrability of the dispute. For example, it was questioned whether public or administrative law disputes could only be heard by standing permanent courts with independent judges and appellate review, as there were States whose domestic law allowed such disputes to be referred to arbitration, i.e. to a private forum to resolve the dispute.

88. It was suggested that further empirical study and analysis on this question would assist the Working Group in its deliberations. In that regard, different views were expressed on the impact of the concern. While it was suggested that a systemic

solution might be needed, another view was that there was no single solution that would meet the concerns. It was generally agreed that qualifications of the decision makers were important, and should be kept in mind by the Working Group, but that that particular point would not deserve the development of a specific tool.

Third-party funding

89. Regarding the practice of third-party funding, information was provided indicating that the practice was increasing in ISDS. Serious concerns were expressed in that regard. It was said that such practice raised ethical issues, and might have negative impact on the procedure. It was further pointed out that third-party funders might gain excessive control or influence over the arbitration process, which could lead to frivolous claims and discouragement of settlements.

90. Possible conflicts of interest between the arbitrators and the third-party funder, which might not necessarily be known to the other party or arbitrators was mentioned, and were considered as important as issues of conflict of interest between the arbitrator and a party. It was noted that the question of conflicts of interest was closely linked to the lack of disclosure and transparency regarding third-party funders. In that context, it was indicated that third-party funding was a complex area, and that there were different forms or types of funding. It was suggested that recent studies and analysis, such as the report of the ICCA-Queen Mary Task Force on Third-Party Funding, provided comprehensive information on the matter.

91. In contrast, it was said that third-party funding could be a useful tool to ensure access to justice, particularly for small- and medium-sized enterprises. It was also said that third-party funding was not a useful tool to ensure access to justice taking into account other options available at the systemic level.

92. The following possible solutions were suggested for further consideration: (i) prohibiting third-party funding entirely in ISDS cases; (ii) regulating third-party funding, for example, by introducing mechanisms to ensure transparency in the arrangements (which could also assist in ensuring the impartiality of the arbitrators). There was general agreement to include the matter of third-party funding and the questions of lack of transparency and of disclosure as well as security for cost to the list of concerns for consideration.

D. Perceptions of States, investors and the public

93. The Working Group considered the question of the perceptions of ISDS by States, investors and the public as outlined in paragraphs 45 to 47 of document A/CN.9/WG.III/WP.142. It was noted that perceptions with regard to a number of issues had already been considered by the Working Group during its deliberations.

94. General remarks were made that the merits and demerits of ISDS had become largely public, with criticisms in leading media focusing on (i) the use of arbitration as opposed to domestic adjudicatory systems to resolve investment disputes, (ii) party-appointment, (iii) the asymmetry of ISDS which was available only to foreign investors. It was also said that ISDS had nowadays become politicized in a growing number of States. In that context, a view was expressed that the legitimacy of ISDS has been repeatedly questioned in various public forums, and that the current ISDS system was perceived to be at odds with global governance and accountability requirements. A further view was that the current regime operated against the interests of developing States.

95. It was said that while perceptions should be taken into account, they should not be the driving force for the current work. It was also said that the right way to deal with the public perception of ISDS, where they were based on false allegations and misunderstandings, was to actively communicate with the public, providing adequate information. It was further said that whether well-founded or not, negative perceptions about ISDS posed concerns and thus would need to be addressed.

96. It was stated that, while public perception was important, perceptions alone would not justify the need for reform and as a subjective concept, would need to be grounded on empirical evidence and facts. In response, it was said: first, that a vast amount of information and studies was available and requiring additional information or further verification of those perceptions could unduly delay progress being made by the Working Group; and second, that negative perceptions could also of themselves justify the need for reform.

97. During the deliberations, the Working Group also heard interventions from invited international non-governmental organizations. These statements highlighted concerns about the impacts of ISDS, including possible regulatory chill, on a range of issues, including: environmental protection; labour rights; transparency; democracy and the role of the domestic courts; accountability of the investors; and impacts on non-parties and access to justice. It was said that it was important to consider public perception and participation, and to take a holistic view of the system, especially of whether it was achieving its purported objectives, when considering and designing any ISDS reform. It was also said that relevant reforms might include the adoption of filter mechanisms, a public interest carve-out, exhaustion requirements and strategies for addressing substantive issues.

E. Concluding remarks

98. The Working Group welcomed the completion of sections 2 and 3 of document A/CN.9/WG.III/WP.142 during the session. It was emphasized that the government-led process in the Working Group had been supported by the provision of information by States and observer organizations alike, and the Working Group looked forward to ongoing and constructive participation.

99. As regards preparation for the next session of the Working Group, several points were made. The Working Group agreed to continue its work at a measured pace, to allow sufficient time for all States to express their views, and to avoid unnecessary delay. The Working Group noted that to the extent that concerns had been identified for further consideration, this did not presuppose any conclusion by the Working Group as to whether reforms were desirable to address those concerns. The Working Group recognized that this issue of desirability was to be addressed as it continued its work. It was also emphasized that States would have the opportunity to raise additional concerns at future sessions of the Working Group.

100. In terms of specific preparations for the next sessions, a number of ideas were suggested: (i) that the Secretariat could prepare a list of the concerns raised during the thirty-fourth and thirty-fifth sessions of the Working Group, which would allow the Working Group to better organize its work; (ii) that the Working Group would benefit from suggestions on a framework for its future deliberations; (iii) that the Secretariat consider what further information could be provided to States with respect to the scope of some concerns; and (iv) that States might wish to submit papers for the consideration of the Working Group in advance of the next sessions.

V. Other business

101. The Working Group welcomed a proposal from the Government of the Republic of Korea to organize an intersessional regional meeting on ISDS reform with the objectives of raising awareness in the Asia-Pacific region of the current work of the Working Group, and providing input to the current discussions. It was clarified that the meeting would be purely informational and that no decisions would be made. It was noted that the intersessional regional meeting would be organized jointly with the Secretariat as well as other interested organizations. It was stated that the intersessional regional meeting could be held in late August or early September of 2018 in Korea and in conjunction with the Trade Law Forum organized by the UNCITRAL Regional Centre for Asia and the Pacific (RCAP). It was further mentioned that while the focus of the intersessional meeting would be to provide a

forum for high-level government representatives from the Asia-Pacific region, it would be open to all those invited to the Working Group. It was also mentioned that the agenda of the intersessional meeting would be made available to States in advance and that a summary report would be submitted to the next session of the Working Group for its consideration.

102. Morocco also expressed its interest in exploring the possibility of hosting a similar meeting at a future time.

E. Possible reform of investor-State dispute settlement (ISDS): submission from the European Union

(A/CN.9/WG.III/WP.145)

[Original: Arabic, Chinese, English, French, Russian, Spanish]

This note reproduces a submission received from the European Union in preparation for the thirty-fifth session of Working Group III. The submission is reproduced as an annex to this note in the form in which it was received by the Secretariat (in Arabic, Chinese, English, French, Russian and Spanish).

Annex

20 November 2017

The identification and consideration of concerns as regards investor to state dispute settlement

1. Introduction

1. This paper is intended as a contribution to the discussions in Working Group III of the United Nations Commission on International Trade (UNCITRAL). The aim of the paper is to identify and consider concerns as regards the current system of investor to state dispute settlement (ISDS) in line with the first stage of the mandate given to Working Group III by the UNCITRAL Commission. Consideration of what reforms might be desirable is for the second stage of discussions and is not addressed in this paper.

2. The Note by the UNCITRAL Secretariat, "Possible reform of investor-State dispute settlement (ISDS)" of 18 September 2017[1] lists a number of concerns which have been identified regarding ISDS (para 19 et seq.). The present paper builds on and responds to that paper. In particular, it suggests that a further and complementary way of thinking about the concerns with the ISDS system is to consider the framework in which the current system of ISDS operates. Considering the system as a whole provides a way of identifying concerns because it permits the existing system of dispute settlement to be compared and contrasted to other systems with similar attributes. Consequently, this paper first examines the key attributes and characteristics of the investment treaty regime (section 2). It then briefly looks, in a comparative manner, at how disputes in regimes with comparable characteristics to the investment regime are managed (section 3). Thereafter, it looks at the factors influencing the design of the current system of ISDS (section 4) before turning, on the basis of the analysis in these previous sections, to identify a number of concerns which merit further consideration (section 5).

2. Key attributes of the investment treaty regime

3. The key attributes of the current investment regime stem from two fundamental features. First, the regime is a **public international law** regime. Second, it resembles **public law** in that it is largely concerned with the treatment of investors and hence the relationship between individual actors and the state.

4. The international investment regime is made up of a large number of international treaties. These are **instruments of public international law**, concluded between public international law actors acting in their sovereign capacity.[2] In these agreements, states grant the power to bring claims to enforce these international treaties to natural or legal persons (investors). However, that does not take away the public international law nature of these agreements, agreed, as they are, between two sovereigns. As treaties, these agreements are also meant to be interpreted in accordance with public international law. This includes the rules on interpreting treaties and other rules, such as the rules on state responsibility.

5. These public international law treaties deal with the **sovereign capacity of states to regulate**, by providing certain protections which are enforceable by investors.[3] This creates a situation similar to public or constitutional law, in which individuals are protected from acts of the state and can act to enforce those protections.[4] It is important to recall that the state is acting in its sovereign capacity,

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[1] A/CN.9/WG.III/WP.142.

[2] Roberts, Anthea "*Clash of paradigms: actors and analogies shaping the investment treaty system*" (2013) American Journal of International Law, 107 (1) 45–94, 58–63.

[3] Ibid., at 63–68.

[4] See, among others, the works of Van Harten, Gus & Loughlin, Martin "*Investment Treaty Arbitration as a Species of Global Administrative Law*", 17 European Journal of International Law 121 (2006); Van Harten, "*Investment Treaty Arbitration and Public Law*" (2007);

both in approving these treaties and as regards the acts challenged. Investment treaty obligations apply to any acts that can be attributed to a state, be it legislation passed by a parliament or an individual decision taken by a local council. In the event that a state is found not to have respected these obligations it must make reparations. Such reparations typically take the form of monetary compensation, implying a charge on the budget of a state.

6. Framed by these two key features, i.e. the public international law basis of the treaties and the public law nature of the relationship, one can identify a number of characteristics of the international investment regime which are relevant for thinking about the present system and assessing concerns. These can be enumerated as follows:

(a) A constitutional/administrative law component: the obligations set down in the investment treaties are intended to protect investors from certain (limited) state conduct. Hence applying the obligations implies striking a balance between the right to exercise sovereign authority and the duty to protect individuals, typical of constitutional/administrative law determinations;

(b) A unidirectional system: the investor initiates the case against the state because the investor accepts the standing offer to arbitrate provided in the treaties;

(c) A vertical relationship: disputes predominantly concern foreign investors bringing cases against host states that arise from the vertical, regulatory relationship between those actors due to the fact that the investor enters into the host state territory and its economic and legal order;

(d) A repeat function: the treaties in question potentially will give rise to multiple disputes over a potentially extended period of time. This is to be distinguished from legal instruments establishing one-off contractual arrangements;

(e) A determinacy component: the substantive obligations are indeterminate in the sense that they set down general, high level standards intended to apply in multiple different fact patterns, much like constitutional law provisions; and,

(f) A predictability/consistency function: given the general formulation of investment protection standards and conscious of the repeat function stakeholders (governments, investors, civil society) look at precedents in order to understand how obligations in the treaties are being or should be interpreted. This occurs both within the same treaty and across treaties, given the relatively high degree of homogeneity of the treaties. This means the adjudicative role is key in elaborating and further refining the precise meaning of the substantive obligations.

3. Comparative analysis

7. Disputes flowing from systems with the characteristics identified above frequently lead to the creation of permanent bodies with full-time and tenured adjudicators to adjudicate disputes. Permanent adjudicatory bodies offer a number of advantages for adjudicating disputes in regimes which display these characteristics. These advantages operate in multiple and overlapping ways. Permanent bodies, by their very permanency, deliver predictability and consistency and manage the fact that multiple disputes arise, since they can elaborate and refine the understanding of a particular set of norms over time and ensure their effective and consistent application. This is particular relevant when the norms are relatively indeterminate. When appointing adjudicators in a permanent setting, thought is given to a long-term approach. States have an interest that public actions can be taken and at the same time individual interests protected and they know that the balance between these interests is to be maintained in the long term. Permanent bodies with full-time adjudicators

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Schneiderman; David, "*Constitutionalizing Economic Globalization: Investment Rules And Democracy's Promise*" (2008); Schill, Stephan W. "*International Investment Law and Comparative Public Law – An Introduction*", in "*International Investment Law and Comparative Public Law*" 3 (Stephan W. Schill ed., 2010); Montt, Santiago "*State Liability in Investment Treaty Arbitration: Global Constitutional And Administrative Law in the BIT Generation*" (2009).

also free the adjudicators from the need to be remunerated from other sources and typically provide some form of tenure. This prevents the adjudicators from coming under pressure to take short-term considerations into account and ensures that there are no concerns as to their impartiality.

8. It can be observed, both on the international and domestic level, that disputes in other regimes involving the characteristics enumerated above for the investment regime are normally settled before standing bodies. The members of these adjudicative bodies are composed of full time adjudicators who are appointed by states, associated with a high degree of independence and impartiality. Frequently, decisions of these standing bodies are subject to review via appeal in order to ensure correctness and greater predictability.

9. At the international level, examples include the European Convention on Human Rights with the European Court of Human Rights and the Inter-American Convention on Human Rights with the Inter-American Court of Human Rights. The legal regimes applied by these courts share many of the characteristics identified above as regards the investment regime.[5] Both of these bodies have permanent, standing courts with full time adjudicators appointed by the treaty parties. Although it does not have jurisdiction on claims advanced by individuals, the WTO also deals with the review of state action. These claims are heard within a structure that permits for appellate review by adjudicators appointed by the treaty parties.

10. At the domestic level, legal regimes with similar characteristics to the investment regime are also typically provided with permanent bodies for adjudication. It is a recognisable feature in domestic legal systems throughout the world that public or administrative law disputes are dealt with by standing permanent courts with independent judges that are positioned within a hierarchy that permits appellate review.

11. These examples are useful, not necessarily in all their details and features, but in showing that when creating or developing regimes with comparable characteristics to the investment regime, countries have consistently created permanent standing bodies. The next section briefly recalls the nature of the existing regime before the paper turns to consider the concerns arising within the existing regime in the light of the characteristics enumerated in section 2.

4. The current dispute settlement mechanisms for the investment regime

12. As of the 1960s the overall approach to the regulation of foreign investment has been characterised by (1) the emergence of international arbitration as a common means of settling investment disputes and (2) the increasing recognition by treaty law of the ability of investors to enforce the treaties directly against host states. The ICSID Convention, concluded in 1965 and currently binding for 161 States, represented and continues to represent a significant advance in the development of international investment law.

13. The ICSID Convention uses a model of dispute settlement based on arbitration. Tribunals are appointed by disputing parties and composed on an ad hoc basis to hear a particular dispute. Awards can be annulled on certain limited grounds by an ad hoc annulment committee. Other ISDS takes place on the basis of rules originally created for commercial arbitration, such as the UNCITRAL Arbitration Rules.

14. The ICSID Convention was conceived before the large body of investment treaties came into existence. Of the 2667 currently in force only 63 were in place in 1970[6] (the ICSID Convention entered into force on 14 October 1966). The drafters therefore did not have in mind that the system of dispute settlement contained in the ICSID Convention would be used, as it currently is, primarily for treaty dispute settlement. Indeed, they envisaged it would primarily be used for investment contract dispute settlement. The drafters of ICSID estimated that around 90 per cent of cases

[5] There are of course also significant differences, such as the nature of the remedies or the relationship to domestic litigation.

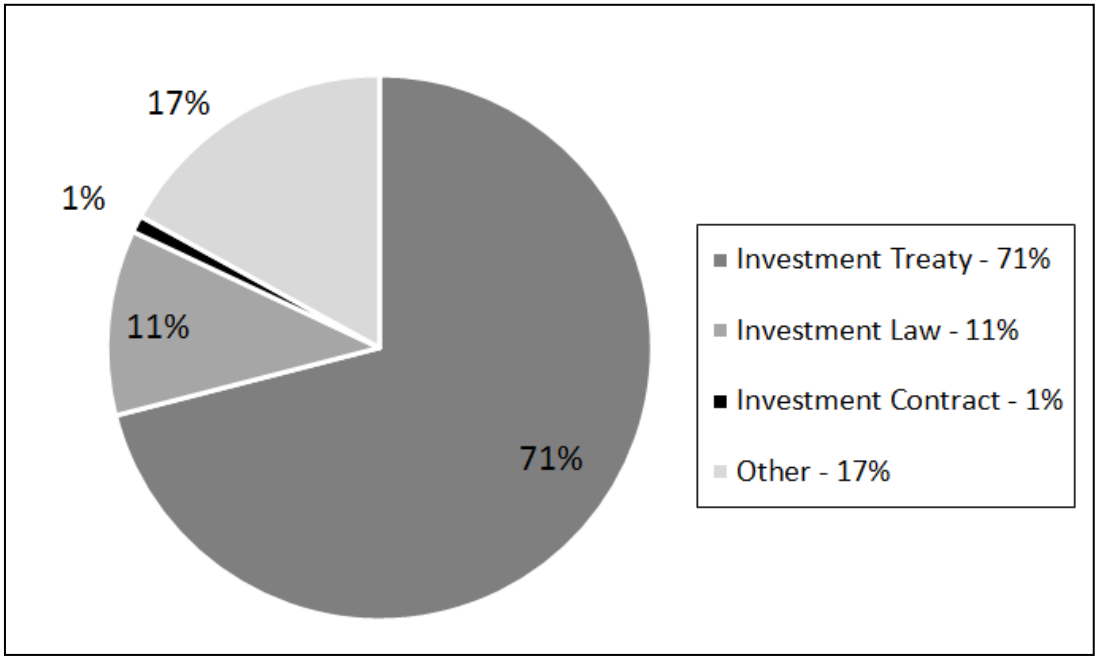
[6] Source: UNCTAD Investment Policy Hub.

would be under investment contracts and concessions and not under investment treaties.[7] This can be understood to have motivated the key design choices made in the ICSID Convention.[8]

15. Indeed, it was only from the 1970s onwards that states started to include provisions permitting investors to themselves enforce the treaties, in part at least on the suggestion of ICSID. This reflected the deliberate choice of states to remove treaty disputes from the state-to-state level, permitting the investor to enforce the agreement without the need to persuade its home state to espouse the claim.

16. The first cases brought at ICSID were based on arbitral clauses in investment contracts or domestic legislation on the promotion and protection of foreign investments. The AAPL dispute from 1990 was the first case where foreign investor's treaty claims were permitted on the understanding that the parties' consent to ICSID arbitration was "perfected" by the investor accepting the host state's offer to arbitrate in the treaty.[9]

17. The AAPL dispute initiated an increase in treaty based cases, buttressed by the changing practice of states in inserting ISDS clauses. More than 70 per cent of ICSID cases have in fact been brought under investment treaties and only 1 per cent exclusively under investment contracts, as illustrated in Graph 1. below.



Graph 1. Instruments of consent in ICSID arbitrations (1976–2016).[10]

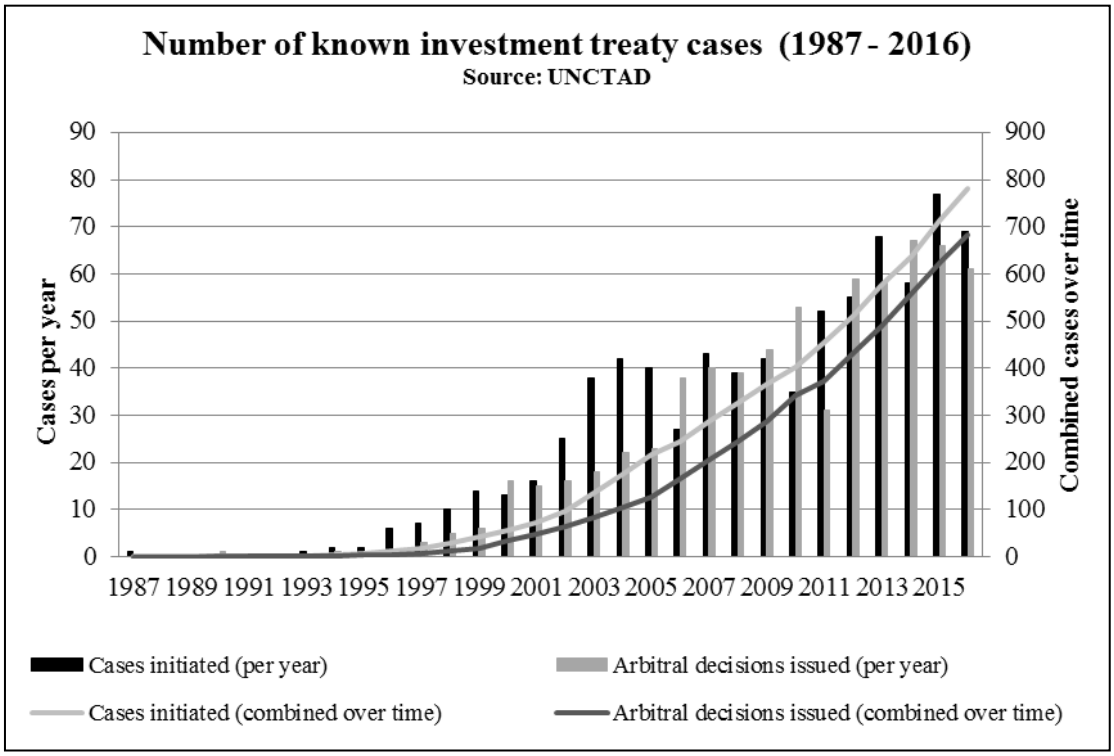
[7] See, J.C. Thomas and H.K. Dhillon "*The Foundations of Investment treaty Arbitration, The ICSID Convention, Investment Treaties and the review of Arbitration Awards*" (2017) 32(3) ICSID Review.

[8] See, J Pauwelyn, "*At the Edge of Chaos ? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed*", ICSID Review, Vol. 29, No. 2 (2014) pp. 372–418, in particular pp. 401–402 quoting Professor Lowenfeld (a member of the US Delegation negotiating ICSID) who wrote: "None of the discussions at the consultative meetings [in preparation of the ICSID Convention], or so far as I know in the contemporary writing and legislative consideration, addressed the possibility that a host state in a bilateral treaty could give its consent to arbitrate with investors from the other state without reference to a particular investment agreement or dispute. I know that I did not mention that possibility in my testimony before the US Congress, and neither did anyone else."

[9] *Asian Agricultural Products Ltd (AAPL) v Democratic Socialist Republic of Sri Lanka*, ICISD Case No. ARB/87/3, Award (27 June 1990). See also J. Paulsson, "*Arbitration without Privity*" ICSID Review, Vol. 10, No. 2 (1995) pp. 232–257.

[10] Jonathan Bonnitcha, Lauge Poulsen and Michael Waibel "*The Political Economy of the Investment Treaty Regime*" Oxford University Press, 2017 P. 61 Source: Author compilation from the ICSID website, based on 573 ICSID Cases, as of August 2016.

18. The growth of cases has come in the 1990s and in particular in the last two decades, as demonstrated in Graph 2. below.



Graph 2. Known investment treaty cases (1987–2016).

19. The extensive network of investment treaties has given rise to a substantial and ever-growing investment arbitration case-law. The rising number of investment treaty-based cases has led to questioning of the current system of investment dispute settlement.

5. Concerns with the current dispute settlement mechanisms for the investment regime

20. When the main attributes of the investment treaty regime are set against the structure of the system of arbitration for investment disputes, a number of concerns can be identified within the existing system. These concerns coincide with those identified in the Secretariat paper but also arise at a systemic level or result from the nature of the system. These concerns take on heightened significance with the knowledge of the relatively high and sustained level of cases. These concerns can be identified as follows:

(a) The ad hoc system impacts consistency and predictability

21. The ad hoc nature of the system impacts consistency and predictability. The ad hoc constitution of arbitral tribunals potentially influences outcomes, inasmuch as arbitrators are repeat players, or are seeking to be repeat players, in a system where the adjudicators need to be appointed afresh for each dispute. When considered at a systemic level, this can be considered as likely to lead to more fact-specific outcomes.[11] This does not enhance the stability and consistency of the system and hence the ability of stakeholders, be they businesses, governments or civil society actors to seek guidance on previous cases to try to determine how the rules will be applied in a particular set of circumstances.

22. There are a number of examples of inconsistent arbitral decisions on core aspects of the traditional investment protection provisions. The questions raised in those conflicting cases concern general concepts and functions of the substantive

[11] See Todd Tucker, "*Inside the Black Box: Collegial Patterns on Investment Tribunals*" (2016) 7(1) J Intl Disp Settlement 183–204.

investment rules that are repeatedly raised in many disputes where consistent responses would be desirable.

23. One example is the ongoing saga on the applicability of the most-favoured nation (MFN) clauses to procedural matters (i.e. dispute resolution). While some tribunals have held that the MFN clause extends to dispute settlement provisions contained in treaties between the respondent State and third States,[12] other tribunals have reached the opposite conclusion.[13] This issue continues to be raised in many cases. An example is *APR Energy and others v. Australia* where the claimants are seeking to import a dispute resolution clause into a treaty that contains no consent to arbitration.[14]

24. In relation to the interpretation of the scope and effect of the umbrella clause, some tribunals have held that the clause would have the effect that breaches of certain contractual commitments would amount to breaches of the investment treaty,[15] whereas others have denied this effect for ordinary commercial contracts.[16]

25. Other examples include several arbitral decisions taken in the aftermath of the Argentine financial and economic crisis of 2001–2002 in relation to the necessity defence under Article XI of the US-Argentina BIT. For instance, while the *Enron* tribunal interpreted this provision by reference to the very strict test for "necessity" as a circumstance precluding wrongfulness,[17] the *Continental Casualty* tribunal interpreted the rule by reference to the less stringent test for "necessary" state measures developed under the law of the World Trade Organization.[18]

26. Counsel would not be acting with due diligence if they did not exploit every possibility to bring an argument which might be of aid to their clients. The ad hoc system creates incentives to run these arguments given there is no structure creating and enforcing consistency. The system therefore in and of itself creates additional costs. This is in addition to the obvious difficulty which arises in terms of consistency and predictability. The repeat nature of the regime and the relative indeterminate nature of obligations heighten the importance of these consistency and predictability concerns.

(b) Significant concerns of perception

27. It is a core feature of the domestic and international adjudicative systems mentioned earlier, that, in the words of a Chief Justice of the English Courts, "justice should not only be done, but should manifestly and undoubtedly be seen to be done."[19] That statement is an expression of the decisive move away from ad hoc systems for public matters in all legal systems, led by the thinking of Jeremy Bentham, Voltaire

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[12] See for instance *Emilio Augustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, para. 64; *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 103; *Gas Natural v. Argentina*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, paras. 31 and 49; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, paras. 53–66.

[13] See for instance *Plama Consortium Ltd v. Republic of Bulgaria* ICSID Case No. ARB/03/24, Decision on Jurisdiction, paras. 184, 223, 227; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, para. 119; *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, paras. 90–100.

[14] *Power Rental Asset Co Two LLC (AssetCo), Power Rental Op Co Australia LLC (OpCo), APR Energy LLC v. the Government of Australia*, UNCITRAL.

[15] *SGS Société Générale de Surveillance s.a. (SGS) v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, para. 128.

[16] *SGS Société Générale de Surveillance s.a. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, para. 166.

[17] *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, paras. 322–345.

[18] *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, paras. 189–230.

[19] Lord Chief Justice Gordon Hewart in *R v Sussex Justices, Ex Parte McCarty* [1924] 1KB 256.

and Alexander Hamilton.[20] The ad hoc nature of the investor-state arbitration wherein the arbitrators, by definition, have other activities creates significant perception problems. These perception problems derive from the fact that the professional and/or personal interests of the persons involved in the system might be perceived to have an effect on the outcomes of the disputes. Whilst the detailed reality and the complex interactions between arbitrators themselves and the actors which appoint them undoubtedly paints a more complex picture, the combination of the unidirectional nature of the system and the importance of perception, of justice being seen to be done, raises concerns.

(c) The limited systemic checks on correctness and consistency

28. Another concern regarding the existing system is the limited possibility for a systemic check for correctness and consistency. Under the ICSID system, annulment is only available to correct a very limited set of errors. Article 52 of the ICSID Convention only provides for annulment in limited circumstances.[21] These do not touch upon the substantive correctness of the award. Similarly, domestic arbitration laws or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards limit the grounds on which recognition and enforcement of an award can be refused.

29. This means that awards can be legally incorrect but the system does not allow for them to be corrected. In *CMS v Argentina*, for example, the Annulment Committee said:

> "Throughout its consideration of the Award, the Committee has identified a series of errors and defects. The Award contained manifest errors of law. It suffered from lacunae and elisions. All this has been identified and underlined by the Committee. However the Committee is conscious that it exercises its jurisdiction under a narrow and limited mandate conferred by Article 52 of the ICSID Convention. The scope of this mandate allows annulment as an option only when certain specific conditions exist. As stated already (paragraph 136 above), in these circumstances the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal."[22]

30. This problem of ensuring correctness compounds the other features of the existing regime leading to lack of consistency and predictability mentioned above. The significance of this is again linked to the repeat function of potential disputes and the relative level of determinacy. It is notable that constitutional and supreme courts function to interpret general and relatively indeterminate norms, fleshing them out and clarifying them over time. These often have important effects on legitimising and stabilising understandings of the underlying substantive rules. An example of this is the WTO Appellate Body, which with a number of foundational reports in the late 1990s and early 2000s effectively calibrated the balance between the free trade obligations of the WTO Agreements and the ability of WTO Members to regulate.[23]

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[20] Gaukrodger, D. (2017), "Adjudicator Compensation Systems and Investor-State Dispute Settlement", OECD Working Papers on International Investment, No. 2017/05, OECD Publishing, Paris.

[21] See Article 52(1) ICSID-Convention ("Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which itis based.").

[22] CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Annulment Decision, para. 158.

[23] Wagner, Markus, Regulatory Space in International Trade Law and International Investment Law (March 16, 2014). University of Pennsylvania Journal of International Law, Vol. 36, No. 1, 2014–2015; University of Miami Legal Studies Research Paper No. 2014-10.

(d) Nature of appointment of adjudicators

31. When states appoint adjudicators *ex ante* (before particular disputes arise), they act in their capacity as treaty parties and have an incentive to balance their interests, ensuring the selection of fair and balanced adjudicators that they would be happy to live with whether a future case is brought by their investors or against them as respondents. In arbitration, however, the choice of arbitrator is made not in advance but *ex post* (i.e. at the time a dispute has arisen), which means that investors and state respondents make decisions about arbitrators with a view to best serving their interests in that particular case. This leads them to focus on arbitrators who are already known in the system and who are considered as having a predisposition towards one or other side (being perceived as investor or state-friendly). On the one hand, that is a natural reaction to the paradigm in which the disputing parties operate as that represents the safest option in the circumstances.[24] On the other, however, it means that parties are looking at appointment to the dispute primarily in their capacity as disputing party and not in their capacity as sovereigns, where their long term interests lies in providing for adjudicative bodies that faithfully interpret and apply the underlying substantive provisions. This is heightened by the repeat nature of potential disputes, the relative indeterminacy, the vertical relationship and both the public international law and public law features of the system.

32. In addition to encouraging the appointment of predisposed (i.e. perceived as investor or state friendly) arbitrators and a small number of repeat players, one of the problems with this approach is that it leads to a continued high concentration of persons who have gained their experience as arbitrators primarily in the field of commercial arbitration involving disputes of "private law" rather than public international law disputes. Such persons often are professionally less familiar with public international law (investment treaties are of course a field of public international law) and public law (which is important because the cases concern the actions of states in their sovereign capacity). Finally, the ad hoc appointment system also impacts on the regional and gender diversity of the individuals chosen to sit as arbitrators, with the system leading to relatively limited diversity on both fronts.

(e) Significant costs

33. As already noted, a problem with the system is the manner in which it generates costs.[25] This comes from the lack of consistency and predictability inherent in the system where diligent counsel will run arguments which might have been dismissed in another case because it is always possible that another tribunal will accept them. Costs are also generated by the need to identify and then appoint arbitrators. Moreover, the disputing parties themselves bear the burden of the costs of the arbitrator's fees and the fees of the arbitral institutions.

34. These elements combine with the already significant costs of litigating a dispute, in particular in hiring specialised counsel, and the lengthy nature of litigation to make the overall costs of bringing a claim under the existing system potentially prohibitive for a significant number of smaller and medium sized investors.

(f) Lack of transparency

35. The existing system, being largely based on or derived from commercial arbitration has historically not regarded transparency as being a necessary component of dispute settlement. This has meant that information is not always provided to the public on investment disputes. Whilst significant steps have been taken to improve this situation, through the amendments of the ICSID Arbitration Rules to provide for certain levels of transparency, to the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the United Nations

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[24] Roberts, Anthea *"Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States" (2010)* American Journal of International Law, *104 (4) 179–225*.

[25] See, Gaukrodger, D. and K. Gordon (2012), "*Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*", OECD Working Papers on International Investment, 2012/03, OECD Publishing, p. 19 et seq.

Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency") to more regular acceptance by disputing parties of the desirability of transparency, this remains a problem with the existing system.

6. Conclusion

36. There are significant concerns with the existing ISDS system. These can be identified as:

- The lack of consistency and predictability flowing from the ad-hoc nature of the system;
- Significant concerns arising from the perception generated by the system;
- Limited systemic checks on correctness and consistency in the absence of an effective appeal mechanism;
- The nature of the appointment process impacting the outputs of the adjudicative process;
- Significant costs; and,
- A lack of transparency.

37. These concerns are systemic in nature. That is they derive from the interplay of multiple elements of the current system, but above all the ad hoc nature of the tribunals and the lack of appellate review. As demonstrated above, the contemporary investment regime is strongly characterised by repeat disputes, relative indeterminacy and vertical relationships in a context of public international law and public law situations. A comparison shows that the international community and states individually have typically chosen to create or develop permanent standing bodies to adjudicate disputes in the context of such regimes.

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F. Note by the Secretariat on possible reform of investor-State dispute settlement (ISDS): submissions from International Intergovernmental Organizations and additional information: appointment of arbitrators

(A/CN.9/WG.III/WP.146)

[Original: English]

Contents

I. Introduction

1. At its forthcoming thirty-fifth session, the Working Group may wish to consider the question of arbitrators and decision makers in ISDS. Section C of document A/CN.9/WG.III/WP.142, Possible reform of investor-State dispute settlement (ISDS), which was before the Working Group at its thirty-fourth session, provides a summary of issues and concerns expressed regarding this question. The Working Paper, including Section C, refers to a broad range of published information on ISDS,[1] and does not seek to express a view on the desirability of reforms as regards issues and concerns discussed.

2. Paragraphs 42 to 44 of document A/CN.9/WG.III/WP.142 summarize concerns expressed about the appointment and ethical requirements of arbitrators, including those arising from the party-appointment method.

3. The Working Group may also wish to take into consideration the information set out in document A/CN.9/916, Possible future work in the field of dispute settlement: Ethics in international arbitration, which explores the concept of ethics in international arbitration and outlines existing legal frameworks (including national legislation, arbitration rules, case law and codes of ethics in investment treaties). That note was produced in response to the Commission's request to explore the possibility of future work on a code of ethics in investment arbitration, drawing upon issues identified in the context of conduct of arbitrators, their relationship with those involved in the arbitration process, and the values that they were expected to share

[1] These resources include online resources regarding ISDS reform, available on the UNCITRAL website at http://www.uncitral.org/uncitral/en/publications/online_resources_ISDS.html, which includes information published by the United Nations Conference on Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD), the Centre for International Dispute Settlement (CIDS), a joint research centre of the Graduate Institute of International and Development Studies and the University of Geneva Law School, as well as information published by the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), and the E15 Initiative on Strengthening the Global Trade and Investment System for Sustainable Development, jointly undertaken by the International Centre for Trade and Sustainable Development (ICTSD) and the World Economic Forum (WEF).

and convey.[2] The Commission also heard that issues relating to conflicts of interest of arbitrators could usefully be further elaborated.[3]

4. Section II of this note sets out a submission from the International Centre for Settlement of Investment Disputes (ICSID) on Arbitrator Appointments in ICSID, and Section III sets out a submission from the Permanent Court of Arbitration (PCA) on Arbitrator Appointments and Arbitrator Challenges. Both submissions were made in preparation for the thirty-fifth session of Working Group III, and are reproduced in the form in which they were received by the Secretariat, other than as regards minor editorial changes to ensure consistency in presentation.

5. As shown in these submissions, in the ISDS regime as it currently stands, disputing parties normally enjoy broad powers in the selection of arbitrators. The rules applicable in investor-State arbitration allow disputing parties to agree on the method to select the arbitrators and to agree directly upon the identities of such arbitrators.

6. As further detailed in the submissions from ICSID and the PCA, arbitrators may also be appointed by appointing authorities. Appointing authorities, which usually intervene in the appointment process to appoint the presiding arbitrator in a three-person tribunal, are playing a broader role in ISDS. As its submission below explains, ICSID as an appointing authority sets requirements for appointees, including as regards ethical conduct and qualifications.

7. The role of appointing authorities is generally not limited to the appointment process and requirements. It may include taking decision on challenges to arbitrators on ethical or other grounds, or, as under the UNCITRAL Arbitration Rules, at the stage of costs determination. As the submission from the PCA indicates, the majority of its ISDS cases relate to arbitration proceedings under the UNCITRAL Arbitration Rules, which allow for an arbitrator to be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

8. Comments commonly expressed regarding the appointing authority role concern the lack of available information on the selection and appointment processes, and the limited mechanism for public or internal accountability of appointing authorities. The absence of transparency in the appointment mechanism mentioned in paragraph 44 of document A/CN.9/WG.III/WP.142 arises largely in connection with the appointing authority mechanism.

II. Submission by the International Centre for Settlement of Investment Disputes (ICSID)

[Original: English]
[Date: 15 February 2018]

Arbitrator appointments in ICSID

9. This submission provides background for UNCITRAL delegates on appointment of arbitrators generally and under the rules of the International Centre for Settlement of Investment Disputes (ICSID).

1. Introduction

10. In general, arbitrators in investment cases are appointed by a disputing party, by the parties jointly, by an arbitral institution, or by an appointing authority. Many

[2] See, further, *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 182–186; *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 148–151; document A/CN.9/880 – Settlement of commercial disputes: Possible future work on ethics in international arbitration; and document A/CN.9/855 – Proposal by the Government of Algeria: possible future work in the area of international arbitration between States and investors – code of ethics for arbitrators.

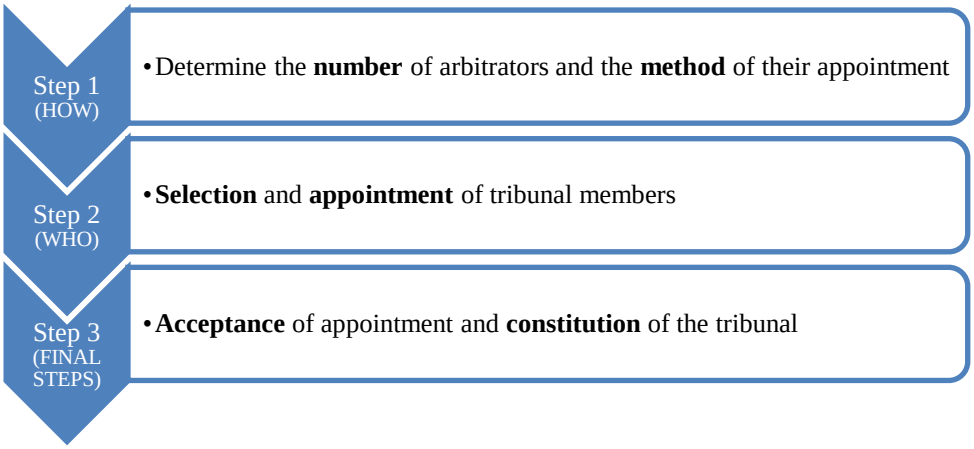
[3] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 184.

investment treaties and contracts contain specific provisions governing appointment, and these take precedence over the ICSID rules. If there are no specific rules in the treaty or contract, the ICSID rules set out a procedure for appointing a tribunal.

11. To date, 84 per cent of arbitrators on ICSID tribunals were appointed by the parties, or by the party-appointed arbitrators. The remaining 16 per cent of tribunal appointments were made by ICSID based on an agreement of the parties or the applicable default provisions. A total of 1,868 appointments have been made by the parties or by party-appointed arbitrators, and by ICSID, including the Secretary-General and Chairman of the Administrative Council. The Chairman has made 249 arbitrator appointments (13 per cent), including cases where the parties agreed to request the Chairman to appoint an arbitrator.

12. The process of appointing a tribunal raises three basic issues: how the tribunal will be selected (number and method), selection of the individual arbitrators to serve on the tribunal (who), and how the tribunal is constituted (acceptance of appointment and constitution).

Chart
Constitution of the tribunal – process



2. How many arbitrators on a tribunal?

13. Parties must first agree on the number of arbitrators that will sit on the tribunal. The relevant treaty or contract may address this. For example, Article 1123 of the North American Free Trade Agreement (NAFTA), states that unless the parties agree otherwise, "the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties."

14. If there is no agreement on the number of arbitrators in an ICSID proceeding, the parties may agree to a sole arbitrator or any uneven number of arbitrators. Selecting a sole arbitrator may help reduce costs and expedite the case, however parties usually agree on a three-person tribunal for investment treaty cases given the complexity of the issues that can arise. In the past 46 years, since the first tribunal was constituted in Holiday Inns v. Morocco (ICSID Case No. ARB/72/1), 98 per cent of ICSID tribunals have been three-person tribunals, with 2 per cent of cases presided over by sole arbitrators.

3. Method of appointment

Party agreement: ICSID Convention, Article 37(2)(a)

15. The next decision for parties concerns the method of appointment. The most usual method of appointment selected by parties is to have three-member tribunals with each party appointing one co-arbitrator and the parties jointly agree on the presiding arbitrator or the co-arbitrators selecting the presiding arbitrator.

16. Another option is for the parties to agree that an appointing authority such as the ICSID Secretary-General or the Chairman of the ICSID Administrative Council will appoint the presiding arbitrator or all three members of the tribunal. Yet another option is for the parties to use a list procedure. In this case, ICSID provides a list of potential candidates, and the parties rank the nominees in order of preference and veto nominees they would not consider. The candidate with the best ranking would be selected.

Default mechanism: ICSID Convention, Article 37(2)(b)

17. If the parties are unable to agree on the number of arbitrators and the method of their appointment, these decisions will be made by applying a default provision. At ICSID, the default provision is contained in Article 37(2)(b) of the ICSID Convention. It provides that:

(a) The tribunal will consist of three arbitrators;

(b) Each party will appoint one co-arbitrator; and

(c) The parties will agree on the third arbitrator, the President of the tribunal;

(d) Either party can invoke this provision 60 days after registration of the request for arbitration.

ICSID appointment: Article 38

18. If the parties are still unable to appoint all members of the tribunal within 90 days after registration of the request for arbitration or any other agreed period), either party may request that the Chairman of the ICSID Administrative Council appoint the arbitrator(s) not yet appointed (Article 38 of the ICSID Convention).

19. In practice, parties can almost always appoint their own party nominee and it is rare for a party nominee to be appointed by default. Where invoked, the default mechanism is most often used to appoint a presiding arbitrator.

20. When a party asks ICSID to appoint a sole arbitrator or a tribunal President, ICSID first conducts a ballot procedure:

(a) ICSID provides the parties with a ballot form containing the names of several candidates;

(b) Each party completes the ballot form, indicating the candidates it would agree to;

(c) A party is not required to share its ballot with the other party;

(d) If the parties agree on a candidate from the ballot, that person will be deemed to have been appointed by agreement of the parties;

(e) If the parties agree on more than one proposed candidate, ICSID selects one of them and informs the parties of the selection.

21. A successful ballot is considered an appointment by agreement of the parties under the established method of constituting the tribunal.

22. If the parties do not agree on a ballot candidate, the Chairman of ICSID's Administrative Council appoints a person from the ICSID Panel of Arbitrators, after consultation with the parties.

4. Selection of arbitrators

23. Parties can, but are not required to, select arbitrators from the ICSID Panel of Arbitrators. The Panel of Arbitrators is a list of persons nominated by ICSID member States to be available for appointment in cases. The ICSID Secretariat has prepared a note on "Considerations for States in Designating Arbitrators and Conciliators to the ICSID Panels" which sets out relevant considerations for States in compiling these lists.

Requirements for appointees

24. The Convention sets certain requirements regarding the qualifications of appointees to ICSID tribunals and their nationality, but the parties are otherwise free to choose whomever they wish.

Arbitrator Qualifications

25. Like most arbitration rules, the ICSID Arbitration Rules have formal qualifications for appointment that must be met. All ICSID arbitrators must be persons:

(a) Of high moral character;

(b) With recognized competence in the fields of law, commerce, industry or finance; and

(c) Who may be relied upon to be impartial and to exercise independent judgment (Article 14(1) and Article 40(2) of the Convention).

Nationality Requirement

26. A majority of arbitrators on a tribunal must be nationals of States other than the State party to the dispute and the State whose national is a party to the dispute (Article 39 of the Convention and Arbitration Rule 1(3)), unless each individual member of the tribunal is appointed by agreement of the parties. Where a tribunal consists of three members, an arbitrator cannot have the same nationality as either party unless both parties agree to that appointment.

27. In practice, this means that:

(a) A sole arbitrator may not have the same nationality as either party unless both parties agree; and

(b) If each party has appointed a person of an excluded nationality (as approved by the other party), the parties must also agree on the appointment of the President of the tribunal.

Additional considerations for selecting arbitrators

28. In addition to the requirements established by the Convention, there are practical considerations that parties often consider when selecting an arbitrator. These include:

(a) Knowledge of the relevant law(s) – this could include public international law and international investment law;

(b) Absence of conflict of interest;

(c) Experience as an arbitrator – this factor is especially relevant for the presiding arbitrator who must manage proceedings involving complex factual and legal questions and procedural rulings;

(d) Language proficiency – although interpretation is always available, parties may consider an arbitrator's capacity in different languages to reduce costs;

(e) Timeliness and availability of arbitrator – parties can consider these factors when identifying arbitrators for appointment and ICSID takes them into account in making appointments by requesting relevant information from candidates;

(f) Cohesiveness of the tribunal – arbitrators must work collegially with co-members in the proceeding;

(g) Other areas of expertise – subject matter expertise relevant to the dispute can also be valuable.

29. ICSID has various materials on its website and in its newsletters that address how parties can identify potential tribunal members. For instance, in the February 2017 issue of the ICSID Newsletter, ICSID featured a piece on "How to Select an Arbitrator" and provided an update and guidance on the Panel designations in the

January 2018 issue. As well, the ICSID website includes the curricula vitae of ICSID arbitrators which may assist parties in their selection.

5. Appointment of an arbitrator and acceptance of appointment

30. Once a tribunal member is selected, the parties provide ICSID with the arbitrator's complete name, nationality, contact information and a current curriculum vitae. The ICSID Secretariat writes to the appointee requesting their acceptance of the appointment within 15 days, pursuant to Arbitration Rule 5(3). The letter seeking acceptance annexes documents regarding the case calendar and schedule of proceedings, as well as information on applicable fees. ICSID aims to ensure that proceedings are time and cost efficient and encourages prospective arbitrators, conciliators and Committee members to confirm their availability during the next 24 months to ensure they participate in a timely manner. The letter seeking acceptance also asks each arbitrator, conciliator and Committee member to confirm their nationality(ies). This is to avoid any conflict with the nationality requirements under the ICSID rules (see Article 39 of the ICSID Convention and Arbitration Rule 1(3)).

31. When accepting an appointment, each arbitrator, must make a declaration as to their independence and impartiality and sign a confidentiality undertaking in the form set by Arbitration Rule 6(2). The signed declaration should include a statement of any relevant information, including information regarding past and present professional, business and other relevant relationships (if any) with the parties and their counsel. The statement should cover any circumstances that might raise justifiable doubts about the appointee's reliability to exercise independent judgment.

32. Each arbitrator has a continuing obligation to promptly notify the Secretary-General of any relationship or circumstance that arises during the proceeding that might bring into question the independence and impartiality of the arbitrator.

33. The Secretary-General notifies the parties of the appointee's acceptance or refusal of appointment and provides them with the arbitrator's declaration. If an arbitrator refuses or fails to accept the appointment within 15 days, ICSID will invite the appointing party to nominate another arbitrator. The Centre endeavours to complete the appointment process within 30 days of the request for appointment.

6. Constitution of the tribunal and effects of constitution

34. The tribunal is constituted on the date the Secretary-General notifies the parties that all arbitrators have accepted their appointments (Arbitration Rule 6(1)).

35. Once a tribunal is constituted, the proceedings are deemed to have begun and a member of the ICSID Secretariat (legal counsel) is designated to serve as Secretary of the tribunal. ICSID then sends the case file, including the request for arbitration and all correspondence between ICSID and the parties to the members of the tribunal, along with any request for provisional measures made under Arbitration Rule 39(1) and (5). The constitution triggers certain procedural time limits, such as the time within which a first session with the parties must be held and any preliminary objections filed.

7. Note on appointment of ad hoc committees in annulment proceedings

36. ICSID tribunal awards may be reviewed in accordance with Article 52 of the ICSID Convention. The appointment of ad hoc committees is different from tribunal appointments in several respects.

37. As soon as possible after the application for annulment is registered, the Chairman of the Administrative Council appoints three persons from the Panel of Arbitrators to form an ad hoc committee which will decide the application. Ad hoc committees must be selected from the ICSID Panel of Arbitrators. There is no party appointment in annulment proceedings. ICSID informs the parties of the proposed appointees and circulates their curricula vitae. The Centre endeavours to complete the appointment process as soon as possible after the registration of the annulment; on average within 60 days.

38. The same qualities and considerations apply to the selection of a committee member as to a tribunal member. Additionally, a member of an ad hoc committee cannot have sat on the tribunal which rendered the award, share the nationality of the tribunal's members, have the same nationality as the disputing parties (State and National of Another State), have been designated to the Panel of Arbitrators by the State party to the dispute or the State whose national is a party to the dispute, or have acted as a conciliator in the same dispute. As a result, in each annulment proceeding there are often five or more nationalities excluded from consideration.

39. Once the ad hoc committee members have accepted their appointments, the committee is constituted and the proceedings begin. The Arbitration Rules apply, mutatis mutandis, to an annulment proceeding (Arbitration Rule 53). This means that the conduct of an annulment proceeding is similar to the conduct of an arbitration, including a first session of the ad hoc committee and a written and oral process. The procedure is described in detail in the Centre's Background Paper on Annulment for the Administrative Council of ICSID.

8. Further information

40. For further information, please visit the ICSID website, including the case database and the Caseload Statistics. A video of ICSID's Secretary-General Meg Kinnear discussing the steps ICSID takes when it is asked to appoint an arbitrator is available on ICSID's live-stream site. In addition, ICSID staff are available to answer any further questions from delegates.

III. Submission by the Permanent Court of Arbitration (PCA)

[Original: English]
[Date: 16 February 2018]

Arbitrator appointments and arbitrator challenges

41. The Permanent Court of Arbitration ("PCA") is an independent intergovernmental organization established in 1899 to facilitate arbitration and other forms of dispute resolution. Having acted as registry in over 180 investor-State dispute settlement ("ISDS") proceedings and numerous arbitrations under public international law, the PCA is pleased to support the discussion of Working Group III at a technical level. This is the PCA's second submission to UNCITRAL Working Group III.[4] It provides the Working Group with information about arbitrator appointments and arbitrator challenges in ISDS cases for which the PCA has acted as registry.

1. Appointing authority requests in ISDS cases

42. The PCA Secretary-General has received over 700 requests to act as appointing authority or designate an appointing authority.[5] One hundred and fifty-six, or 22 per

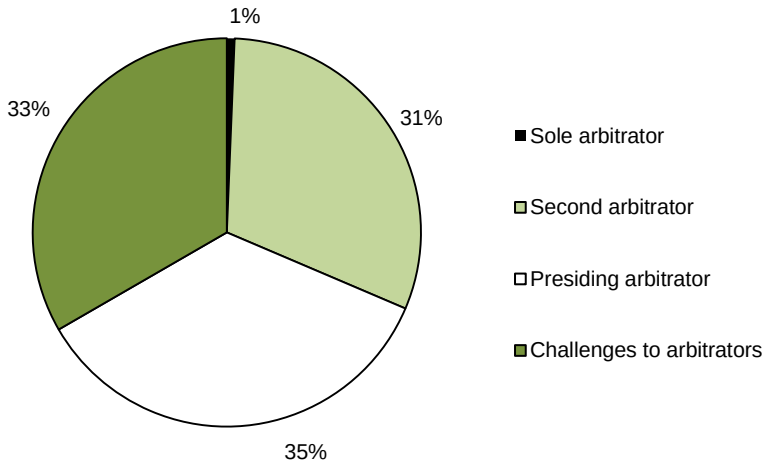
[4] A first submission addressed the PCA's involvement in the settlement of investment-related disputes, including State-State arbitration and investor-State arbitration, see UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Submissions from International Intergovernmental Organizations, 13 October 2017, A/CN.9/WG.III/WP.143.

[5] The parties may agree that the PCA Secretary-General act as appointing authority in proceedings under any procedural rules. In addition, the PCA Secretary-General is empowered under the UNCITRAL Arbitration Rules to designate an appointing authority where no appointing authority is agreed. The UNCITRAL Arbitration Rules 1976 entrust the Secretary-General with the power to designate the appointing authority in cases where: (i) the parties cannot agree on the choice of a sole arbitrator; (ii) the respondent fails to appoint a second arbitrator; (iii) the two party-appointed arbitrators cannot agree on the choice of the presiding arbitrator; or (iv) when a challenge to an arbitrator is to be decided, and the parties cannot agree on an appointing authority or an agreed appointing authority refuses or fails to act. Under the UNCITRAL Arbitration Rules 2010 and 2013, a party may request the Secretary-General to designate an appointing authority at any time.

cent, of these requests were submitted between 2001 and January 2018 in ISDS cases for which the PCA acted as registry.[6]

43. Out of these 156 requests, 104 requests concerned the appointment of an arbitrator (48 in respect of second arbitrators, 55 in respect of presiding arbitrators and 1 in respect of a sole arbitrator). Fifty-two requests made in 33 distinct proceedings concerned an arbitrator challenge.

Figure 1
Appointing authority requests in ISDS registry cases at the PCA



44. Sixty-nine cases, or 38.5 per cent, proceeded without the need for any assistance by an appointing authority.

45. Since the great majority of appointing authority requests received by the PCA in respect of ISDS cases relate to arbitration proceedings pursuant to the UNCITRAL Arbitration Rules, the following sections will principally focus on the procedures for appointments and challenges under those Rules.[7]

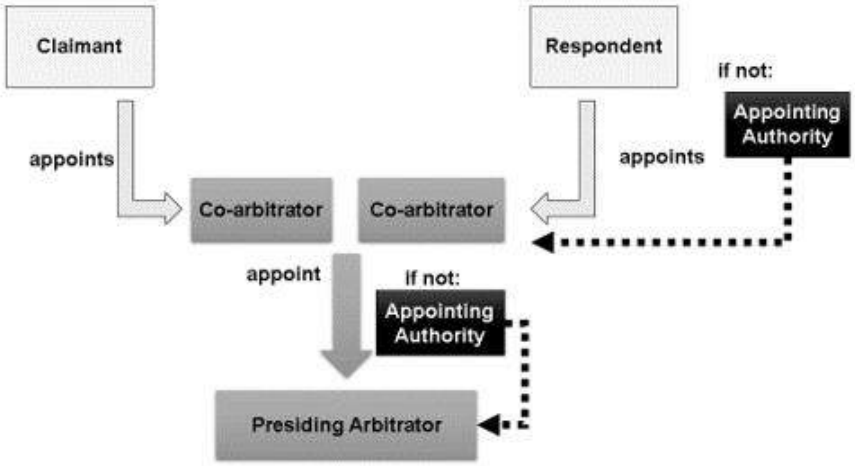
2. Arbitrator appointments in ISDS cases under the UNCITRAL Arbitration Rules

46. Unless the parties agree on the appointment of a sole arbitrator, a three-member tribunal is to be constituted in arbitrations pursuant to the UNCITRAL Arbitration Rules. The mechanism for the constitution of a three-member tribunal may be summarized as follows:

[6] In recent years, the proportion of appointing authority requests relating to ISDS cases has risen to almost 40 per cent.

[7] Since the PCA Arbitration Rules 2012 are based on the UNCITRAL Arbitration Rules 2010 – with certain changes to (i) reflect the public international law elements that may arise in disputes involving a State, State-controlled entity, and/or intergovernmental organization and (ii) indicate the role of the Secretary-General and the PCA's International Bureau – much of the information contained in this submission also applies to proceedings under the PCA Rules.

Figure 2
Appointment of a three-member tribunal under the UNCITRAL Arbitration Rules



47. Accordingly, an appointing authority may be called upon to assist in the appointment process by appointing the second arbitrator of a three-member tribunal; the presiding arbitrator of a three-member tribunal; or a sole arbitrator.

(a) Appointment of the second arbitrator

48. The appointing authority shall appoint a second arbitrator upon request of a party if, within thirty days after the receipt of a party's notification of the appointment of an arbitrator, the other party has not notified the first party of the arbitrator whom it has appointed.[8] From 2001 to January 2018, the appointment of a second arbitrator was requested in 48 ISDS cases. In 31 instances the appointment was made by the appointing authority, while in 17 instances the respondent appointed the second arbitrator shortly after the claimant had requested the intervention of the appointing authority.

49. Before proceeding to an appointment, the Secretary-General may seek further information as to the nature of the case or circumstances pertaining to the Secretary-General's prima facie competence to act under the Rules. In selecting a suitable arbitrator, the Secretary-General will typically take account of the following factors, subject to any specific requirements that the treaty parties or disputing parties may have identified:

- The nationalities of the parties;
- The place of arbitration;
- The language(s) of the arbitration;
- The amount claimed; and
- The subject-matter and complexity of the dispute.

And, with respect to any prospective arbitrator:

- Nationality;
- Qualifications;
- Experience;
- Place of residence;
- Language abilities; and
- Availability.[9]

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[8] Article 7(2)(a) of the UNCITRAL Arbitration Rules 1976, Article 9(2) of the UNCITRAL Arbitration Rules 2010.

[9] Brooks W. Daly, Evgeniya Goriatcheva and Hugh A. Meighen, *A Guide to the PCA Arbitration Rules* (Oxford University Press 2014) MN 4.10.

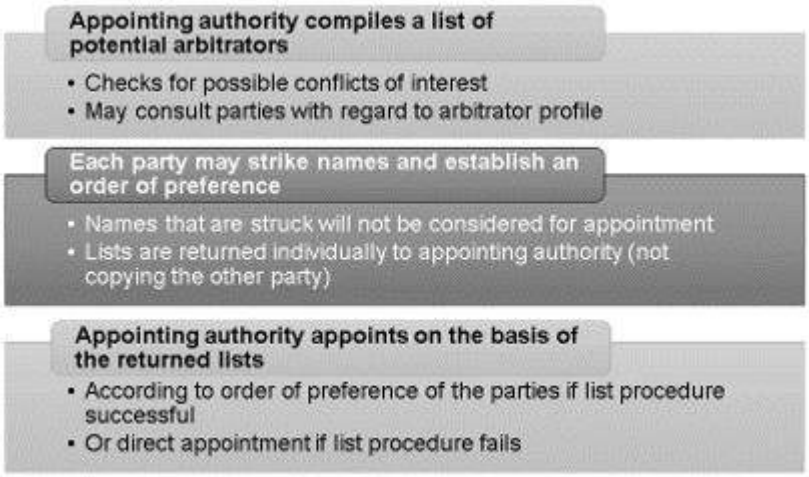
50. All candidates considered for appointment by the PCA Secretary-General are requested to conduct a check for conflicts of interest and submit a written statement of impartiality and independence, thereby making any required disclosure.

(b) Appointment of the presiding arbitrator

51. Under the UNCITRAL Arbitration Rules, the disputing parties have no direct role in appointing the presiding arbitrator. Such appointment falls in principle to the co-arbitrators. In the event that the co-arbitrators fail to agree within thirty days, the intervention of the appointing authority may be solicited. From 2001 to January 2018, a presiding arbitrator was appointed in 55 ISDS cases for which the PCA acted as registry.

52. The UNCITRAL Arbitration Rules provide, by default, for the conduct of a list-procedure, which may be graphically represented as follows:

Figure 3
List-procedure under the UNCITRAL Arbitration Rules



53. The Secretary-General may enquire with the disputing parties as to the profile – including any particular qualifications – that the arbitrator should possess. Occasionally, the parties themselves approach the Secretary-General with an agreed set of qualifications or other criteria.

54. The list-procedure described above applies "unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case".[10] Utilizing the discretion afforded by the Rules, the PCA Secretary-General has regularly asked disputing parties whether they would agree to a modified list procedure, pursuant to which the number of strikes by each side is limited to "50 per cent minus 1". This approach is designed to assure that at least one common candidate remains on the list, even if the parties strike the maximum number of candidates.

55. The following appointment mechanisms have also been used in place of the default list-procedure, generally at the joint request of the parties:[11]

(a) List procedure excluding "strikes": the parties are limited to ranking candidates on the list and/or commenting on the relative qualifications and suitability of candidates;

(b) List procedure on the basis of a closed list/roster: the appointing authority's choice is limited to persons nominated to a closed list of arbitrators;

[10] Article 6(3) of the UNCITRAL Arbitration Rules 1976, Article 8(2) of the UNCITRAL Arbitration Rules 2010.

[11] D. Pulkowski, "Permanent Court of Arbitration", in R.A. Schütze (ed.), *Institutional Arbitration: Article-by-Article Commentary* (forthcoming, 2nd ed., C.H. Beck/Hart/Nomos, 2018), Article 8.

(c) List procedure on the basis of lists from the parties: the list procedure is conducted on the basis of names separately supplied by each party, rather than a list composed by the appointing authority;

(d) Selection between options submitted by the parties: following bilateral discussion, the parties jointly submit a shortlist of candidates to the appointing authority, who will then select one candidate for appointment without providing reasons for its choice;

(e) Selection at discretion of appointing authority: finally, the selection of the sole or presiding arbitrator (or, indeed, all arbitrators) may be placed in the hands of the appointing authority. While the parties may be invited to provide general comments on the required profile of the arbitrator, they have no role in proposing or commenting on any specific candidates for appointment.

56. As in the event of the appointment of a second arbitrator, all potential appointees are requested to conduct a check for conflicts of interest and submit a written statement of impartiality and independence, thereby making any required disclosure.

(c) Appointment of a sole arbitrator

57. A sole arbitrator is to be appointed by the appointing authority where the parties have agreed that the tribunal will be composed of a sole arbitrator but have reached no agreement on the individual who is to serve as sole arbitrator within thirty days. The appointment procedure corresponds to that for a presiding arbitrator of a three-member tribunal. Sole-arbitrator tribunals have been rare in ISDS. Only 1 ISDS case for which the PCA acted as registry was decided by a sole arbitrator. In that case, the sole arbitrator was appointed by the appointing authority.

3. Arbitrator challenges in ISDS cases under the UNCITRAL Arbitration Rules

58. The UNCITRAL Arbitration Rules require an arbitrator to "disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence."[12] A party may challenge an arbitrator "if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."[13]

(a) Challenges in ISDS registry cases

59. The PCA has broad experience in handling challenges to arbitrators. The PCA's role typically takes the following forms: (i) the PCA Secretary-General himself decides the challenge;[14] or (ii) the PCA's International Bureau provides administrative assistance to the appointing authority designated to decide the challenge.[15]

60. From 2001 to January 2018, the PCA saw one or more arbitrator challenges in 33 ISDS cases for which it acted as registry. This means that over 80 per cent of the PCA's ISDS cases proceeded without an arbitrator challenge. In the 33 cases that did involve one or more arbitrator challenges, 60 different arbitrators were challenged in 52 notices of challenge. All notices of challenge were submitted under the UNCITRAL Arbitration Rules 1976 or 2010.

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[12] Article 9 of the UNCITRAL Arbitration Rules 1976, Article 11 of the UNCITRAL Arbitration Rules 2010.

[13] Article 10(1) of the UNCITRAL Arbitration Rules 1976, Article 12(1) of the UNCITRAL Arbitration Rules 2010.

[14] In addition, the PCA Secretary-General has occasionally provided a recommendation as to how a challenge might be decided upon the request of the appointing authority, see S. Grimmer, "The Determination of Arbitrator Challenges by the Secretary General of the Permanent Court of Arbitration", *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunal* (Brill Nijhoff, 2015), pp. 83–85.

[15] Often, after an appointing authority has been designated by the PCA, the appointing authority seeks the administrative support and assistance of the International Bureau of the PCA. In this regard, one may highlight, for example, the PCA's experience in supporting the work of the Iran-United States Claims Tribunal, where the PCA has acted as secretariat to the appointing authority in relation to, so far, 22 challenges.

61. These challenges involved the following procedural situations:

Challenged arbitrator/challenging party	*No. of challenges excluding concurrent challenges to several members of the tribunal*	*No. of challenges including concurrent challenges to several members of the tribunal*
Presiding arbitrators challenged by either party	2	7
Arbitrators appointed by claimant challenged by claimant	1	1
Arbitrators appointed by claimant challenged by respondent	25	29
Arbitrators appointed by respondent challenged by claimant	18	18
Arbitrators appointed by respondent challenged by respondent	0	4
Sole arbitrator challenged by either party	1	1

62. Seventeen notices of challenge were filed within six months of the commencement of the arbitration or shortly after the appointment of the challenged arbitrator.

(b) The standard of impartiality and independence

63. Under the UNCITRAL Rules, an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.[16] This is an objective test. A challenge is upheld if a reasonable third person having knowledge of the relevant facts would have justifiable doubts as to the arbitrator's impartiality or independence. A showing of actual bias or prejudgment by the arbitrator is not required for a challenge to be sustained.

64. The procedure to be followed to reach a decision on a challenge is at the discretion of the appointing authority. The PCA Secretary-General typically decides challenges on the basis of one or two rounds of written submissions by the parties, although in one case, at the request of the parties, a hearing was held. The challenged arbitrator is also given an opportunity to comment on the challenge.

(c) Outcomes of arbitrator challenges in ISDS registry cases

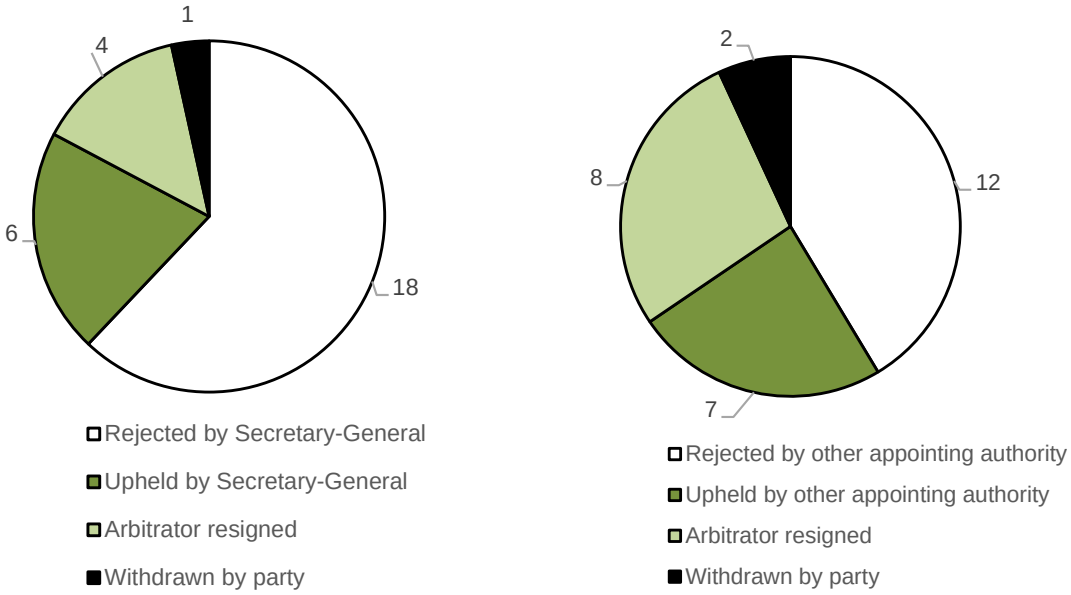
65. Out of the challenges against 60 different arbitrators in ISDS cases for which the PCA acted as registry, 24 were decided by the PCA Secretary-General and 19 by another appointing authority. No decision was required in respect of the remaining challenges.

66. Specifically, as regards requests submitted to the PCA Secretary-General, challenges were rejected in respect of 18 arbitrators and upheld in respect of 6 arbitrators. In 4 instances the arbitrator resigned before a decision was issued. One request was withdrawn by the challenging party. One challenge is currently pending.

67. As regards requests submitted to another appointing authority, challenges were rejected in respect of 12 arbitrators and upheld in respect of 7 arbitrators. Eight arbitrators resigned before a decision was issued. The challenging party withdrew its request in 2 instances. One arbitrator resigned before the appointing authority was designated.

[16] Article 12(1) of the UNCITRAL Arbitration Rules 2010.

Figure 4
Challenges in PCA ISDS registry cases



68. The average time in which the PCA Secretary-General issues his decision, from the date of the last submission, is fifteen days.[17] The Secretary-General provides reasons for his decision if at least one party so requests.

[17] S. Grimmer, "The Determination of Arbitrator Challenges by the Secretary-General of the Permanent Court of Arbitration", *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunal* (Brill Nijhoff, 2015), p. 89.

G. Note by the Secretariat on possible reform of investor-State dispute settlement (ISDS): comments by the Government of Thailand

(A/CN.9/WG.III/WP.147)

[Original: English]

In preparation for the thirty-fifth session of the Working Group, the Government of Thailand submitted to the Secretariat comments regarding procedural concerns regarding ISDS. The English version of the comments was submitted to the Secretariat on 11 April 2018. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

Annex

Procedural Concerns Regarding Investor-State Dispute Settlement: Thailand's Perspective

[Original: English]
[Date: 11 April 2018]

1. Introduction

1. This paper aims to identify procedural concerns regarding ISDS from the perspective of a developing country, both as a recipient of foreign direct investment and as a capital exporter. It is without prejudice to Thailand's position that discussions on ISDS reform should focus not only on procedural but also substantive matters, taking into account the substantive divergences among international investment agreements (IIAs).

2. The paper first reiterates the general principles that should guide the Working Group's discussion on ISDS reform (section 2). It then identifies and explains procedural concerns regarding ISDS that warrant detailed elaboration by the Working Group (section 3). The last section (section 4) discusses the relevance of inter-institutional cooperation and capacity-building initiatives for the Working Group's discussions on ISDS reform.

2. Guiding principles for discussions

3. With the objective of promoting a reform that is legitimate, viable, sustainable, and beneficial to all, an important principle that should guide the Working Group's discussions on ISDS is inclusiveness. Both members and non-members of UNCITRAL must be able to participate fully regardless of their level of development to ensure that all concerns raised are considered in the process.

4. Discussions on ISDS reform should be holistic and balanced, taking into account the different priorities of each State including: (a) the pursuit of public policy objectives of host States; (b) the promotion of responsible investment; (c) the protection of investors' rights; and (d) the attainment of global objectives such as sustainable development and food security.

5. Discussions on ISDS reform should also be thorough and not limited to just one aspect of ISDS – that is, arbitration. Focusing discussions on arbitration as a way to resolve investment disputes could deprive the Working Group of innovative solutions to the current problems. Instead, the Working Group should allow for discussions on other aspects of ISDS, in particular alternative dispute settlement mechanisms that may be used during the pre-arbitral stage and in parallel with the arbitration.

3. Concerns regarding ISDS procedures

3.1 The large amount of time and cost required in the arbitral proceedings

3.1.1 Ineffective use of alternative dispute resolution mechanisms during the pre-arbitral phase – a missed opportunity to reduce gaps between opposing positions?

6. Developing countries in a dispute are not always familiar with alternative dispute resolution (ADR) mechanisms and their potential to be used at the pre-arbitral phase. In many IIAs, only the consultation process is expressly provided for as a means to reach a mutually acceptable solution. In other cases, the IIAs are silent on the use of ADR mechanisms altogether.

7. Pre-arbitral proceedings, including good offices, mediation and conciliation, can help claimants and host States clarify each other's positions, and reduce the gap between the parties. In this respect, such mechanisms can facilitate the resolution of disputes through constructive dialogue. The involvement of third-party facilitators at an early stage should also be encouraged and widely used to assist the disputing parties in arriving at a mutually agreed solution, thus reducing time and cost spent for

the entire process. However, if the third-party facilitators participate too late in the process, one of the parties may deem such intervention unnecessary and a possible delay tactic from the other side.

8. A discussion on a possible guideline aimed at promoting an increasing interaction between professionals involved in the pre-arbitral phase through ADR mechanisms and arbitrators engaged during the arbitral proceedings would be useful.

3.1.2 Long "battle" during the enforcement phase of awards – another hidden aspect of costly and lengthy arbitration process

9. For the non-ICSID Member States which decide not to recognize and enforce the award rendered by the arbitral tribunal, they may request annulment of such award following the rules under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Such enforcement process usually involves a large amount of time and financial resources. In some complex cases, it may take longer time than the arbitration phase itself. From the perspective of a developing country with limited resources, any ISDS reform should therefore focus on promoting clarity and efficiency at the enforcement stage.

3.2 Arbitrators and their conduct

10. Another concern in ISDS is related to arbitrators' possible pre-existing bias due to their repeated appointments on one side of the dispute, and situations of "double-hatting" where the same persons are appointed as counsel and arbitrators in similar disputes. Such situations can bring about conflicts of interests in positions, and undermine the impartiality of arbitrators.

11. In addition, leading arbitrators are usually engaged in a large number of ongoing cases, giving them insufficient time to conduct a comprehensive analysis of issues at stake.

12. Another procedural concern results from specific requirements of arbitrators, which could generate extra burdens for developing countries. Arbitrators usually have predominance over the States regarding the establishment of rules of procedure and additional procedural arrangements, which can incur unexpected costs and time.

13. Inconsistent and incoherent views of arbitrators produce inconsistent and incoherent arbitration awards. Within the context of striking a proper balance between the preservation of host State's policy space and the safeguarding of investors' rights, any future reform should aim at ensuring consistent awards by ensuring that States secure the position of "master of treaties" through, inter alia, a joint interpretation mechanism, and do not become "slave of their own treaties" through an arbitration process. In parallel, the Working Group should consider carefully the idea of adding a new layer to the current ISDS system, be it an internationally composed entity or an appellate review mechanism of awards, and avoiding unnecessary new ISDS institutions.

14. To address these concerns, a code of conduct on ethics of arbitrators could be considered, containing, inter alia, clear provisions on permissible external activities and ways of implementing the joint interpretation mechanism.

3.3 External counsel and their professionalism

15. Developing countries often lack experience in ISDS cases and do not have in-house lawyers specialized in ISDS. They consequently have to rely heavily on legal services provided by external counsel. Since well-established external counsel are also often from a limited pool and are preoccupied with many concurrent cases, it is often the case that there can only be limited resources granted to each one.

16. There are international law firms specializing in ISDS that do not have a lot of experience working with developing countries. Therefore, they are not necessarily familiar with developing countries' procedures, mindset and methodology of work. Such a situation leads to a range of problems from the law firms not being able to present what developing countries need at the initial interview to the law firms not

being able to draft the terms of the employment contract that would suit the particular requirement of the State. The most immediate concerns of developing countries regarding external counsel are the cost of the arbitral proceedings, dealing with the arbitration procedures and their lack of flexibility in certain circumstances. International law firms and administering authorities need to recognize the limited resources of developing countries.

3.4 Unpreparedness of host States in ISDS cases

17. Developing countries generally lack the expertise on ISDS arbitration issues. As a consequence, they usually find themselves unprepared when ISDS disputes arise. This problem is compounded by the fact that there is usually no internal channel of communication available, leading to an inefficient coordination among relevant national agencies. This consequently prevents developing countries from effectively administering the disputes. In addition, respondent States are regularly facing tight schedules, especially when preparing their submissions. This puts them at a disadvantage compared to the claimants that usually have much more time to prepare. This situation is exacerbated by the fact that some of the existing arbitration rules, such as the UNCITRAL Arbitration Rules 1976, do not provide the respondent State with the opportunity to challenge the schedule established by the arbitral tribunal.

18. In an ISDS case, developing countries may also face unforeseen situations, where the claimants are financed by third-party funders. Although third-party funding may facilitate access to justice and improve security for costs in the arbitral proceedings, it raises concerns regarding conflicts of interest where, for example, counsel for a funded case is also an arbitrator in another case with the same funder. This could affect the arbitrators' impartiality, endangering the legitimacy of the arbitral proceedings. An appropriate regulation of third-party funding can help minimize its unintended consequences, while maximizing its benefits such as the allocation of costs and the security for costs.

3.5 Limited access to legal service at a reasonable cost

19. At present, there is no international body, which specializes in providing independent, low-cost legal advice on ISDS to developing countries – a body similar to the Advisory Centre on WTO Law (ACWL), which provides low-cost legal services on WTO law. Many developing countries thus have to endure the relatively high cost of legal services provided by international law firms, many of which may not even have adequate experience and expertise in handling ISDS cases. Indeed, defending ISDS cases requires a huge amount of developing countries' resources, both human and financial – resources, which could have been more usefully spent on meeting their developmental needs.

20. In this light, the establishment of an independent advisory entity, which caters for developing countries' particularities and specific needs, might be useful. Such an entity might take the form of an investment dispute advisory centre, which is separate from the proposed establishment of the International Tribunal for Investment. It should be independent, internationally funded, and composed of lawyers representing geographical diversity and would specialize in providing low-cost legal advice on international investment law to developing countries. Its operation should be expeditious and generate as little transaction costs as possible.

21. Such an entity could help ensure that developing countries are able to defend themselves adequately in ISDS cases, thus enhancing the expertise-based legitimacy of ISDS system.

4. Additional suggestions

4.1 Promote coordination among relevant international organizations

22. Many developing countries, including Thailand, have engaged in discussions on ISDS in many international forums besides UNCITRAL, including UNCTAD and OECD. Yet, these discussions have thus far yielded few concrete outcomes, in part due to the lack of sufficient coordination among the relevant forums. Without

coordinated efforts, these piece-meal discussions on ISDS reform may lead to fragmented, inconsistent outcomes that are counter-productive to the global efforts at reforming ISDS.

23. To ensure concerted efforts among the different organizations, UNCITRAL should coordinate more closely with other organizations, both regional and international, which are engaging in discussions on ISDS reform including, inter alia, UNCTAD, ICSID and OECD. Such enhanced coordination will not only help avoid duplication of efforts among different organizations but also enrich and contextualize the discussions of the Working Group.

4.2 Provide capacity-building assistance to promote dispute prevention

24. Developing countries often lack knowledge and/or capacity to prevent conflicts from escalating to full-fledged arbitral proceedings. This makes them, as host States, vulnerable to claims from investors. Thus, any ISDS reform should go hand in hand with the promotion of dispute prevention policy. One such policy could be the improvement of investor-State communication through strengthening institutional arrangements between investors and the respective agencies.

25. From developing countries' perspective, the provision of capacity-building assistance should be deemed as a priority for reform purposes. Such assistance may be provided by relevant international organizations or by developed countries with expertise in the investment dispute management, and may take several forms, such as the organization of workshops or training sessions for the agencies concerned. These capacity-building exercises can help States develop effective and rational investment policies, thus avoiding the proliferation of ISDS cases.

IV. ELECTRONIC COMMERCE

A. Report of the Working Group on Electronic Commerce on the work of its fifty-sixth session (New York, 16–20 April 2018)

(A/CN.9/936)

[Original: English]

Contents

I. Introduction

1. At its forty-ninth session, in 2016, the Commission confirmed its decision that the Working Group could take up work on the topics of identity management (IdM) and trust services as well as of cloud computing upon completion of the work on the draft Model Law on Electronic Transferable Records. The Commission was of the view that it would be premature to prioritize between the two topics. It was mentioned that priority should be based on practical needs rather than on how interesting the topic was or the feasibility of work. The Secretariat, within its existing resources, and the Working Group were asked to continue to update and conduct preparatory work on the two topics including their feasibility in parallel and in a flexible manner and report back to the Commission so that it could make an informed decision at a future session, including the priority to be given to each topic.[1] At its fiftieth session, in 2017, the Commission reaffirmed that mandate and requested the Secretariat to consider convening expert group meetings as it deemed necessary to expedite the work in both areas and ensure the productive use of conference resources by the Working Group. States and international organizations were invited to share with the Working Group and the Secretariat their expertise in the relevant areas of work.[2]

[1] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 235 and 353.

[2] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), para. 127.

2. The Working Group considered both topics at its fifty-fourth and fifty-fifth sessions. In the area of cloud computing, the Working Group decided to recommend to the Commission the preparation of a checklist of major issues that contracting parties might wish to address in cloud services contracts (A/CN.9/902, para. 15). In the area of IdM and trust services, the Working Group identified the legal recognition and mutual recognition of IdM and trust services as the goals of the work of UNCITRAL in that area (A/CN.9/902, para. 45) and agreed that party autonomy, technological neutrality, functional equivalence (with special considerations applicable to IdM) and non-discrimination would guide that work (A/CN.9/902, paras. 52 and 63). The Working Group asked the Secretariat to revise document A/CN.9/WG.IV/WP.143 by including definitions and concepts listed in paragraph 20 of document A/CN.9/WG.IV/WP.144 (A/CN.9/902, para. 92).

3. In preparation for the fifty-sixth session of the Working Group, the Secretariat convened an expert group meeting on contractual aspects of cloud computing in Vienna on 20 and 21 November 2017 and an expert group meeting on legal aspects of IdM and trust services in Vienna on 23 and 24 November 2017. (For further background information, see A/CN.9/WG.IV/WP.147, paras. 6–8 and 14–16.)

II. Organization of the session

4. The Working Group, composed of all States members of the Commission, held its fifty-sixth session in New York from 16 to 20 April 2018. The session was attended by representatives of the following States members of the Working Group: Argentina, Armenia, Austria, Brazil, Burundi, Canada, Chile, China, Cyprus, Czechia, Denmark, France, Germany, Greece, Honduras, Hungary, India, Indonesia, Israel, Italy, Japan, Kenya, Lebanon, Libya, Mexico, Nigeria, Panama, Philippines, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Thailand, Turkey, United States of America and Venezuela (Bolivarian Republic of).

5. The session was also attended by observers from the following States: Algeria, Belgium, Dominican Republic, Iraq, Norway, Saudi Arabia, Sudan and Syrian Arab Republic.

6. The session was also attended by observers from the Holy See and the European Union.

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

(a) *United Nations system*: World Bank;

(b) *International non-governmental organizations*: American Bar Association (ABA), the China Society of Private International Law (CSPIL), Grupo Latinoamericano de Abogados para el Derecho del Comercio Internacional (GRULACI), Global System for Mobile Communications Association (GSMA), International Association of Young Lawyers (AIJA), Jerusalem Arbitration Centre (JAC), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association (MAA) and Union Internationale du Notariat (UINL).

8. The Working Group elected the following officers:

Chairperson: Ms. Giusella Dolores FINOCCHIARO (Italy)

Rapporteur: Sra. Ligia C. GONZÁLEZ LOZANO (Mexico)

9. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.IV/WP.147); (b) a draft checklist of main contractual aspects of cloud computing contracts (A/CN.9/WG.IV/WP.148); (c) a note by the Secretariat containing updates on the preparatory work held by the Secretariat on IdM and trust services (A/CN.9/WG.IV/WP.149); (d) a note containing revised definitions of terms and concepts relevant to identity management and trust services (A/CN.9/WG.IV/WP.150); and (e) a proposal by the United States on contractual aspects of cloud computing (A/CN.9/WG.IV/WP.151).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Contractual aspects of cloud computing.
5. Legal issues related to identity management and trust services.
6. Technical assistance and coordination.
7. Other business.
8. Adoption of the report.

III. Deliberations and decisions

11. The Working Group held a reading of the draft checklist of main contractual aspects of cloud computing contracts contained in document A/CN.9/WG.IV/WP.148, taking into account comments on the draft submitted by the United States (A/CN.9/WG.IV/WP.151). The Working Group requested the Secretariat to revise the text reflecting the deliberations and decisions of the Working Group at the session, found in chapter IV of this report, and to submit a revised text for review and approval by the Commission. The recommendations of the Working Group to the Commission on agenda item 4 may be found in paragraphs 17 and 44 of this report.

12. The Working Group continued consideration of legal issues related to IdM and trust services on the basis of notes by the Secretariat (A/CN.9/WG.IV/WP.149 and A/CN.9/WG.IV/WP.150). The deliberations and decisions of the Working Group on legal issues related to IdM and trust services are found in chapter V of this report. The recommendations of the Working Group to the Commission on agenda item 5 may be found in paragraph 95 of this report.

IV. Contractual aspects of cloud computing

A. Comments on a draft checklist contained in document A/CN.9/WG.IV/WP.148

1. General comments (form of the work and drafting style)

13. The Working Group expressed appreciation to the experts who contributed to the preparation of the draft contained in document A/CN.9/WG.IV/WP.148 and to the Secretariat. It was indicated that the draft covered most issues that were intended to be covered. The prevailing view was that providing an explanation of main issues arising in connection with cloud computing contracts would be essential for the document to be helpful. The view was also expressed that the Working Group could consider inserting additional explanations where useful.

14. The Working Group recalled its decision to prepare a checklist of main contractual issues related to cloud computing contracts, which should not provide guidance on best practices or recommendations (A/CN.9/902, para. 15). The Working Group reaffirmed its decision that the document should not favour a particular contracting party or recommend a particular course of action on legal or practical issues. It was explained that a fully neutral and descriptive style would be appropriate in the light of rapidly evolving practices and delicate issues involved. The Secretariat was requested to revise the draft in light of those considerations.

15. The Working Group noted that, although some existing UNCITRAL documents could be used as a model for preparing a checklist, no UNCITRAL text was entitled “checklist”. The suggestion was made to entitle the document “notes” in order not to convey a message that the preparation of a simple list of issues relevant to contracting parties, without any explanation of those issues, was intended. The Working Group

agreed to refer to the document as "Notes on main issues of cloud computing contracts".

16. The Working Group discussed the Secretariat's suggestion that the document could be prepared as an online reference tool, which would allow presenting its content in a more-user friendly way and updating it more rapidly when necessary. Questions were raised on how that approach would differ from the existing policy on posting UNCITRAL texts on the UNCITRAL website, how the online content would be kept up to date and how the feedback from readers would be analysed and presented to UNCITRAL for further improvement of the tool. In that respect, it was explained that, while all UNCITRAL documents were already available electronically, it was possible to envisage different types of interactive documents.

17. The view was expressed that the Working Group would need to consider in due time ways of keeping the document comprehensive and relevant. Some delegations found the suggestion attractive in the light of that need. Several delegations acknowledged that preparing an online reference tool would constitute a significant departure from the existing policy on posting UNCITRAL texts on the UNCITRAL website as reproductions of printed documents. It was noted that the suggested approach would have broader implications. For those reasons, those delegations expressed the need to analyse further details as well as budgetary and other implications. After discussion, the Working Group recommended to the Commission to request the Secretariat to prepare a note setting out considerations relating to the preparation of the suggested online reference tool.

2. Introduction (paras. 1–7)

18. No comments were made with respect to that part of the document.

3. Part One. Main pre-contractual aspects (paras. 8–29)

19. The Working Group agreed: (a) to replace in paragraphs 11 and 15 and elsewhere, references to "assurances" with references to "contractual commitments"; (b) to highlight in paragraphs 10 and 11 that compliance with data localization requirements set forth in applicable law would be of paramount importance for the parties, and that the contract could not override those requirements; (c) to replace in paragraph 15(h) the word "evidence" with another term, such as "information"; (d) to replace in paragraph 15(i) the phrase "financial standing" with "financial viability"; and (e) to add a reference to risks arising from the insufficient isolation of data and other content in cloud computing infrastructure.

20. In response to the suggestion to move paragraphs 17 and 18 to part two, the view was expressed that it was desirable to highlight intellectual property (IP) infringement risks and associated costs among issues to be assessed at the pre-contractual stage. It was explained that unsophisticated parties in developing countries might be particularly unaware that IP infringement might indeed arise because of the move of data and other content to the cloud.

4. Part Two. Drafting a contract (paras. 30–172)

21. With respect to section A, the Working Group agreed: (a) to delete the last sentence in paragraph 30; (b) to redraft paragraph 36 to the effect that applicable law may require a contract in paper form for specific purposes, such as tax purposes, although that would not be considered a desirable practice in light of the general goal to promote the use of electronic means; and (c) to add in paragraph 38 a reference to the effects of the termination of the contract.

22. With respect to section B, the Working Group agreed: (a) to redraft the second sentence in paragraph 39 to the effect that the applicable law would specify the information needed to ascertain the legal personality of a business entity and its capacity to enter into a contract; and (b) to delete paragraph 40.

23. With respect to section C, the Working Group agreed: (a) to clarify in paragraph 42 that the phrase "applicable standards" referred to technical, and not legal

standards; (b) to redraft paragraph 43 to indicate that different commitments (i.e. obligations of result or of best efforts) could be agreed upon depending on circumstances, including the value of the contract, and that the type of commitment would have implications on the burden of proof in case of dispute; (c) to highlight in paragraph 43 that the formulation of performance parameters may require the involvement of information technology (IT) specialists; (d) to shorten the examples provided after paragraph 43, in particular by deleting explanations of terms and concepts appearing elsewhere; (e) to add in paragraph 48 that attention should be given to the fact that in a few jurisdictions the law could impose duties on the provider as regards the content hosted on its cloud infrastructure, e.g. the duty to report illegal material to public authorities, which might have privacy and other ramifications, and that the provider would be unable to transfer those duties to the customer and to end-users by acceptable use policies (AUP) or otherwise; (f) to reflect in paragraph 49 that AUP may restrict not only the type of content that may be placed on the cloud but also the customer's right to give access to data and other content placed on the cloud to third parties (e.g. nationals of certain countries or persons included in sanctions lists); (g) to delete the second sentence in paragraph 54; and (h) to replace "would" with "could" in the last sentence of paragraph 64. The question was raised under which applicable law content placed on the cloud would be considered illegal.

24. With respect to section D, the Working Group agreed: (a) to delete the phrase "non-binding" in paragraph 80 and elsewhere where that qualifier was used with reference to contractual terms; and (b) in paragraphs 79–81, to consider replacing the phrase "data deletion" with the phrase "data erasure" or describing the term "data deletion" in the Glossary. The point was made that the same term should be used throughout the document.

25. No comments were made with respect to section E.

26. With respect to section F, it was agreed that paragraph 92 should be moved from that section to section G.

27. With respect to section G, the Working Group agreed: (a) to delete the last sentence in paragraph 99; (b) to move paragraphs 100 and 101 from that section to a separate section that would be entitled "Suspension of services"; (c) to add in paragraphs 102–103 or in other appropriate sections of the document a discussion of consequences for the customer, such as migration costs, arising from unilateral changes of the terms and conditions of the contract by the provider; and (d) to replace the phrase "contractual documents" with the phrase "different documents forming the contract" in paragraph 102. The suggestion to delete the last sentence of paragraph 98 did not gain support.

28. With respect to section H, the Working Group agreed to eliminate repetitions in paragraphs 108–111 and better illustrate issues relating to "back-to-back" contracts. In that respect, it was mentioned that alignment of linked contracts would be necessary not only for data protection purposes but also for ensuring confidentiality, compliance with data localization requirements and safeguards in case of insolvency, among others.

29. With respect to section I, the Working Group agreed: (a) to delete reference to "security incidents" in the second sentence of paragraph 114; (b) to redraft paragraph 118 to convey that clauses containing disclaimers and limitations of liability, if agreed upon by the parties, would need to be included in the contract, and that the applicable law might impose additional form or other requirements for the validity and enforceability of those clauses; and (c) to add an informative example at the end of paragraph 121 along the following lines "Waiver of liability in cases where the customer has no control or ability to effect security may be found abusive".

30. No comments were made with respect to section J.

31. With respect to section K, the Working Group agreed: (a) to redraft paragraph 131 by eliminating recommendations contained therein; and (b) to redraft the first sentence of paragraph 136 as follows: "Certain modifications to the contract

by the provider may not be acceptable to the customer and may justify termination of the contract."

32. With respect to section L, the Working Group agreed to redraft paragraph 147 to convey that the provider should not be expected in all cases to offer proactive assistance with migrating customer's data back to the customer or to another provider, but should ensure that migration was possible and simple. With respect to the same section, the Working Group noted that a consequential change would need to be made in paragraph 148 to reflect the modifications to be made in the section on data deletion (see para. 24 above).

33. With respect to section M, the Working Group agreed to add a subsection on online dispute resolution (ODR) in the light of the relevance and importance of ODR to resolution of disputes arising from cloud computing transactions and taking into account UNCITRAL's work in that area.

34. No comments were made with respect to sections N, O and P.

35. With respect to section Q, the Working Group agreed to delete the last sentence in paragraph 170.

36. The suggestion was made to repeat the content of paragraph 15 in part two of the document as the elements listed therein were relevant at both pre-contractual and contract drafting stages. The other view was that some of the items listed in that paragraph were already discussed in part two, and that the Secretariat might consider adding in that part the discussion of other relevant items. The Working Group requested the Secretariat to add the discussion of other relevant items in part two.

5. Glossary

37. Concerns were raised about the translation of some terms, such as cloud computing, IaaS and public cloud, to Russian. Assistance was offered with finding the correct terminology in the area of cloud computing in the Russian language.

38. With respect to the term "Acceptable use policy (AUP)", it was suggested that the phrase "according to the applicable law" be added at the end of the description of that term in the Glossary. Another suggestion was to delete the examples from that description or, alternatively, expand them to encompass other content that, although not illegal or prohibited by law, could not be placed in the cloud under the terms of the AUP. The Working Group decided to delete examples from the description of the term.

39. The Secretariat was requested: (a) to spell out all abbreviated terms used for the first time in the Glossary; (b) to improve the description of the term "cloud computing services"; (c) to consider including a separate description of the term "data subject" (currently that term appeared in the description of the term "personal data"); (d) to shorten the description of the term "lock-in" by moving some elements from that description to paragraphs 19 to 21 and inserting in that description references to those paragraphs; (e) to refer in the description of the term "personal data" to both sensitive and non-sensitive data; (f) to insert the term "personal" before the word "data" at the end of the description of "personal data processing", and to retain the words "personal data" before the word "processing" in that same description; (g) to add the description of the term "security incident"; and (h) to replace the last part of the description of the term "Service Level Agreement (SLA)", reading "how they should be delivered (the **performance parameters**)", with the phrase "the level of service expected or to be achieved under the contract (the **performance parameters**)".

40. The suggestion was to quote in the Glossary well-known cloud computing terms, such as IaaS or PaaS, from applicable international technical standards. The other view was that, although it was important to ensure compliance of all descriptions of the terms listed in the Glossary with the definitions found in international technical standards, descriptions in the Glossary should be easily understandable also by non-specialists. The Secretariat was requested to retain in the Glossary descriptions of technical terms frequently used in the text to facilitate understanding of the

document. The Secretariat was also requested to ensure compliance of those descriptions with the definitions of relevant terms in international technical standards.

41. In response to the suggestion to add a description of the term "due diligence" in the Glossary and to convey therein that undertaking due diligence might be important for both contracting parties, the view was expressed that the substantive concerns underlying the proposal should be addressed in the main part of the text and not in the Glossary. The Secretariat was requested to keep providers' perspectives in mind when revising section B of part one. In particular, the point was made that the provider might be interested in verifying the customer's standing vis-à-vis criteria listed in paragraph 15.

B. Recommendation to the Commission as regards further work in the area of cloud computing

42. The Secretariat was requested to revise the draft document reflecting deliberations at the session. Various views were expressed on whether a revised draft should be further considered by the Working Group. After discussion, the prevailing view was that it should not be, and that a recommendation should be made to the Commission that the final document would be issued as a Secretariat document in the light of the limited involvement of the Working Group in drafting the document. However, the appropriateness of issuing the document as a Secretariat work product after the Working Group's detailed consideration of the draft and ensuing instructions to the Secretariat on its revision was questioned.

43. The Working Group also considered whether to recommend to the Commission any further work in the area of cloud computing. Private international law issues were highlighted as important issues to consider. The Working Group recalled its decision taken at the fifty-fifth session (see para. 14 above) and reaffirmed at the current session that no guidance on best practices or recommendations should be provided. The prevailing view was that it was not feasible and desirable to undertake further work in that area. The point was made that the draft document raised a number of legal issues that would need to be further analysed, and that proposals for future work might be made in the future on that basis.

44. The Working Group decided to recommend to the Commission to review the document to be prepared by the Secretariat and authorize its publication or issuance in the form of an online reference tool, in both cases as a work product of the Secretariat. The point was made that appropriate amount of time would need to be allocated for discussion of the document by the Commission. It was indicated that, taking into account the need to revise and translate the document, such discussion might take place at the earliest during the fifty-second session of the Commission, in 2019. The understanding was that the Commission, when considering the document, might decide to refer the draft back to the Working Group for further consideration.

V. Legal issues related to identity management and trust services (A/CN.9/WG.IV/WP.149 and A/CN.9/WG.IV/WP.150)

A. General comments

45. The Secretariat introduced working papers A/CN.9/WG.IV/WP.149 and A/CN.9/WG.IV/WP.150. The Secretariat in particular reported on the main conclusions of the expert group meeting held in Vienna, on 23 and 24 November 2017, and invited the Working Group to consider the issues listed in paragraph 32 of document A/CN.9/WG.IV/WP.149.

46. The Working Group agreed to proceed with the consideration of issues listed in paragraph 32.

B. Consideration of legal aspects of IdM and trust services

47. The Working Group considered paragraph 32(a) of document A/CN.9/WG.IV/WP.149. Several delegations pointed to the lack of cross-border recognition as a main legal obstacle to the broader use of IdM and trust services that could be addressed by the Working Group. It was explained that the need to identify business partners in a legally enforceable manner was of paramount importance to promote trade across borders. However, it was added, lack of legal harmonisation, e.g. when laws referred to different definitions and attributed different legal effects, prevented mutual legal recognition of IdM and trust services.

48. The Working Group also recognized the need to achieve technical interoperability for removing obstacles to the use of IdM and trust services across borders, at the same time agreeing that those aspects would be outside the work of UNCITRAL in this field.

49. While acknowledging the importance of functional equivalence and other fundamental principles that guided UNCITRAL work in the area of electronic commerce, the view was also expressed that the Working Group should not limit itself to the task of removing legal obstacles by formulating functional equivalence rules like those already found in existing UNCITRAL texts. It was suggested that the formulation of substantive rules might be unavoidable. However, it was also indicated that future work should focus on cross-border aspects and respect existing national rules. In response, doubts were expressed about the feasibility of non-interfering with domestic processes since identity schemes were determined domestically. It was added that developing countries may particularly benefit from further guidance on both national and international legal aspects of IdM and trust services.

50. Reference was made to document A/CN.9/WG.IV/WP.144 that was before the Working Group at its fifty-fifth session. The Working Group was invited to use that document as a road map for discussion. Support was expressed for starting substantive deliberations on levels of assurance and the principle of proportionality of security before other legal issues. It was indicated that level of assurance was a notion relevant for both IdM and trust services.

51. Doubts were expressed about the desirability of referring to the notion of levels of assurance in the commercial context where establishing minimum criteria for trust could be sufficient. The need to respect freedom of parties in choosing identification mechanisms in business transactions and allocating risks accordingly was emphasized. Concern was expressed that levels of assurances might interfere with such freedom, in particular, if strict compliance was requested. (For further discussion of levels of assurance, see paras. 54–56, 76–77 and 80–82 below). The Working Group was invited to consider existing international instruments aimed at ensuring mutual recognition of legal effects across borders in the paper environment, such as the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (The Hague, 5 October 1961) (the "Apostille Convention")[3] and the Protocol on Uniformity of Powers of Attorney which are to be Utilized Abroad (Washington, 17 February 1940),[4] which might offer guidance on minimum elements for cross-border mutual recognition of IdM and trust services.

52. With respect to the scope of the work and the question raised in paragraph 32(b) of document A/CN.9/WG.IV/WP.149, the difficulty of distinguishing between commercial and non-commercial, and public and private aspects in the IdM and trust services context was acknowledged. While there was broad agreement that the mandate of UNCITRAL pertained to trade and that the main goal of possible future work should therefore focus on enabling commercial transactions, several delegations expressed the view that distinctions based on the nature of the participants and the type of transaction should be avoided given the possibility of using public IdM and trust services for commercial transactions and, conversely, of using commercial IdM and trust services for public transactions. It was indicated that IdM schemes could be

[3] United Nations, *Treaty Series*, vol. 527, No. 7625, p. 189.
[4] United Nations, *Treaty Series*, vol. 161, No. 487, p. 230.

used for a broad range of purposes, including regulatory compliance. In that respect, it was recalled that a significant obstacle to cross-border trade arose in the context of paperless trade facilitation from the limited acceptance of foreign IdM and trust services by public authorities. It was added that UNCITRAL texts on electronic commerce found frequent application in non-commercial transactions. The point was also made that entities and transactions could be characterized differently in different jurisdictions.

53. Reference was made to the relationship between identification and electronic signatures also in light of existing practices of using electronic signatures for identification purposes. It was indicated that identification was a generic assertion of identity, while electronic signatures were a trust service aiming at fulfilling specific functions based on the intention of the signatory. Hence, it was explained, while electronic signatures linked an entity with its identity, they should not be used to establish identity.

54. The Working Group considered the following questions: (a) how are levels of assurance defined?; (b) was definition of levels of assurance a legal or a technical exercise?; (c) who would verify compliance with the asserted level of assurance?; and (d) who would be liable in case of failure to comply? It was generally agreed that those questions were of fundamental importance.

55. It was indicated that levels of assurance had both legal and technical aspects. The view was expressed that UNCITRAL should refer to existing or future definitions of levels of assurance and in any case refrain from engaging in technical work.

56. As regards verification of levels of assurance, reference was made to various mechanisms, including independent auditing or certification, oversight by public authorities, and self-regulation.

57. The view was expressed that the liability regime was a complex matter involving delicate policy choices, which could influence significantly the development of the IdM and trust services market. Different options to address that issue were described. It was indicated that liability matters could be dealt with in applicable national law, which should be easily identifiable. Alternatively, it was said that compliance with commonly agreed requirements and rules could exempt the complying IdM and trust service provider from liability or lead to reversing the burden of proof. However, concerns were raised that under that approach commercial parties could face significant economic losses without recourse against service providers. It was also indicated that public IdM and trust services providers could be exempted from liability under national law. Reference was made to the use of insurance as well as to the relevance of private international law issues when discussing liability in a cross-border context.

58. The Working Group identified the following issues as relevant for future work on legal aspects of IdM and trust services: (a) scope; (b) definitions; (c) mutual legal recognition requirements and mechanisms, possibly differentiated for IdM schemes and for trust services; (d) certification of IdM schemes; (e) levels of assurance of IdM schemes; (f) liability; (g) institutional cooperation mechanisms; (h) transparency, including disclosure duties with respect to services offered and notification of security breaches; (i) no new obligation to identify; (j) data retention; and (k) supervision of service providers. It was said that the list of identified topics was open-ended.

59. It was noted that, while the issues identified might be relevant for advancing the consideration of the topic, no assumption should be made on the possible form of a final product. It was also indicated that caution should be exercised when discussing certain identified issues so as to avoid introducing regulatory requirements. It was suggested that it could be useful to consider which issues were relevant for all parties involved and which for service providers only.

60. The Working Group recalled the relevance of general principles, including party autonomy (see para. 2 above).

C. Main topics identified by the Working Group for further discussion

1. Scope of the work

61. The Working Group agreed that future work should pursue the general goal of promoting international trade and that the scope of that work should be the facilitation of the cross-border use of IdM and trust services.

62. It was indicated that future work should focus on business-to-business transactions, and that certain business-to-government and government-to-government transactions relevant for international trade, such as cross-border single windows for customs operations, might be further considered.

63. It was suggested that future work should deal with the identification of individuals and business entities involved in cross-border trade, without excluding certain entities relevant for commercial activities that might not have distinct legal personality.

64. Different views were expressed on whether identification of objects should also be covered by the work. The prevailing view was that it should not since objects did not have legal personality and could not be held autonomously liable. It was understood that the Working Group might consider explaining reasons for excluding the identification of objects from its work. However, the view was also expressed that identification did not require autonomous legal personality.

65. Another view was that the consideration of identification of objects could take place after the Working Group dealt with that of persons, if policy discussions related to Internet of things, artificial intelligence, blockchain and smart contracts suggested doing so.

66. Recognizing that the aim of the work should be to facilitate trade, the view was expressed that no technical barriers to trade should inadvertently be created by the work in this field.

2. General principles

67. The Working Group reaffirmed that the following overarching principles would guide the work on the topic: technological neutrality, party autonomy, non-discrimination against the use of electronic means and functional equivalence (see para. 2 above).

68. It was indicated that functional equivalence in the IdM context would need to be considered in a broader sense and not restricted to identification duties. It was noted that one consequence of the adoption of that principle was the necessity to respect substantive law, namely well-established identification rules in the paper-based environment. It was recalled that UNCITRAL provisions applying the principle of functional equivalence to trust services already existed. It was noted that application of functional equivalence might depend on the ultimate form of any instrument to be prepared by the Working Group.

69. The importance of the principle of technological neutrality was stressed also in light of the experience of jurisdictions that had enacted legislation favouring particular technical standards and technology and subsequently amended it. It was added that, in application of that principle, guidance on minimum system requirements should refer to system properties and not to specific technologies.

70. Different views were expressed on the need to refer to economic neutrality, also referred to as system model neutrality, as a principle for the work on the topic. Some delegations explained that that notion should be further considered as it was particularly relevant for business decisions. It was suggested that another dimension of economic neutrality would need to be taken into account, namely avoiding imposing unjustified costs for access to IdM schemes and trust services. Other delegations indicated that the principle required further illustration before discussion.

71. Reference was made to the principle of proportionality. Several delegations requested additional clarifications on its possible content. It was indicated that the principle referred to the choice by the user of IdM schemes and trust services adequate for its needs. It was added that proportionality was related to party autonomy.

72. It was recalled that party autonomy was subject to limitations set out in mandatory applicable law.

73. The Working Group was also invited to consider the principle of reciprocity, in particular in the context of its discussion of mutual legal recognition.

3. Definitions

74. Reference was made to documents A/CN.9/WG.IV/WP.144 and A/CN.9/WG.IV/WP.150, which contained useful definitions. It was indicated that terminology to be used in future work on IdM and trust services should comply with internationally established definitions, in particular those of the International Telecommunication Union (ITU). The attention of the Working Group was brought to definitions being elaborated by the United Nations and the World Bank in the context of the implementation of Sustainable Development Goal (SDG) target 16.9 on legal identity. It was suggested that future discussions should consider whether the definition of "trust services" should be open-ended.

4. Mutual recognition requirements and mechanisms

75. There was agreement that discussion of mutual recognition requirements and mechanisms was necessary to address the cross-border use of IdM and trust services. It was suggested that that discussion should extend to legal consequences for non-compliance with those requirements.

76. It was explained that that discussion should focus on creating a set of rules for schemes and services so as to promote trust in them. It was added that a decentralized approach should be considered as particularly suitable to operate at the global level. It was further explained that trust could be promoted by describing the elements of the process, which included levels of assurance and independent audits. It was indicated that a discussion on possible differences between mutual recognition requirements and mechanisms applicable respectively to IdM schemes and to trust services could take place at a later stage and refer to use cases.

77. In response, doubts were expressed on whether establishing generic levels of assurance was a prerequisite for mutual recognition, taking into account that mutual recognition was not always necessary in commercial transactions and, when necessary, it would be context specific and would not necessarily require reference to levels of assurance. Hence, it was added, parties' reliance was always relevant for commercial transactions, while recognition by a central authority was not. The concern was expressed that demanding strict compliance with the requirements associated with levels of assurance could hinder trade. It was also questioned that the Working Group was well-equipped to work on levels of assurance in the light of the technical issues involved. In response, it was observed that some regions had already succeeded in that endeavour. (For discussion of levels of assurance, see also paras. 50–51 and 54–56 above and paras. 80–82 below.)

5. Certification of IdM and trust services schemes

78. Relevance of certification, accreditation and independent audits to both IdM and trust services was recognized. The degree of that relevance, it was explained, would depend on the type of instrument to be prepared by the Working Group.

79. A close link between certification and liability (see section 7 below) and certification and supervision of service providers (see section 12 below) was acknowledged. It was indicated that future discussions on the topic could refer to the possibility of requiring independent audits for higher levels of assurance, but that such requirement should not infringe the principle of technological neutrality. In that respect, it was indicated that an independent audit would certify the processes and

means used in IdM and trust services systems but not require the use of any particular technology or method.

6. Levels of assurance for IdM and trust services

80. The Working Group recalled its consideration of levels of assurance in the context of mutual recognition (see paras. 76–77 above). The view was expressed that the topic could be considered either as stand-alone or in the context of mutual recognition, provided that its fragmented and repetitive consideration was avoided.

81. It was said that, while it was useful to consider the notion of level of assurance in future discussions on IdM, one possible outcome of that discussion might be the establishment of a single level of assurance. In response, it was said that in practice the levels of assurance "substantial" and "high" were frequently used. It was added that a discussion on the number of levels of assurance was premature.

82. It was indicated that it could be useful to distinguish the notion of level of assurance, to be applied to IdM schemes, and that of qualification, relevant for trust services. It was explained that, while level of assurance referred to the quality of the identification procedure, qualification referred to the implementation of the trust service. It was added that the two notions had different requirements and nature and were not necessarily related in practical use. It was noted that both notions were relevant for future deliberations. It was indicated that matters to be discussed in relation to those notions included their legal effects and the generic description of their requirements, which should be outcome-based in order to preserve technological neutrality.

7. Liability

83. There was broad agreement on the relevance of liability matters for future work on IdM and trust services.

84. One possibility to be discussed was that liability would fall under national law. It was indicated that in such case applicable law in cross-border transactions should be identified, and that a discussion of forum shopping could be relevant in that context.

85. Another possibility was the preparation of legislative or non-legislative texts on liability of IdM and trust services, which could discuss, among others: which entities should be liable (issuers, providers, other parties), taking into account special liability regimes for public entities; the possibility to limit liability of parties complying with predetermined requirements; statutory mechanisms to limit liability, e.g. by exemption or reversal of burden of proof; and contractual limitations of liability.

86. It was noted that in certain cases it could not be easy to identify a liable entity, e.g. when using distributed ledger technology for timestamping. It was explained that in those cases the system could create trust despite the absence of a central service provider.

8. Institutional cooperation mechanisms

87. The Working Group considered whether institutional cooperation mechanisms would be relevant to future discussions on legal aspects of IdM and trust services. It was indicated that those mechanisms could involve both public and private entities. The importance of cooperation among parties involved in IdM and trust services was emphasized. The desirability of dealing with federated identity management systems in this framework or elsewhere was mentioned.

9. Transparency

88. The Working Group identified the principle of transparency as relevant for future discussions on IdM and trust services. The importance of guidance on that principle for developing countries was stressed. It was indicated that one relevant aspect of that principle pertained to duties of disclosure with respect to the services offered and their quality.

89. Notification of security breaches was also identified as a relevant aspect of the principle of transparency. In that respect, it was noted that security breach notifications had elements in common with data breach notifications, but also significant differences. It was added that useful examples of mechanisms going beyond mere notification in case of security breach existed.

10. No new obligation to identify

90. It was emphasized that the consideration of legal aspects of IdM and trust services was not intended to interfere with substantive laws and in particular to create obligations to identify where such obligations did not already exist under applicable law or contract. It was indicated that discussions on that topic should not imply that a decision to prepare a legislative text had already been made.

11. Data retention

91. The importance of harmonisation and interoperability of data retention regimes for cross-border trade was emphasized. Questions were raised on whether data retention should be considered in future discussions on IdM and trust services and, if so, under which perspective. It was indicated that one aspect of that topic related to data protection, which raised particularly complex issues. It was added that another aspect related to data storage and archiving, which could be considered a trust service. In that context, reference was made to the possible discussion of an obligation to preserve information necessary for legal proceedings. Yet another relevant aspect identified related to portability of archives.

12. Supervision of service providers

92. Reference was made to the possible discussion of supervision of service providers as a stand-alone topic. It was indicated that supervision was a useful mechanism to increase trust in service providers, in particular in developing countries. It was added that public law aspects, such as regulatory compliance, might also deserve further consideration.

93. Caution was expressed against introducing regulatory requirements. The possibility of considering supervision in the framework of independent audits was mentioned, and the link with liability matters highlighted (see paras. 79 and 83–86 above).

94. The desirability of discussing not only centralised supervision, but also independent third-party evaluation as well as self-regulation was mentioned. Recent legislative developments favouring independent evaluation were mentioned. It was indicated that the distributed nature of certain systems might pose challenges to supervision.

D. Recommendation to the Commission as regards further work in the area of IdM and trust services

95. The Working Group recalled its recommendations to the Commission as regards the work on cloud computing (see paras. 17 and 44 above). Taking into account that the Working Group completed the work in that area, the Working Group recommended to the Commission that it should request the Working Group to conduct work on legal issues relating to IdM and trust services with a view to preparing a text aimed at facilitating cross-border recognition of IdM and trust services, on the basis of the principles and discussing the issues identified by the Working Group at its fifty-sixth session.

VI. Technical assistance and coordination

96. The Working Group heard an oral report by the Secretariat on technical assistance and cooperation activities undertaken since the oral report by the

Secretariat at the previous session of the Working Group. Reference was made, in particular, to activities relating to promoting the adoption of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 23 November 2005)[5] and of the UNCITRAL Model Law on Electronic Transferable Records,[6] including in cooperation with other United Nations entities such as the United Nations Economic Commission for Europe (UN/ECE), the United Nations Economic and Social Commission for Asia and the Pacific (UN/ESCAP) and the United Nations Conference on Trade and Development (UNCTAD). Appreciation was expressed for the information provided and the activities undertaken by the Secretariat on technical assistance and cooperation in the area of electronic commerce law.

VII. Other business

97. The Working Group took note of dates tentatively allocated to the Working Group for its future sessions before the fifty-second session of UNCITRAL in 2019 (19–23 November 2018 and 8–12 April 2019). The Working Group agreed that, subject to the decision of UNCITRAL, the usual pattern of two sessions per year should be maintained to allow the Working Group to continue making progress in the discussion of legal issues related to IdM and trust services. The understanding was that the Secretariat might decide to convene expert group meetings, if necessary and subject to availability of resources, between regular sessions of the Working Group.

98. The delegations intending to submit proposals for consideration by the Working Group were requested to alert the Secretariat as soon as possible to allow timely forecasting those proposals. It was noted that the timely submission would allow States' consideration of proposals before sessions.

[5] United Nations, *Treaty Series*, vol. 2898, No. 50525.
[6] United Nations publication, Sales No. E.17.V.5.

B. Note by the Secretariat on contractual aspects of cloud computing

(A/CN.9/WG.IV/WP.148)

[Original: English]

Contents

Paragraphs

I. Introduction

1. The Working Group may wish to refer to paragraphs 1 to 6 of document A/CN.9/WG.IV/WP.142 for background information related to its work on cloud computing until the fifty-fifth session of the Working Group (New York, 24–28 April 2017). A summary of developments related to that work in the Working Group at its fifty-fifth session and in the Commission at its fiftieth session may be found in the provisional agenda of the current session (see document A/CN.9/WG.IV/WP.147, paras. 7 and 8).

2. In accordance with the recommendation of the Working Group for possible future work on cloud computing (A/CN.9/902, para. 23) and views expressed in the Commission at its fiftieth session on the same matter,[1] the Secretariat submits a draft checklist of main issues of cloud computing contracts to the Working Group for its consideration. The draft checklist, prepared by the Secretariat with the involvement of experts, reflects the preliminary considerations of the Working Group as regards the scope and contents of, and approaches to drafting, a checklist (A/CN.9/902, paras. 11–28).

3. The Working Group is expected to report on progress of its work on cloud computing to the Commission at its fifty-first session (New York, 25 June–13 July 2018).[2] In the light of intended users of a checklist and of transactions for which it is expected to be used, the Working Group may wish to consider whether the checklist should be prepared as an online reference tool. If so, the Working Group may wish to recommend that course of action to the Commission, in particular that the Secretariat should prepare an online reference tool that would reflect the substantive content of the draft checklist as revised by the Working Group at its fifty-sixth session and the Commission at its fifty-first session.

II. Draft checklist of main issues of cloud computing contracts

[*The terms appearing in bold throughout the checklist are described in the glossary in the end of the checklist. In an online reference tool they may be explained in a more user-friendly way.*]

Introduction

1. The checklist addresses main issues of cloud computing contracts between business entities where one party (the provider) provides to the other party (the customer) one or more **cloud computing services** for the end use. Contracts for resale or other forms of further distribution of **cloud computing services** are excluded from the scope of the checklist. Also excluded from the scope of the checklist are contracts with **cloud computing service partners** and other third parties that may be involved in the provision of the cloud computing services to the customer (e.g., contracts with sub-contractors and Internet service providers).

2. Cloud computing contracts may be qualified under the applicable law as a service, rental, outsourcing, licensing, mixed or other type of contract. Statutory requirements as regards its form and content may vary accordingly. In some jurisdictions, parties themselves in their contract may qualify the contract as a contract of a particular type if legislation is silent or vague on that issue; the court would take such qualification into account in interpreting the terms of the contract unless this would contradict the law, court practice, the actual intention of the parties, factual situation or business customs or practices.

3. The issues addressed in this checklist may arise from cloud computing contracts regardless of the type of **cloud computing services** (e.g., **IaaS, PaaS or SaaS**), their

[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 116–127.

[2] Ibid., paras. 116 and 127.

deployment model (e.g., public**, community, private or hybrid)** and payment terms (with or without remuneration). The primary focus of the checklist is on contracts for provision of **public SaaS**-type cloud computing services for remuneration.

4. Ability to negotiate cloud computing contract clauses would depend on many factors, in particular on whether the contract involves **standardized commoditized multi-subscriber cloud** solutions or an individual tailor-made solution, whether a choice of competing offers exists, and on the bargaining positions of the potential parties. The ability to negotiate terms of a contract, in particular clauses on unilateral suspension, termination or modification of the contract by the provider and liability clauses, may be an important factor in choosing the provider where the choice exists [cross-link]. Having been prepared primarily for parties negotiating a cloud computing contract, the checklist may nevertheless also be useful for customers reviewing standard terms offered by providers to determine whether those terms sufficiently address the customer's needs.

5. The checklist should not be regarded by the parties as an exhaustive source of information on drafting cloud computing contracts or as a substitute for obtaining any legal and technical advice and services from competent professional advisers. The checklist suggests issues for consideration by potential parties before and during contract drafting without intending to convey that all of those issues must always be considered. The various solutions to issues discussed in the checklist will not govern the relationship between the parties unless they expressly agree upon such solutions, or unless the solutions result from provisions of the applicable law. Headings and sub-headings used in the checklist and their sequence are not to be regarded as mandatory or suggesting any preferred structure or style for a cloud computing contract. The form, content, style and structure of cloud computing contracts may vary significantly reflecting various legal traditions, drafting styles, legal requirements and parties' needs and preferences.

6. [The checklist is not intended to express the position of UNCITRAL on the desirability of concluding cloud computing contracts.]

7. The checklist consists of two parts and a glossary: part one addresses main pre-contractual aspects that potential parties, primarily the customer, may wish to consider before entering into a cloud computing contract; part two addresses main contractual issues that negotiating parties may face while drafting a cloud computing contract; and the glossary describes some technical terms used in the checklist, to facilitate understanding.

Part One. Main pre-contractual aspects

A. Verification of mandatory law and other requirements

8. The legal framework applicable to the customer, the provider or both may impose conditions for entering into a cloud computing contract. Such conditions may stem also from contractual commitments, including **intellectual property (IP) licences**. The customer and the provider should in particular be aware of laws and regulations related to **personal data**, cybersecurity, export control, customs, tax, trade secrets, IP and **sector-specific regulation** that may be applicable to them and their future contract. Negative consequences of noncompliance with mandatory requirements may be significant, including, invalidity or unenforceability of a contract or part thereof, administrative fines and criminal liability.

9. Conditions for entering into a cloud computing contract may vary by sector and jurisdiction. They may include requirements to take special measures for protection of **data subjects' rights,** to deploy a particular model (e.g., **private** as opposed to **public cloud**), to encrypt data placed in the cloud and to register a transaction or a software used in the processing of **personal data** with State authorities. They may also include **data localization** requirements, as well as requirements regarding the provider.

- *Data localization*

10. **Data localization** requirements may in particular arise from the law applicable to personal **data**, accounting data and public sector data and export control laws and regulations that may restrict the transfer of certain information or software to particular countries. They may also arise from contractual commitments, e.g., **IP licences** that may require the licensed content to be stored on the user's own secured servers. **Data localization** may be preferred for purely practical reasons, for example to increase **latency**, which may be especially important for real-time operations, such as stock exchange trading.

11. Providers' standard terms may expressly reserve the right of the provider to store customer data in any country in which the provider or its sub-contractors do business. Such a practice will most likely be followed even in the absence of an explicit contractual right, since it is implicit in the provision of **cloud computing services** that they are provided, as a general rule, from more than one location (e.g., back-up and antivirus protection may be remote and support may be provided in a global "**follow-the-sun**" model). The customer that must comply with **data localization** requirements would need assurances from the provider that those requirements can be met. Where negotiation of a cloud computing contract is possible, contractual safeguards may be included, such as prohibition of moves outside the specified location or a requirement that the provider seek the prior approval of the customer for such moves [cross-link].

- *Requirements as regards the provider*

12. The customer's choice of a suitable provider may be restricted, in addition to market conditions, by statutory requirements. There may be a statutory prohibition to enter into a cloud computing contract with foreign providers, providers from certain jurisdictions or providers not accredited/certified with competent State authorities. There may be a requirement for a foreign provider to form a joint venture with a national provider or to acquire local licenses and permissions, including export control permissions, for the provision of **cloud computing services** in a particular jurisdiction. **Data localization** requirements [cross-link] may also influence the choice of a provider. In choosing a suitable provider, the customer may also be concerned with any statutory obligations on the provider to disclose or provide access to the customer data and other content to State authorities of foreign States.

B. Pre-contractual risk assessment

13. The applicable mandatory law may require risk assessment as a pre-condition to enter into a cloud computing contract. Even in the absence of statutory requirements, potential parties to a cloud computing contract may decide to undertake risk assessment that might help them to identify appropriate risk mitigation strategies, including negotiation of appropriate contractual clauses.

14. Not all risks arising from cloud computing contracts would be cloud specific. Some risks would need to be handled outside a future cloud computing contract (e.g., risks arising from online connectivity interruptions) and not all risks could be mitigated at an acceptable cost (e.g., reputational damage). In addition, risk assessment would not be a one-off event before concluding a contract. Risk assessment could be ongoing during the operation of the contract, and risk assessment outcomes may necessitate amendment or termination of the contract.

- *Verification of information about the chosen provider*

15. The following information may inform the customer about possible risks of dealing with a particular provider:

(a) The privacy, confidentiality and security policies of the provider, in particular as regards prevention of unauthorized access, use, alteration or destruction of the customer's data during processing, transit or transfer into and out of the provider's system;

(b) Assurances of the customer's ongoing access to **metadata,** audit trails and other logs demonstrating security measures;

(c) The existing disaster recovery plan and notification obligations in the case of a security breach or system malfunction;

(d) Migration-to-the-cloud and end-of-service assistance offered by the provider and provider's assurances of **interoperability** and **portability**;

(e) The existing measures for vetting and training of employees, sub-contractors and other third parties involved in the provision of the cloud computing services;

(f) Statistics on security incidents and information about past performance with disaster recovery procedures;

(g) Certification by an independent third party on compliance with technical standards;

(h) Evidence of regularity and extent of audit by an independent body;

(i) Financial standing;

(j) Insurance policies;

(k) Possible conflicts of interest; and

(l) Extent of sub-contracting and **layered cloud computing services**.

- *Penetration tests, audits and site visits*

16. Laws and regulations mandatorily applicable to the customer may require **audits**, penetration tests and physical inspection of data centres involved in the provision of the cloud computing services, in particular to ascertain that their location complies with statutory **data localization** requirements. The customer and the provider would need to agree on conditions for undertaking those activities, including their timing, allocation of costs and indemnification for any possible damage caused to the provider as a result of those activities.

- *IP infringement risks*

17. IP infringement risks may arise if, for example, the provider is not the owner or developer of the resources that it provides to its customers, but rather uses them under

a **IP licence** arrangement with a third party. IP infringement risks may also arise if the customer is required, for the implementation of the contract, to grant to the provider a licence to use the content that the customer intends to place in the cloud. In some jurisdictions, storage of the content on the cloud even for back-up purposes may be qualified as a reproduction and require prior authorization from the IP rights owner.

18. It is in the interests of both parties to ensure beforehand that the use of the cloud computing services would not constitute an infringement of IP rights and a cause for the revocation of the IP licences granted to either of them. Costs of IP infringement may be very high. The right to sub-licence may need to be arranged, or a direct licence arrangement may need to be concluded with the relevant third-party licensor under which the right to manage the third party licences will be granted. The use of open source software or other content may necessitate obtaining an advance consent from third parties and disclosing the source code with any modifications made to open source software or other content.

- *Lock-in risks*

19. Avoiding or reducing **lock-in** risks may be one of the most important considerations for the customer. **Lock-in** risks may arise in particular from the lack of **interoperability** and **portability.** The law may not require the provider to ensure **interoperability** and **portability**. The onus might be completely on the customer to create compatible export routines, unless the contract provides otherwise.

20. The contract may in particular contain the provider's assurances of **interoperability** and **portability**. It may require the use of common, widely used standardized or interoperable export formats for data and other content or give the customer the right to choose among available formats. The contract may also need to address the customer's rights to joint products and the provider's applications or software, without which the use of customer data and other content in another cloud host or in-house may be impossible [cross-link]. The contract may also include the provider's obligations to assist with the export of customer data back in-house or to another provider upon termination of the contract [cross-link]. The customer would also need to carefully consider the impact of the duration of the contract: higher lock-in risks may arise from long-term contracts and from automatically renewable short- and medium-term contracts [cross-link].

21. The customer may consider testing beforehand whether data and other content can be exported to another cloud provider or back in-house and made usable there. It may also need to ensure synchronization between cloud and in-house platforms and replication of its data elsewhere. Transacting with more than one provider and opting for a combination of various types of **cloud computing services** and their **deployment models** (i.e., multi-sourcing), although possibly with cost and other implications for the customer, may be an important mitigating strategy against **lock-in** risks.

- *Business continuity risks*

22. The customer would be concerned about business continuity risks not only in anticipation of the scheduled termination of the contract, but also its possible earlier termination, including when either party may no longer be in business. Business continuity risks may also arise from the provider's suspension of the provision of the cloud computing services. The customer may be required by law to have an appropriate strategy planned in advance in order to ensure business continuity and avoid the negative impact of termination or suspension of the cloud computing services on end-users. Contractual clauses may assist the customer with mitigating business continuity risks, in particular in case of the provider's insolvency [cross-link] and unilateral suspension or termination of the cloud computing services [cross-link].

- *Exit strategies*

23. The customer would need to consider ahead of time the content that will be subject to exit (e.g., only the data that the customer entered in the cloud or also **cloud service derived data**). The customer would also need to seek assurances of its timely access to any decryption keys kept by the provider or third parties. It would also need

to think about any amendments that would be required to **IP licences** to enable the use of data and other content outside the provider's system. Where the customer has developed programs to interact with the provider's application programming interfaces (API) directly, they may need to be re-written to take into account the new provider's API. **SaaS** customers with a large user-base can incur particularly high switching costs when migrating to another **SaaS** provider, as end-user re-training would be necessary.

24. All those factors and the time frame that would be needed to export and make fully usable all customer data and other content back in-house or in another provider's system would need to be taken into account in negotiating end of service contractual clauses [cross-link].

C. Other pre-contractual issues

- *Disclosure of information*

25. The applicable law may require potential parties to a contract to provide each other with information that would allow them to make an informed choice about the conclusion of the contract. In some jurisdictions, the absence, or the lack of clear communication to the other party, of any information that would make the object of the obligation determined or determinable prior to contract conclusion may make a contract or part thereof null and void or entitle the aggrieved party to claim damages.

26. In some jurisdictions, the pre-contractual information may be considered an integral part of the contract. In such cases, the parties would need to ensure that such information is appropriately recorded and that any mismatch between that information and the contract itself is avoided. The parties would also need to deal with concerns over the impact of pre-contractually disclosed information on flexibility and innovation at the contract implementation stage.

- *Confidentiality*

27. Some information disclosed at the pre-contractual stage may be considered confidential (e.g., security, identification and authentication required by the customer or offered by the provider, information about sub-contractors and information about the location and type of data centres, which in turn may identify the type of data stored there and access thereto by State authorities, including of foreign States). Potential parties may need to agree on confidentiality of information to be disclosed at the pre-contractual stage. Written confidentiality undertakings or non-disclosure agreements may be required also from third parties involved in pre-contractual due diligence (e.g., auditors).

- *Migration to the cloud*

28. Before migration to the cloud, the customer would usually be expected to classify data to be migrated to the cloud and secure it according to its level of sensitivity and criticality and inform the provider about the level of protection required for each type of data. The customer may also need to supply to the provider other information necessary for the provision of the services (e.g., the customer's data retention and disposition schedule, user identity and access management mechanisms and procedures for access to the encryption keys if necessary).

29. In addition to the transfer of data and other content from the customer or customer's previous provider to the provider's cloud, migration to the cloud may involve installation, configuration, encryption, tests and training of the customer's staff and other end-users. The provider may agree to help the customer with those issues, for extra fees or otherwise, as part of the contract with the customer or under a separate agreement with the customer or a third party acting on behalf of the customer (e.g., **a system integrator**). Parties involved in the migration would need to agree on their roles and responsibilities as regards installation and configuration, the format in which the data or other content is to be migrated to the cloud, timing of migration, an acceptance procedure to ascertain that the migration was performed as agreed and other details of the migration plan.

Part Two. Drafting a contract

A. General considerations

- *Freedom of contract*

30. The widely recognized principle of freedom of contract in business transactions allows parties to enter into a contract and to determine its content. Restrictions on freedom of contracts may stem from legislation on non-negotiable terms applicable to particular types of contract or rules that punish abuse of rights and harm to public order, morality and so forth. The consequences of non-compliance with those restrictions may range from unenforceability of a contract or part thereof to civil, administrative or criminal liability. Enforceability of contracts not freely negotiated, especially those that impose abusive terms on a party in a weaker bargaining position [cross-link], may in particular be questionable in jurisdictions where parties are expected to respect the principles of good faith and fair dealing.

- *Contract formation*

31. The concepts of offer and acceptance have traditionally been used to determine whether and when the parties have reached an agreement as regards their respective legal rights and obligations that will bind them over the duration of the contract. The applicable law may require certain conditions to be fulfilled for a proposal to conclude a contract to constitute a final binding offer (e.g., the proposal is to be sufficiently definite as regards the covered cloud computing services and payment terms).

32. The contract is concluded when the acceptance of the offer becomes effective. There could be different acceptance mechanisms (e.g., for the customer clicking a check box on a web page, registering online for a cloud computing service, starting to use cloud computing services or paying a service fee; for the provider starting or continuing to provide services; and for both parties signing a contract online or on paper). Material changes to the offer (e.g., as regards liability, quality and quantity of the cloud computing services to be delivered or payment terms) may constitute a counter-offer that may need to be accepted by the other party for a contract to be concluded.

33. **Standardized commoditized multi-subscriber cloud solutions** are as a rule offered through interactive applications (e.g., “click-wrap” agreements). There may be no or very little room for negotiating and adjusting the standard offer. Clicking “I accept”, “OK” or “I agree” is the only step expected to be taken to conclude the contract. Where negotiation of a contract is involved, contract formation may consist of a series of steps, including preliminary exchange of information, negotiations, delivery and acceptance of an offer and the contract’s preparation.

- *Contract form*

34. Cloud computing contracts are typically concluded online. They may be called differently (a cloud computing service agreement, a master service agreement or terms of service (TOS)) and may comprise one or more documents such as an **acceptable use policy (AUP)**, a **service level agreement (SLA)**, a data processing agreement or data protection policy, security policy and license agreement.

35. The legal rules applicable to cloud computing contracts may require that the contract be in **writing**, especially where **personal data processing** is involved, and that all documents incorporated by reference be attached to the master contract. Even when **written** form is not required, for ease of reference, clarity, completeness, enforceability and effectiveness of the contract, the parties may decide to conclude a contract in **writing** with all ancillary agreements incorporated thereto.

36. The signing of a contract on paper may be required under the applicable law, e.g., for tax reasons in some jurisdictions.

- *Definitions and terminology*

37. Due to the nature of **cloud computing services**, cloud computing contracts would by necessity contain many technical terms. The glossary of terms may be included in the contract as well as definitions of main terms used throughout the contract, to avoid ambiguities in their interpretation. The parties may wish to consider using the internationally established terminology for the purpose of ensuring consistency and legal clarity.

- *Minimum contract content*

38. A contract would normally: (a) identify the contracting parties; (b) define the scope and object of the contract; (c) specify rights and obligations of the parties, including payment terms; (d) establish the duration of the contract and conditions for its termination and renewal; and (e) identify remedies for breach and exemptions from liability. It usually also contains dispute resolution and choice of law and choice of forum clauses.

B. Identification of contracting parties

39. Correct identification of contracting parties may have a direct impact on the formation and enforceability of the contract. The name of the legal person, its legal form, business registration number (if applicable), and registered office or business address, together with statutory documents of that legal person usually provide a sufficient basis for ascertaining the legal personality of a business entity (be it a company or an individual) and its capacity to enter into a binding contract. The law may require additional information, for example an identification number for tax purposes or power of attorney to ascertain the power of a natural person to sign and commit on behalf of a legal entity.

40. Verification of the identity of a legal person may be carried out in various ways either directly by the parties or by relying on a third party. Parties are usually free to determine methods of identification unless the applicable law prevents them from doing so. The physical presence of an authorized representative of the legal person may be required, or the remote presence using electronic identification means acceptable to the parties may be sufficient. Where parties can choose, their choice is usually dictated by several factors, including risks involved in a particular contractual dealing. Some legislation may require or recognize only some methods of identification, in particular for issuing a power of attorney. It may also require the provider to identify its customers to competent State authorities in accordance with applicable standards.

C. Defining the scope and the object of the contract

41. Objects of cloud computing contracts vary substantially in their type and complexity given the range of **cloud computing services**. Within the duration of a single contract, the object may change: some **cloud computing services** may be cancelled and other services may be added. The object of the contract may comprise the provision of core, ancillary and optional services.

42. Description of the object of the contract would include description of a type of cloud computing services (**SaaS, PaaS, IaaS** or combination thereof), their **deployment model** (**public,** community**, private** or **hybrid**) and their technical, quality and performance characteristics and any applicable standards. Several documents comprising the contract may be relevant for determining the object of the contract [cross-link].

- *Service level agreement (SLA)*

43. The **SLA** contains **performance parameters** against which the delivery of the cloud computing services by the provider will be measured. It is thus an important tool for determining the extent of the contractual obligations and possible contractual

breaches of the provider. Standard provider **SLAs** may lack any specific obligations of result and instead contain non-enforceable statements of intent (e.g., "the provider will make best [or reasonable] efforts to ensure high service availability," "the provider will strive to keep services available 24 hours 7 days a week [or reach 99% uptime] (but does not guarantee that)"). The customer may lack any remedy under those contracts since the breach of professional best efforts provisions may be difficult to determine. To avoid such situations, the customer would be interested in including in the **SLA** quantitative and qualitative performance parameters with specific metrics, quality assurances and performance measurement methodology.

Examples of quantitative performance parameters

Capacity	- X capacity of data storage - X amount of memory available to the running program
Availability	- the amount or percentage of **uptime** (e.g., 99.9 per cent) - a detailed formula for calculation of **uptime** - specific dates or days and time when availability of the service is critical (100 per cent) - availability of a particular application (100 per cent)
Downtime or outages	- 10 outages of 6 minutes - 1 outage of 1 hour - time for restoring the data following a service outage
Elasticity and scalability	- how much and how fast services can be scaled up or down, e.g., maximum available resources within a minimum period
Latency	- less than X milliseconds
Encryption	- X bit value at rest, in transit and use
Support services	- 24/7 - typical operating hours of the customer
Incident and disaster management and recovery plans	- the maximum incident resolution time - the maximum **first response time** - **recovery point objectives (RPOs)** - **recovery time objectives (RTO)** - specific dates or days and time when it is critical to achieve recovery within X time frame
Persistency of data storage	- intact data /(intact data + lost data during X period of time (e.g., a calendar month)). The type of data (e.g., files, databases, codes, applications) and the unit of measurement (the number of files, bit length) would need to be defined.

Examples of qualitative performance parameters

Data portability	- the customer data is retrievable by the customer via a single download link or documented API - the data format is structured and documented in a sufficient manner to

	allow the customer to re-use it or to restructure it into a different data format if desired
Data localization requirements	- customer data (including any copy, **metadata**, and backup thereof) is stored exclusively in data centres physically located in the jurisdictions indicated in the contract and owned and operated by entities established in those jurisdictions – data is never to be moved outside country X, must be duplicated in country Y and elsewhere but never in country Z
Security	- the services provided under the contract are certified at least annually by an independent auditor against a security standard identified in the contract
Encryption	- the provider will ensure that customer data will be encrypted whenever it is transported over a public communication network, such as the Internet, both between the customer and the provider and between data centres used by the provider and whenever it is at rest in data centres used by the provider - the provider has implemented a key management policy in compliance with an international standard identified in the contract
Data protection/privacy	- the services provided under the contract are certified at least annually by an independent auditor against the data protection/privacy standard identified in the contract
Data deletion	- the provider ensures that the customer data is effectively, irrevocably and permanently deleted wherever requested by the customer within a certain time frame identified in the contract and in compliance with the standard or technique identified in the contract

44. The contract may need to include mechanisms to facilitate implementation of changes in the customer's demands. Otherwise, a potentially time consuming negotiation process may occur each time the customer's demands change.

Performance measurement

45. The contract may need to provide for the chosen measurement methodology and procedures, specifying in particular a reference period for measurement of services (daily, weekly, monthly), service delivery reporting mechanisms (frequency and form), role and responsibilities of the parties and the point of measurement. The parties may agree on independent measurement of performance and allocation of related costs.

46. The customer would be interested in measuring services during peak hours, i.e., when they are most needed. It may be in a position to measure, or verify the measurements provided by the provider or third parties, of only those metrics that are based on performance at the point of consumption, but not those that are based on system performance at the point of provision of services. The customer may be in a position to evaluate the latter from reports provided by the provider or third parties.

The provider may agree to provide the customer with performance reports on demand, periodically (daily, weekly, monthly, etc.) or following a particular incident. Alternatively, it may agree to grant the right to the customer to review the provider's records related to the service level measurements. Some providers enable customers to check data on service performance in real time.

47. The contract may oblige either or both parties to maintain records about the provision and consumption of services for a certain length of time. Such information may be useful in negotiating any amendments to the contract and in case of disputes.

- *Acceptable use policy (AUP)*

48. The **AUP** sets out conditions for use by the customer and its end-users of the cloud computing services covered by the contract. It aims at protecting the provider from liability arising out of the conduct of their customers and customers' end-users. Any potential customer is expected to accept such policy, and it will form part of the contract with the provider. The vast majority of standard AUPs prohibit a consistent set of activities that providers consider to be improper or illegal uses of **cloud computing services**. In some cases, removing some prohibitions may be justified in the light of specific needs of the customer.

49. It is usual for provider's standards terms to require that customer's end-users also comply with the **AUP** and to oblige the customer to use its best efforts or commercially reasonable efforts to ensure such compliance. Some providers may require customers to affirmatively prevent any unauthorized or inappropriate use by third parties of the cloud computing services offered under the contract. The customer may prefer to limit its obligations to communication of the **AUP** to known end-users and not to authorize or knowingly allow such uses, in addition to notifying the provider of all unauthorized or inappropriate uses of which it becomes aware.

- *Security policy*

50. Security of the system, including customer data security, involves shared responsibilities of the provider and the customer. The contract would need to specify reciprocal roles and responsibilities of the parties as regards security measures, reflecting obligations that may be imposed by mandatory law on either or both parties.

51. It is usual for the provider to follow its security policies. In some cases, it might be possible, although not in **standardized commoditized multi-subscriber solutions**, to negotiate that the provider will follow the customer's security policies. The contract may specify security measures (e.g., requirements for sanitization or deletion of data in the damaged media, the storage of separate packages of data in different locations, the storage of the customer's data on specified hardware that is unique to the customer). The parties would however need to assess risks of excessive disclosure of security information in the contract.

52. Some security measures would not presuppose the other party's input and would rely exclusively on the relevant party's routine activities, such as inspections by the provider of the hardware on which the data is stored and on which the services run and effective measures to ensure controlled access thereto. In other cases, allowing the party to perform its corresponding duties or evaluate and monitor the quality of security measures delivered may presuppose the input of the other party. The customer, for example, would be expected to update lists of users' credentials and their access rights and inform the provider of changes in time to ensure the proper identity and access management mechanisms. The customer would also be expected to identify to the provider the level of security to be allocated to each category of data.

53. Some threats to security may be outside the contractual framework between the customer and the provider and may require alignment of the terms of the cloud computing contract with other contracts of the provider and the customer (e.g., with Internet service providers).

- *Data integrity*

54. Providers' standard contracts may contain a general disclaimer that ultimate responsibility for preserving integrity of the customer's data lies with the customer.

Providers may offer only non-binding assurances that they will make best efforts to safeguard customer data.

55. Some providers may be willing to undertake data integrity commitments (for example, regular backups), possibly for additional payment. Regardless of the contractual arrangements with the provider, the customer may wish to consider whether it is necessary to secure access to at least one usable copy of its data outside of the provider's and its sub-contractors' control, reach or influence and independently of their participation.

- *Confidentiality clause*

56. In some cases, the provider does not offer a confidentiality or non-disclosure clause or these clauses are not sufficient to guarantee respect for confidentiality of customer data. Some providers may even expressly waive any duty of confidentiality regarding customer data, shifting full responsibility for keeping data confidential to the customer, e.g., through encryption. Providers may only agree to assume liability for confidentiality of data disclosed by the customer during contract negotiations, but not for data processed during service provision. The provider's willingness to commit to ensuring confidentiality of customer data would depend on the nature of services provided to the customer under the contract, in particular whether the provider will be required to have unencrypted access to data for the provision of those services.

57. In most cases, the customer will want the provider to ensure confidentiality for all customer data placed in the cloud and undertake a higher level of confidentiality commitments as regards some sensitive data (with a separate liability regime for breach of confidentiality of such data). The customer may in particular be concerned about its trade secrets, know-how and information that it is required to keep confidential under law or commitments to third parties.

58. Where an extra layer of protection is necessary, it may be appropriate to restrict access to the customer data to a limited set of the provider's personnel and to require the provider to obtain individual confidentiality commitments from them, in particular from those with high-risks roles (e.g., system administrators, auditors and persons dealing with intrusion detection reports and incident response). It would be for the customer to properly specify to the provider the confidential information, the required level of protection, any applicable law or contractual requirements and any changes affecting such information, including any changes in the applicable legislation.

59. In some cases, the disclosure of customer data may be necessary for fulfilment of the contract. In other cases, the disclosure may be mandated by law, for example, under the duty to provide information to competent State authorities [cross-link]. Appropriate exceptions to confidentiality clauses would thus be warranted.

60. The provider may in turn wish to impose on the customer the obligation not to disclose information about the provider's security arrangements and other details of services provided to the customer under the contract or law.

- *Data protection/privacy policy or data processing agreement*

61. **Personal data** is subject to special protection by law in many jurisdictions. Law applicable to the **processing** of such data may be different from the law applicable to the contract and will override any non-compliant contractual clauses.

62. The contract may include a data protection or privacy clause, data processing agreement or similar type of agreement, although some providers may only agree to the general obligation to comply with applicable data protection laws. In some jurisdictions, such general commitment may be insufficient: the contract would need to stipulate at a minimum the subject-matter, duration, the nature and purpose of the **processing**, the type of **personal data** and categories of **data subjects** and the obligations and rights of the **data controller** and the **data processor**. Where the possibility of negotiating a data protection clause in the contract does not exist, the customer may need at least to review standard terms to determine whether the

provisions give the customer sufficient guarantees of lawful **personal data processing** and adequate remedies for damages.

63. The customer will likely be **data controller** and will assume responsibility for compliance with data protection law in respect of **personal data** collected and processed in the cloud. The customer may need to seek contractual clauses that would oblige the provider to support the customer's compliance with the applicable data protection regulations, including requests related to **data subjects' rights**. Separate remedies could be negotiated should the provider breach that obligation, including the possibility of unilateral termination of the contract by the customer and provider compensation for damages.

64. Providers' standard contracts usually stipulate that the provider does not assume any **data controller** role. The provider will likely act only as **data processor** when it processes the customer data according to instructions of the customer for the sole purpose of providing the cloud computing services. The provider may however be regarded as **data controller,** regardless of contractual clauses, when it further processes data for its own purposes or upon instructions of State authorities [cross-link]. It would assume full responsibility for **personal data** protection in respect of that further **processing**.

- *Obligations arising from data breaches and other security incidents*

65. The parties may be required under law or contract or both to notify each other immediately of a security incident of relevance to the contract or any suspicion thereof that becomes known to them. That obligation may be in addition to general notification of a security incident that may be required under law to inform all relevant stakeholders, including **data subjects**, insurers and State authorities, in order to prevent or minimize the impact of security incidents.

66. The parties may agree on the notification period (e.g., one day after the party becomes aware of the incident or threat), form and content of the **security incident notification** and **post-incident steps**, which may vary depending on the categories of data stored in the cloud. Any notification requirements should recognize the need not to disclose any sensitive information that could lead to the compromise of the affected party's system, operations or network.

67. The customer may wish to reserve the right to terminate the contract in case of a serious security incident resulting, for example, in loss of customer data.

D. Rights to customer data and other content

- *Provider rights to customer data for the provision of services*

68. Providers usually reserve the right to access customer data on the "need-to-know" principle. That arrangement would allow access to customer data by the provider's employees, sub-contractors and other third parties (e.g., auditors) where necessary for the provision of the cloud computing services (including maintenance, support and security purposes) and for monitoring compliance with applicable **AUP, SLA**, **IP licences** and other contractual documents. Customers may be interested to narrow down circumstances when access would be allowed and insist on measures that would ensure confidentiality and integrity of customer data.

69. Certain rights to access customer data can be considered to be implicitly granted by the customer to the provider by requiring a certain service or feature: without those rights, the provider will not be able to perform the services. For example, if the provider is required to regularly backup customer data, the fulfilment of that task necessitates the right to copy the data. Likewise, if sub-contractors are to handle customer data, the provider must be able to transfer the data to them.

70. The contract may explicitly indicate which rights concerning data required for the performance of the contract the customer grants to the provider, whether and to what extent the provider is entitled to transfer those rights to third parties (e.g., to its sub-contractors) and the geographical and temporal extent of the granted or implied

rights. The geographical limitations could be particularly important for the customer if it wishes to prevent data from leaving a certain country or region. The contract would also typically state whether the customer would be able to revoke granted or implied rights and under what conditions. Since the ability to provide the services at the required level of quality may depend on the rights granted by the customer, the direct impact of revocation of certain rights could be the amendment or termination of the contract.

- *Provider use of customer data for other purposes*

71. The provider may request use of customer data for purposes other than those linked to the provision of the cloud computing services under the contract (e.g., for advertising, generating statistics, analytical or predictions reports, engaging in other data mining practice). The questions for the customer to consider in that context include: (a) which information about the customer and its end-users will be collected and the reasons for and purposes of its collection and use by the provider; (b) whether that information will be shared with other organizations, companies or individuals and if so, the reasons for doing so and whether this will be done with or without the customer's consent; and (c) how compliance with confidentiality and security policies will be ensured if the provider shares that information with third parties. Where the provider's use of customer data will affect **personal data**, the parties would need in addition to carefully assess their regulatory compliance obligations under applicable data protection laws.

72. Generally, the contract may need to state that the provider acquires no automatic rights to use the customer data for its own purposes. The contract can list permissible grounds for the use of the customer data other than for the purposes of the provision of the services. For example, the contract could permit the provider to use data as anonymized open data or in aggregated and de-identified form for its own purposes during the term of the contract or beyond. In such cases, the contract may include obligations regarding de-identification and anonymization of customer data to ensure compliance with any applicable data protection and other regulations. It may also impose limits on reproduction of content and communication to public.

- *Provider use of customer name, logo and trademark*

73. Providers' standard terms may grant the provider the right to use customer names, logos and trademarks for purposes of the provider's publicity. The customer may negotiate deletion or modification of such provisions. For example, it may require the provider to seek prior approval by the customer of the use of its name, logo and trademark or it may limit the permissible use to the customer name.

- *Provider actions as regards customer data upon State orders or for regulatory compliance*

74. Provider' standard terms may reserve a provider's broad discretion to disclose, or provide access to, customer data to State authorities (e.g., by including such wording as "when doing so will be in the best interests of the provider"). The customer may be interested to narrow down circumstances in which the provider will be able to do so, for example when the provider faces an order from a court or other State authority to provide access to data or to delete or change it (e.g., enforcing **data subjects' right** to be forgotten). The provider may however insist on its right to remove or block customer data immediately in other cases, irrespective of State orders, e.g., after the provider gains knowledge or becomes aware of illegal content, to avoid liability under law (the "notice and takedown" procedure [cross-link]).

75. At a minimum, the contract may oblige the provider to notify the customer immediately of State orders or the provider's own decisions as regards customer data with a description of the data concerned, unless such notification would violate law. Where the advance notification and involvement of the customer is not possible, the contract may require the provider to serve immediate ex-post notification to the customer of the same information. The contract may oblige the provider to keep, and provide customer access to, logs of all orders, requests and other activities as regards customer data.

- *Rights to cloud service derived data*

76. The contract may need to address customer rights to **cloud service derived data** and how such rights can be exercised during the contractual relationship and upon termination of the contract.

- *IP rights protection clause*

77. Some types of cloud computing contracts may result in the creation of objects of IP rights, either jointly by the provider and the customer (e.g., service improvements arising from the customer's suggestions) or by the customer alone (new applications, software and other original work). The contract may contain an express IP clause that will determine which party to the contract owns IP rights to various objects deployed or developed in the cloud and the use that the parties can make of such rights. Where no option to negotiate exists, the customer may need at least to review any IP clauses to determine whether the provider offers sufficient guarantees and allows the customer appropriate tools to protect and enjoy its IP rights and avoid **lock-in** risks [cross-link].

- *Data retrieval for legal purposes*

78. Customers may be required to be able to search and find data placed in the cloud in its original form for legal purposes, such as in legal proceedings. The electronic records may in particular be required to be capable meeting auditing and investigation standards. Some providers may be in a position to offer assistance to customers with the retrieval of data in the format required by law for legal purposes. In such cases, the contract may need to define exactly the assistance the customer would require from the provider to fulfil requests of competent authorities for data retrieval for legal purposes.

- *Data deletion*

79. Data deletion considerations will be applicable during the term of the contract, but particularly upon its termination. For example, certain data may need to be deleted according to the customer's retention plan. Sensitive data may need to be destroyed at a specified time in its lifecycle (e.g., by destruction of hard disks at the end of the life of equipment that stored such data). Data may also need to be deleted in order to comply with law enforcement deletion requests or after confirmed IP infringement cases [cross-link].

80. Provider' standard terms may contain only non-binding statements to delete customer data from time to time. The customer may be interested to oblige the provider to delete data, its backups and **metadata** immediately, effectively, irrevocably and permanently, in compliance with the data retention and disposition schedules or other form of authorization or request communicated by the customer to the provider. The contract may address the time period and other conditions for data deletion, including the provider's obligation to serve the customer with a confirmation of the data deletion upon completion of the deletion and to provide customer access to audit trails of the deletion activities.

81. Particular standards or techniques for deletion may be specified, depending on the nature and sensitivity of the data (e.g., deletion may be required from different locations and media, including from sub-contractors' and other third parties' systems, with different levels of deletion, such as data sanitization ensuring confidentiality of the data until its complete deletion or hardware destruction). More secure deletion involving destruction rather than redeployment of equipment may be more expensive and not always possible (if for example data of the provider's other customers is stored on the same hardware). Those aspects would need to be taken into account in negotiating the contract, for example by requiring the provider to use an isolated infrastructure for storing a customer's particularly sensitive data.

E. Audits and monitoring

- *Monitoring activities*

82. The parties may need to monitor activities of each other to ensure regulatory and contractual compliance (e.g., compliance of the customer and its end-users with **AUP** and **IP licenses** and compliance of the provider with **SLA**, data protection policy, etc.). Some monitoring activities, such as those related to **personal data processing,** may be mandated by law.

83. The contract should identify periodic or recurrent monitoring activities together with the party responsible for their performance and obligations of the other party to facilitate monitoring. The contract may also anticipate any exceptional monitoring activities and provide options for handling them. The contract may also provide for reporting requirements to the other party as well as any confidential undertakings in conjunction with such monitoring activities.

84. Excessive monitoring may affect performance and increase costs of services. For services requiring near real-time performance, the customer may wish to seek the right to require the provider to pause or stop monitoring if it is materially detrimental to the service performance.

- *Audit and security tests*

85. Audit and security tests, in particular initiated by the provider to check the effectiveness of security measures, are common. Some audits and security tests may be mandated by law. The contract may include clauses that would address the audit rights of both parties, the scope of audits, recurrence, formalities and costs. It may also oblige the parties to share with each other the results of the audits or security tests that they commission. The contractual rights or statutory obligations for audit and security tests may need to be complemented in the contract with corresponding obligations of the other party to facilitate the exercise of such rights or fulfilment of those obligations (e.g., to grant access to the relevant data centres).

86. Parties may agree that audits or security tests may only be performed by professional organizations or that the provider or the customer may choose to have the audit or security test performed by a professional organization. The contract may specify qualifications to be met by the third party and conditions for their engagement, including allocation of costs. Special arrangements may be agreed upon by the parties for audits or security tests subsequent to an incident and depending on the severity and type of the incident (for example, the party responsible for the incident may be obliged to partially or fully reimburse costs).

F. Payment terms

- *Pay-as-you-go*

87. Price is an essential contractual term, and failure to set the price or a mechanism for determining the price may render the contract unenforceable.

88. The **on-demand self-service** characteristic of cloud computing is usually reflected in the **pay-as-you-go** billing system. It is common for the contract to specify the price per unit for the agreed volume of supply of the cloud computing services (e.g., for a specified number of users, number of uses or time used). Price scales or other price adjustments, including volume discounts, may be designed as incentives or penalties for either of the parties. Free trials are common as is not charging for some services. Although there could be many variations for price calculation, a clear and transparent price clause, understood by both parties, may avoid future conflict and litigation.

- *Licensing fees*

89. The contract should make it clear whether the payment for the cloud computing services encompasses licensing fees for any licences the provider may grant to the

customer as part of the services. **SaaS**, in particular, often involve the use by the customer of software licensed by the provider.

90. The licensing fees may be calculated on a per-seat or per instance basis and fees may vary depending on the category of users (e.g., professional users, as opposed to non-professional users, may be in one of the most expensive categories). The customer would need to consider the implications of various payment structures. For example, a customer's licence costs may increase exponentially if software is charged on a per instance basis each time a new machine is connected, even though the customer is using the same number of machine instances for the same duration. It would also be important for the customer to identify in the contract not only the number of potential users of a software covered by the licence arrangement, but also the number of users in each category (for example, employees, independent contractors, suppliers) and rights to be granted to each category of users. The customer would also want the contract to identify access and use rights that will be included in the scope of the licence and cases of access and use by the customer and its end-users that may lead to an expanded scope of the license and consequently increased licensing fees.

- *Additional costs*

91. The price may cover also one-off costs (e.g., configuration and migration to the cloud). There could also be additional services not included in the basic cloud computing service contract but offered by the cloud computing service provider against separate payment (e.g., support after business hours charged per time or provided for a fixed price). The parties should also clarify the impact of taxes since cloud computing services may or may not fall within the category of taxable services or goods.

- *Changes in price*

92. Providers' standard terms often give the provider the right to unilaterally modify the price or price scales. The customer may prefer to limit that right. The parties may agree to specify in the contract the pricing methodology (e.g., how frequently the provider can increase prices and by how much). The prices may be capped to a specific consumer price index, to a set percentage or to the provider's list price at a given moment. The customer may require the provider to serve advance notice of a price increase and stipulate in the contract the consequences of non-acceptance of the price increase by the customer.

- *Other payment terms*

93. Payment terms may need to cover invoicing modalities (e.g., e-invoicing) and the form and content of the invoice, which may be important for tax regulations compliance. Tax authorities of some jurisdictions may not accept electronic invoices or may require a special format, including that any tax applicable to the cloud computing services may need to be stated separately.

94. The contract may also need to specify payment due date, currency, the applicable exchange rate, manner of payment, sanctions in case of late payment and procedures for resolving disputes over payment claims.

G. Changes in services

95. **Cloud computing services** by nature are flexible and fluctuating. The contract may contain many options the customer may use to adjust services to its evolving business needs. In addition, the provider may reserve the right to adjust its service portfolio at its discretion. Different contractual regimes may be appropriate depending on whether changes concern the core services or ancillary services and support aspects. Different contractual regimes may also be justified for changes that might negatively affect services as opposed to service improvements (e.g., a switch

from a standard offering to an enhanced cloud computing offering with higher security levels or shorter response times).

- *Upgrades*

96. Although upgrades may be in the customer's interests, they may also cause disruptions in the availability of cloud computing services since they could translate into relatively high **downtime** during normal working hours even if the service is to be provided on 24/7 basis. They may also have other negative impact, for example requiring changes to customer applications or IT systems or calling for retraining of customer users.

97. The contract may require the provider to notify the customer well in advance of pending upgrades and implications thereof. The provider may be obliged to schedule upgrades during period of little or no demand for the customer. The parties may agree that the older version should be retained in parallel with the new version for an agreed period of time where significant changes are made to the previous version, to ensure the customer business continuity. Procedures for reporting and solving possible problems may need to be agreed. The contract may also need to address assistance to be provided by the provider with changes to customer applications or IT systems and with retraining of the customer's end-users when required. The parties may also need to agree on allocation of costs arising from upgrades.

- *Degradation or discontinuation of services*

98. Technological developments, competitive pressure or other reasons may lead to degradation of some cloud computing services or their discontinuation with or without their replacement by other services. The provider may reserve in the contract the right to adjust the service portfolio offering, e.g., by terminating a portion of the services. Discontinuation of even some cloud computing services by the provider may however expose the customer to liability to its end-users.

99. The contract may need to build in adequate protection for the customer in such cases, including an advance notification of those changes to the customer, the customer right to terminate the contract in the case of unacceptable changes and an adequate retention period to ensure the timely **reversibility** of any affected customer data or other content. The contract may altogether prohibit modifications that could negatively affect the nature, scope or quality of provided services, or limit the provider's right to introduce only "commercially reasonable modifications". The customer would however not necessarily be always in the best position to judge on reasonableness of modifications to the services provided and might need to rely in that respect on advice of independent experts.

- *Suspension of services at the provider's discretion*

100. Providers' standard terms may contain the right of the provider to suspend services at its discretion at any time. The customer may wish to restrict such unconditional right by not permitting suspension except for clearly limited cases (e.g., in case of the fundamental breach of the contract by the customer, for example non-payment). "Unforeseeable events" is a common justification for unilateral suspension of services by the provider. Such events are usually defined broadly encompassing any impediments beyond the provider's control, including failures of sub-contractors, sub-providers and other third parties involved in the provision of the cloud computing services to the customer, such as Internet network providers.

101. The customer may consider conditioning the right of suspension due to unforeseeable events on the provider properly implementing a business continuity and disaster recovery plan. The contract may require that such plan contain protections against common threats to the provision of the cloud computing services and be submitted for comment and approval by the customer. Those protections may include a geographically separate disaster recovery site with seamless transition and the use of an uninterruptible power supply and back-up generators.

- *Notification of changes*

102. Providers' standard terms may contain no obligation on the provider to notify the customer regarding changes in the terms of services. Customers may be required to check regularly whether there have in fact been any changes in contractual documents hosted on the provider's website(s). Those contractual documents may be numerous; some may incorporate by reference terms and policies contained in other documents, which may in turn incorporate by reference additional terms and policies, all of which may be subject to unilateral modification by the provider. It might therefore not be easy for the customer to notice changes introduced by the provider.

103. Since the continued use of services by the customer is deemed to be acceptance of the modified terms, the customer may wish to include in the contract an obligation for the provider to notify the customer of changes in the terms of services sufficiently in advance of their effective date. The contract may also oblige the provider to give the customer access to audit trails concerning evolution of services. The customer may also wish to preserve all agreed terms and oblige the provider to define the services by reference to a particular version or release.

H. Sub-contractors, sub-providers and outsourcing

- *Identification of the sub-contracting chain*

104. Sub-contracting, **layered cloud computing services** and outsourcing are common in **cloud computing.** Providers' standard terms may explicitly reserve the provider's right to use third parties for provision of the cloud computing services to the customer or that right may be implicit because of the nature of services to be provided. The provider may be interested in retaining as much flexibility as possible in that respect.

105. Identifying in the contract third parties involved in the provision of the cloud computing services to the customer may be required by law or be beneficial to the customer for verification purposes. The customer would in particular be interested in seeking assurances concerning compliance of third parties with security, confidentiality, data protection and other requirements arising from the contract or law, the absence of conflicts of interest and the risks of non-performance of the contract by the provider due to failures of third parties. Although the provider may not be always in a position to identify all third parties involved in the provision of the cloud computing services to the customer, it should be able to identify those playing key roles.

- *Changes in the sub-contracting chain*

106. The contract may prohibit further changes in the sub-contracting chain without the customer's consent. It may provide for the customer's right to vet and veto any new third party involved in the provision of the cloud computing services to the customer. Alternatively, the contract may include the list of third parties pre-approved by the customer from which the provider can choose when the need arises.

107. The provider may however insist on its right to make unilateral changes in its sub-contracting chain with or without notification of the customer. The customer may wish to reserve the right to allow the provider to implement the change subject to subsequent approval by the customer. In the absence of such approval, it might be agreed that services would need to continue with the previous or other pre-approved third party or with another third party to be agreed by the parties; otherwise, the contract may be terminated. Mandatory applicable law may stipulate circumstances in which changes in a provider's sub-contracting chain may require termination of the contract.

- *Alignment of contract terms with linked contracts*

108. Although third parties instrumental to the performance of the cloud computing contract may be listed in the contract, they would not be parties to the contract between the provider and the customer. They would be liable for obligations under

their contracts with the provider. Nevertheless, various mechanisms may exist to ensure that the terms of the contract between the customer and the provider are made binding on those third parties. In particular, the contract may require the provider to align the terms of the contract with existing or future linked contracts. The contract may also require the provider to supply the customer with copies of linked contracts for verification purposes.

109. The customer may opt to contract with third parties instrumental to the performance of the cloud computing contract directly, in particular on such sensitive issues as confidentiality and **personal data processing**. It may also want to negotiate with key third parties obligations to step in if the provider fails to perform under the contract, including in case of the provider's insolvency.

- *Liability of sub-contractors, sub-providers and other third parties*

110. Under applicable law or contract, the provider may be held liable to the customer for any issue within the responsibility of any third party whom the provider involved in the performance of the contract. In particular, the joint liability of the provider and its sub-contractors may be established by law for any issues arising from **personal data processing**, depending on the extent of sub-contractors' involvement in processing.

111. The contract could oblige the provider to create third party beneficiary rights for the benefit of the customer in linked contracts or make the customer a party to linked contracts. Both options would allow the customer to have direct recourse against the third party in case of its non-performance under a linked contract.

I. Liability

- *Allocation of risks and liabilities*

112. In business to business transactions, the parties are free to allocate risks and liabilities as they consider appropriate, subject to any mandatory provisions of applicable law. Factors such as risks involved in the provision of the cloud computing services, whether they are provided for remuneration or otherwise and the amount charged for the cloud computing services by the provider would all be considered in negotiating the allocation of risks and liabilities. Although parties generally tend to exclude or limit liability as regards factors that they cannot control or can control only to a limited extent (e.g., behaviour of end-users, actions or omissions of sub-contractors), the level of control would not always be a decisive consideration. A party may be prepared to assume risks and liability for elements that it does not control in order to distinguish itself in the market place. It is nevertheless likely that the party's risks and liabilities would increase progressively in proportion to the components under its control.

113. For example, in **SaaS** involving the use of standard office software, it is likely that the provider would be responsible for virtually all resources provided to the customer, and liability of the provider could arise in each case of non-provision or malfunctioning of those resources. Nevertheless, even in those cases, the customer could still be responsible for some components of the services, such as encryption or backups of data under its control. The failure to ensure adequate backups might lead to the loss of the right of recourse against the provider in case of the loss of data. On the other hand, in **IaaS** and **PaaS**, the provider could be responsible only for the infrastructure or platforms provided (such as hardware resources, operating system or middleware), while the customer would assume responsibility for all components belonging to it, such as applications run using the provided infrastructure or platforms and data contained therein.

- *Exclusion or limitation of liability*

114. Providers' standard terms may exclude any liability under the contract and take the position that liability clauses are non-negotiable. Alternatively, the provider may be willing to accept liability, including unlimited liability, for breaches controllable by the provider (e.g., a breach of IP licenses granted to the provider by the customer)

but not for breaches that may occur for reasons beyond the provider's control (e.g., security incidents, unforeseeable events or leaks of confidential data). Providers' standard terms generally exclude liability for indirect or consequential loss (e.g., loss of business opportunities following the unavailability of the cloud computing service).

115. Where liability is accepted generally or for certain specified cases, providers' standard terms often limit the amount of losses that will be covered (per incident, per series of incidents or per period of time). In addition, providers often fix an overall cap on liability under the contract, which may be linked to the revenue expected to be received under the contract, to the turnover of the provider or insurance coverage.

116. The customer may be interested in negotiating unlimited liability or higher compensation for defined types of damage caused by an act or omission of the provider or its personnel. The ability to do so may depend, among other factors, on the **deployment model** [cross-link]. Customer data loss or misuse, personal data protection violations and IP rights infringement in particular could lead to potentially high liability of the customer to third parties or give rise to regulatory fines. Imposing a more stringent liability regime on the provider where those cases are due to the provider's fault or negligence may be justified. Unlimited liability of the provider may also flow from certain types of defects under law (e.g., defective hardware or software).

117. Providers' standard terms usually impose liability on the customer for non-compliance with **AUP**. The customer may wish to limit its liability arising from violation of **AUP** in particular for actions of its end-users that it cannot control.

118. Disclaimers and limitations of liability may need to be contained in the main body of the contract and properly communicated to the other party in order to be enforceable.

- *Liability insurance*

119. The contract may contain insurance obligations for both or either party, in particular as regards quality requirements for an insurance company and the minimum amount of insurance coverage sought. It may also require parties to notify changes to the insurance coverage or provide copies of current insurance policies to each other.

- *Statutory requirements*

120. While most legal systems generally recognize the right of contracting parties to allocate risks and liabilities and limit or exclude liability through contractual provisions, this right is usually subject to various limitations and conditions. For example, an important factor in risk and liability allocation in **personal data processing** is the role that each party assumes as regards the **personal data** placed in the cloud. The data protection law of many jurisdictions imposes more liability on the **data controller** than on **data processors** of **personal data**. Notwithstanding contractual provisions, the factual handling of such data will generally determine the legal regime to which the party would be subject under the applicable law. **Data subjects** who have suffered loss resulting from an unlawful processing of **personal data** or any act incompatible with domestic data protection regulations may be entitled to compensation directly from the **data controller**.

121. In addition, in many jurisdictions, a total exclusion of liability for a person's own fault is not admissible or is subject to limitations. It might not be possible to exclude altogether liability related to personal injury (including sickness and death) and for gross negligence, intentional harm, defects, breach of core obligations essential for the contract or non-compliance with applicable regulatory requirements. Moreover, if the terms of the contract are not freely negotiated, but rather are imposed or pre-established by one of the parties ("contracts of adhesion"), some types of limitation clauses may be found to be "abusive" and therefore invalid [cross-link].

122. The ability of public institutions to assume certain liabilities may be restricted by law, or public institutions would need to seek prior approval of a competent State body for doing so. They may also be prohibited from accepting exclusion or limitation of a provider's liability altogether or for acts or omissions defined in law.

123. The applicable law may, on the other hand, provide for exemption from liability if certain criteria are fulfilled by a party that would otherwise face a risk of liability. For example, under the "notice and take down" procedure in some jurisdictions, the provider will be released from liability for hosting the illegal content on its cloud infrastructure if it removed such content once it became aware of it [cross-link].

J. Remedies for breach of the contract

- *Types of remedies*

124. Within the limits provided by applicable law, the parties are free to select remedies. Remedies may include in-kind remedies aimed at providing the aggrieved party with the same or equivalent benefit expected from contract performance (e.g., replacement of the defective hardware), monetary remedies (e.g., service credits) and termination of the contract. The contract could differentiate between types of breaches and specify corresponding remedies.

- *Suspension or termination of services*

125. Suspension or termination of the provision of the cloud computing services to the customer is a usual remedy of the provider for the customer's breach of a contract or violation of **AUP** by the customer's end-users. The customer would be interested in contractual safeguards against broad suspension or termination rights. For example, the right of the provider to suspend or terminate the provision of the cloud computing services to the customer may be limited to cases of fundamental breach of the contract by the customer and significant threats to the security or integrity of the provider's system. The provider's right to suspend or terminate may also be restricted only to those services that are affected by the breach, where such a possibility exists.

- *Service credits*

126. An often-used mechanism to compensate the customer for non-performance by the provider is the system of service credits. These credits take the form of a reduced fee for the services to be provided under the contract in the following measured period. A sliding scale may apply, i.e., a percentage of reduction may depend on the extent to which the provider's performance under the contract falls short of the performance parameters identified in **SLA** or other parts of the contract. An overall cap for service credits may also apply. Providers may limit the circumstances in which service credits are given to those, for example, where failures arise from matters under the provider's control or where credits are claimed within a certain period of time. Some providers may also be willing to offer a refund of fees already paid or an enhanced service package in the following measured period (e.g., free IT consultancy). If a range of options exists, providers' standard terms usually stipulate that any remedy for provider non-performance will be at the choice of the provider.

127. The customer would need to assess on a case-by-case basis the appropriateness of the contract fixing service credits as the sole and exclusive remedy against the provider's non-performance of its contractual commitments. Doing so may limit the customer's rights to other remedies, including suing for damages or terminating the contract. The customer may be interested in the contract providing other measures to mitigate risks of non-performance by the provider, as well as sufficient incentives for the provider to perform well under the contract and improve services. Penalties for example could have a bigger financial impact on the provider than service credits. In addition, service credits in the form of fee reduction or an enhanced service package in the following measured period may be useless if the contract is to be terminated. Excessive service credits may be unenforceable if they have been considered as an unreasonable approximation of harm at the outset of the contract.

- *Formalities to be followed in case of the breach of the contract*

128. The contract may include formalities to be followed in cases of breach. For example, the contract could require a party to notify the other party when any terms of the contract are deemed to be violated and to provide a chance to remedy such asserted violation. Time limits for claiming remedies may also be set.

K. Term and termination of the contract

- *Effective start date of the contract*

129. The effective start date of the contract would need to be clearly stated in the contract. It may be different from the signature date, the date of acceptance of the offer or the date of acceptance of configuration and other actions required for the customer to migrate to the cloud. The date when the cloud computing services are made available to the customer by the provider, even if they are not actually used by the customer, may be considered the effective start date of the contract. The date of the first payment by the customer for the cloud computing services, even if they are not yet made available to the customer by the provider, may also be considered the effective start date of the contract.

- *Duration of the contract*

130. The duration of the contract could be short, medium or long. It is common in **standardized commoditized multi-subscriber cloud solutions** to provide for a fixed initial duration (short or medium), with automatic renewals unless terminated by either party. The customer may oblige the provider to notify the customer of the upcoming expiration of the term of the contract and the need to take a decision about renewal. That mechanism may be useful for the customer in efforts to avoid risks of **lock-in** and missing better deals.

- *Earlier termination*

131. The contract would address circumstances in which the contract could be terminated other than upon expiration of its fixed term, such as for convenience, breach or other reasons. The contract may need to provide modalities for earlier termination, including requirements for a sufficiently advance notice, **reversibility** and other end-of-service commitments [cross-link].

Termination of the contract for convenience

132. Providers' standard terms, especially for provision of **standardized commoditized multi-subscriber cloud** solutions**,** usually reserve the right of the provider to terminate the contract at any time without customer default. The customer may wish to limit the circumstances under which such a right could be exercised and oblige the provider to serve the customer with sufficiently advance notice of termination.

133. The customer's right to terminate the contract for convenience (i.e., without the default of the provider) is especially common in public contracts. The provider may demand payment of early termination fees in such cases. Payment of early termination fees by public entities may however be restricted by law. In contracts of indefinite duration, providers may be more inclined to accept termination by the customer for mere convenience without compensation, but that might also lead to a higher contract price.

Termination for breach

134. Fundamental breach of the contract usually justifies termination of the contract. To avoid ambiguities, the parties may define in the contract events that will be considered by the parties fundamental breach of the contract. For the customer, those may include data loss or misuse, personal data protection violations, recurrent security incidents (e.g., more than X times per any measured period), confidentiality leaks and non-availability of services at certain time points or for certain period of time. Non-payment by the customer and violation by the customer or its end-users of **AUP** are among the most common reasons for termination of the contract by the provider. The party's right to terminate the contract may be conditional on serving a prior notice, holding good faith consultations, providing a possibility to remedy the

situation and committing to restoration of contract performance within a certain number of days after remedial action has been taken.

135. The contract may need to address the provider's end-of-service commitments that would survive the customer's fundamental breach of the contract. The customer would want to ensure, at a minimum, **reversibility** of its data and other content [cross-link].

Termination due to unacceptable modifications of the contract

136. Unacceptable, commercially unreasonable modifications or materially detrimental unilateral modifications to the contract may justify termination of the contract. Those modifications might include modifications to **data localization** requirements or sub-contracting terms. The contract may need specifically to preserve the customer's right to terminate the entire contract if modifications to the contract due to the restructuring of the provider's service portfolio lead to termination or replacement of some services [cross-link].

Termination in case of insolvency

137. An insolvent customer may need to continue using the cloud computing services while resolving its financial difficulty. The customer may thus be interested in restricting the right of the provider to invoke the insolvency of the customer as the sole ground for termination of the contract in the absence of, for example, the customer's default in payment under the contract.

138. Risks of insolvency of the provider may be identified during the risk assessment. The contract may require the provider to supply the customer with periodic reports about the provider's financial condition and provide for the customer's right to terminate the contract without further obligation or liability in event the provider lacks the financial ability to fully perform the contract.

139. Risks of never being able to retrieve data and other content from the insolvent provider's cloud infrastructure are high where a mass exit and withdrawal of content occurs due to a crisis of confidence in the provider's financial position. The insolvent provider or an **insolvency representative** may limit the amount of content (data and application code) that can be withdrawn in a given time frame. It may also be decided that end-of-service commitments should proceed on a first come first served basis. The customer may therefore be interested in contractual mechanisms to ensure that it will be able to retrieve its data from the insolvent provider. The customer could request source code or key escrow that would automatically be released and allow access to the customer data and other content upon the provider's insolvency. Mandatory provisions of insolvency law may however override contractual undertakings.

Termination in case of change of control

140. The change of control may for example involve a change in the ownership or the capacity to determine, directly or indirectly, the operating and financial policies of the provider, which may lead to changes in the provider's service portfolio. The change of control may also involve the assignment or novation of the contract, with rights and obligations or only rights under the contract transferred to a third party. As a result, an original party to the contract may change or certain aspects of the contract, for example payments, may need to be performed to a third party.

141. The contract may need to oblige the provider to serve an advance notice of an upcoming change of control and its expected impact on continuity of services. The customer may be interested in reserving its contractual right to terminate the contract if, as a result of the change of control, the provider or the contract is taken over by the customer's competitor or if the take-over leads to discontinuation of, or significant changes in, the service portfolio. The applicable law may require termination of the contract if as a result of the change of control, mandatory requirements of law (e.g., data localization requirements or prohibition to deal with certain entities under international sanctions regime or because of national security concerns) cannot be

fulfilled. Public contracts may in particular be affected by statutory restrictions on the change of control.

Inactive account clause

142. Customer inactivity for a certain time period specified in the contract may be a ground for unilateral termination of the contract by the provider. The inactive account clause would however rarely, if at all, be found in business to business cloud computing contracts provided for remuneration.

L. End of service commitments

143. End of service commitments may raise not only contractual but also regulatory issues. The contract would need to achieve a balance between the customer's interest in continuous access to its data and other content, including during the transition period, and the provider's interest in ending any obligation towards the former customer as soon as possible.

144. End of service commitments may be the same regardless of the cause of termination of the contract or may be different depending on whether termination is for the breach of the contract or other reasons. Issues that may need to be addressed by the parties in the contract include:

- *Timeframe for export*

145. The customer would be interested in a sufficiently long period to ensure smooth transition by the customer of its data and other content to another provider or back in-house.

- *Customer access to the content subject to export*

146. The contract would need to specify data and other content subject to export and ways of gaining customer access thereto, including any decryption keys that may be held by the provider or third parties. The parties may agree on an escrow to ensure automatic access by the customer to all attributes required for export. The contract may also specify export options, including their formats and processes, to the extent possible, recognizing that they may change over time.

- *Export assistance by the provider*

147. The extent, procedure and time period for the cloud provider's involvement in export of the customer data to the customer or to another provider of the customer's choice may need to be specified in the contract. The provider may require separate payment for the provision of export assistance. In such case, the parties may fix the amount of the payment in the contract or agree to refer to the provider's pricing list at a given time. Alternatively, the parties may agree that such assistance is included in the contract price or that no extra payment will be charged if the contract termination follows the provider's breach of the contract.

- *Deletion of data from the provider's cloud infrastructure*

148. The contract may need to specify rules for deletion of the customer data and other content from the provider's cloud infrastructure upon export or expiration of the period specified in the contract for export. The data can be deleted automatically by the provider or upon a specific customer's request and instructions. The contract can include an obligation for the provider to alert the customer before the data is deleted and to confirm to the customer the deletion of data, backups and **metadata**. The provider may be obliged to deliver an attestation, report or statement of deletion, including deletion from third parties' systems.

- *Post-contract retention of data*

149. The provider might be required to retain customer data by law, in particular data protection law, which might also address a time frame during which the data must be retained. In addition, the customer may allow the provider to retain specified data or may wish the provider to contractually commit on retention of data after the

termination of the contract for regulatory, litigation and other legal reasons affecting the customer. Some providers may allow customers to choose a post-contract retention period at additional cost.

150. Special requirements (e.g., to de-identify personal information) may need to be set out as regards data that is not or cannot be returned to the customer and whose deletion would not be possible. The contract would need to specify the format in which that data is to be retained after termination of the contract. It may be a format approved by the customer (an encrypted or unencrypted format), or the contract may state generally that the data is to be retained in a usable and interoperable format to allow its retrieval when required. The contract would need to specify the responsibilities of the parties for post-contractual retention of the data in the specified format.

- *Post-contract confidentiality clause*

151. The parties may agree on a post-contract confidentiality clause. Confidentiality obligations may survive the contract, for example, for five-seven years after the contract is terminated or continue indefinitely, depending on the nature of the customer data and other content that was placed in the provider's cloud infrastructure.

- *Post-contract audits*

152. Post-contract audits may be agreed by parties or imposed by law. The contract would need to specify terms for carrying out such audits, including the time frame and allocation of costs.

- *Leftover account balance*

153. The parties may need to agree on conditions for the return to the customer of leftover amounts on its account or for the offset of those amounts against any additional payments the customer would need to make to the provider, including for end-of-the-service activities or to compensate for damage.

M. Dispute resolution

- *Methods of dispute settlement*

154. It is advisable that the parties agree on the method by which future disputes arising out of the contract would be settled. Dispute settlement methods include negotiation, mediation, conciliation, arbitration and judicial proceedings. Different types of dispute may justify different dispute resolution procedures. Disputes over financial and technical issues, for example, may be referred to a binding decision by a third party expert (individual or body), while some other types of disputes may be more effectively dealt with through direct negotiations between the parties. Law of some jurisdictions may prescribe certain alternative dispute resolution mechanisms that the parties would need to exhaust before being able to refer a dispute to a domestic court.

- *Arbitral proceedings*

155. Disputes that are not amicably settled may be referred to arbitral proceedings, if the parties opted for it. The parties should verify the arbitrability of issues subject to adjudication (i.e., whether the issues to be submitted to adjudication by arbitration are reserved by the State for adjudication by a domestic court). If the parties opted for arbitration, it is advisable for them to agree on a set of arbitration rules to govern arbitral proceedings. A contract can include a standard dispute resolution clause referring to the use of internationally recognized rules for the conduct of dispute resolution proceedings (e.g., the UNCITRAL Arbitration Rules). In the absence of such specification, the arbitral proceedings will normally be governed by the procedural law of the State where the proceedings take place or, if an arbitration institution is chosen by the parties, by the rules of that institution. The parties may opt for an online dispute resolution mechanism with its own set of rules.

- *Judicial proceedings*

156. If judicial proceedings are to take place, due to the nature of **cloud computing services**, several States might claim jurisdiction. Where possible, parties may agree on a jurisdiction clause under which they are obligated to submit disputes to a specific court [cross-link].

- *Retention of data*

157. The contract should address issues of retention of, and access by the customer to, its data and other content for a reasonable period of time, regardless of the nature of the dispute. That may be important for the customer not only because of the need to ensure business continuity but also because access to data, including **metadata** and other **cloud service derived data,** may be vital for dispute resolution proceedings themselves (e.g., to substantiate a claim or counter-claim).

- *Limitation period for complaints*

158. The parties may need to agree on limitation periods within which claims may be brought. The providers may tend to impose relatively short limitation periods for customers to bring claims in respect of the services. Such terms may be unenforceable if they violate mandatory limitation periods stipulated in the applicable law.

N. Choice of law and choice of forum clauses

159. Freedom of contract usually allows parties to choose the law that will be applicable to their contract and to choose the jurisdiction or forum where disputes will be considered. The mandatory law (e.g., data protection law) may however override the choice of law and the choice of forum clauses made by the contracting parties, depending on the subject of the dispute. In addition, regardless of the choice of law and choice of forum, more than one mandatory law (e.g., data protection law, insolvency law) may be applicable to the contract.

- *Considerations involved in choosing the applicable law and forum*

160. Choice of law and choice of forum clauses are interconnected. Whether the selected and agreed-upon law will ultimately apply depends on the forum in which the choice-of law clause is presented to a court or another adjudicating body, e.g., arbitral tribunal. It is the law of that forum that will determine whether the clause is valid and whether the forum will respect the choice of applicable law made by the parties. Because of the importance of the forum law for the fate of the choice of law clause, a contract with such a clause usually also includes a choice of forum clause.

161. In choosing the forum, the parties usually consider the impact of the chosen or otherwise applicable law and the extent to which a judicial decision made in that forum would be recognized and enforceable in the countries where enforcement would likely be sought. Preserving flexibility in enforcement options may be an important consideration, especially in the **cloud computing** settings where the location of assets involved in the provision of services, the provider and the customer and other factors that parties usually take into account in formulating choice of law and choice of forum clauses may be uncertain.

- *Mandatory law and forum*

162. The law and the forum of a particular jurisdiction may be mandatory on various grounds, for example:

(a) Accessibility of the cloud computing services in the territory of a particular State may be sufficient for application of data protection law of that State;

(b) Nationality or residence of the affected **data subject** or the contracting parties, in particular the **data controller**, may trigger the application of the law of that **data subject** or the party; and

(c) The law of the place in which the activity originated (the location of the equipment) or to which the activity is directed for the purpose of extracting benefits

may trigger the application of the law of that place. The usage of the geographic domain name associated with a particular place, the local language used by the provider in its web design, pricing in local currency and local contact points are among factors that might be taken into account in making such determination.

- *Provider or customer home law and forum*

163. Contracts for **standardized commoditized multi-subscriber cloud solutions** often specify that they are governed by the law of the cloud provider's principal place of business or place of establishment. They typically grant the courts of that country exclusive jurisdiction over any disputes arising out of the contract. The customer may prefer to specify the law and jurisdiction of its own country. Public institutions generally would have significant restrictions on their ability to consent to the law and jurisdiction of foreign countries. Providers that operate in many jurisdictions may be flexible as regards the choice of the law and forum of the country where the customer is located.

- *Multiple options*

164. The parties may also specify various options for different aspects of the contract. They may also opt for a defendant's jurisdiction to eliminate the home forum advantage for a plaintiff and thus encourage informal resolution of disputes.

- *No choice of law or forum*

165. Some parties may prefer no choice of law or forum clause in their contract, leaving the question open for later argument and resolution if and when needed. That might be considered the only viable solution in some cases.

O. Notifications

166. Notifications clauses would address the form, language, recipient and means of notification, as well as when the notification becomes effective (upon delivery, dispatch or acknowledgment of receipt). In the absence of any mandatory legislative provisions, parties may agree upon formalities for notification, which could be uniform or vary depending on the level of importance, urgency and other considerations. More stringent requirements would be justified, for example, in case of suspension or unilateral termination of the contract, as compared to routine notifications. Deadlines in such cases should allow for **reversibility** and customer business continuity. The contract may contain references to any notifications and deadlines imposed by law.

167. The parties may opt for **written** notification to be served at the physical or electronic address of the contact persons specified in the contract. The contract may specify the legal consequences of a failure to notify and of a failure to respond to a notification that requires a response.

P. Miscellaneous clauses

168. Parties often group under miscellaneous clauses provisions that do not fall under other parts of the contract. Some of them may contain a standard text appearing in all types of commercial contracts (so called "boilerplate provisions"). Examples include a severability clause allowing removing invalid provisions from the rest of the contract or a language clause identifying a certain language version of the contract as prevailing in case of conflicts in interpretation of various language versions. Placing contractual clauses among miscellaneous provisions does not diminish their legal significance. Some of them may need to be carefully considered by the parties in the light of cloud computing specifics.

Q. Amendment of the contract

169. Amendments to the contract could be triggered by either party. The contract would address the procedure for introducing amendments and making them effective. The contract may also need to address the consequences of rejection of amendments by either party.

170. In the light of the nature of **cloud computing**, it might be difficult to differentiate changes that would constitute amendment of the contract from those changes that would not. For example, the customer's use of any options made available from the outset in the contract would not necessarily constitute an amendment of the initial contract, nor would changes in services resulting from routine maintenance and other activities of the provider covered by the contract. The addition of any features not covered by the originally agreed terms and thus justifying changes in price may, on the other hand, constitute amendment of the contract. Any updates leading to material changes to previously agreed terms and policies may also constitute an amendment of the contract. Substantial modifications to the material terms of the originally concluded contract (e.g., discontinuation of some cloud computing services) may effectively lead to a new contract.

171. The extent of permissible modifications to public contracts may be limited by public procurement rules that usually restrict the freedom of parties to renegotiate terms of a contract that were subject to public tendering proceedings.

172. In the light of frequent modifications of the originally agreed terms, each party may wish to store independently of each other the complete set of the originally agreed terms and their modifications.

Glossary

Acceptable use policy (AUP) – part of the cloud computing contract between the provider and the customer that defines boundaries of use by the customer and its end-users of the cloud computing services covered by the contract, e.g., that the customer and its end-users shall not place and use any illegal or other prohibited content in the cloud [cross-link].

Audit – the process of examining compliance with contractual and statutory requirements. It may cover technical aspects, such as quality and security of hardware and software; compliance with any applicable industry standards; and the existence of adequate measures, including isolation, to prevent unauthorized access to and use of the system and to assure data integrity. It may be internal by the provider or external by the customer or by an independent third party appointed by either the provider, the customer or both.

Cloud computing – supply and use of **cloud computing services** through open or closed network. It may be characterized by:

(a) **Broad network access,** meaning that **cloud computing services** can be accessed over the network from any place where the network is available (e.g., through Internet), using a wide variety of devices, such as mobile phones, tablets and laptops;

(b) **Measured service,** meaning metered delivery of **cloud computing services** as in the public utilities sector (gas, electricity, etc.), allowing usage of the resources to be monitored and charged by reference to level of usage (on a **pay-as-you-go** basis);

(c) **Multi-tenancy,** meaning that physical and virtual resources are allocated to multiple users whose data is isolated and inaccessible to one another;

(d) **On-demand self-service,** meaning that **cloud computing services** are used by the customer as needed, automatically or with minimal interaction with the provider;

(e) **Elasticity and scalability,** meaning the capability for rapidly scaling up or down the consumption of **cloud computing services** according to customer's needs, including large-scale trends in resource usage (e.g., seasonal effects). Elasticity and scalability encompass not only quantitative aspects of the service but also the quality and security of the measures, that may need to be adapted to the varying sensitivities of the stored customer data;

(f) **Resource pooling,** meaning that physical or virtual resources can be aggregated by the provider in order to serve one or more customers without their control or knowledge over the processes involved.

Cloud computing services – services provided via **cloud computing**. They vary and constantly evolve. They may include the provision and use of simple connectivity and basic computing services (such as storage, emails and office applications). They may also include the provision and use of the whole range of physical information technology (IT) infrastructure (such as servers and data centres) and virtual resources needed to build own IT platforms, or deploy, manage and run customer-created or customer-acquired applications or software. **IaaS, SaaS, PaaS**, etc., are all types of cloud computing services.

Cloud computing service partners (e.g., cloud auditors, cloud service brokers or system integrators) – persons engaged in support of, or auxiliary to, activities of either the provider or the customer or both. Cloud auditors conduct an **audit** of the provision and use of **cloud computing services**. Cloud service brokers assist parties with a wide range of issues, e.g., with finding the right cloud solution, negotiating acceptable terms and migrating the customer to the cloud.

Cloud service derived data – data under control of the provider that is derived as a result of the use by the customer of the cloud computing services of that provider. It includes **metadata** and any other log data generated by the provider containing

records of who used the services, at what times, which functions and the types of data involved. It can also include information about authorized users, their identifiers, any configuration, customization and modification.

Data controller – a person that determines the purposes and means of the processing of **personal data**.

Data localization requirements – requirements relating to the location of data and other content or data centres or the provider. They may prohibit certain data (including **metadata** and backups**)** from residing or transiting in or out of a certain area or jurisdiction or require prior approval to be obtained from a competent State body for that. They are often found in data protection law and regulations, which may in particular prohibit **personal data** from residing or transiting in jurisdictions that do not adhere to certain standards of **personal data** protection.

Data processor – a person that processes the data on behalf of the **data controller**.

Data subjects' rights – rights associated with data subjects' **personal data**. Data subjects under law may enjoy the right to be informed about all significant facts related to their personal data, including its location, use by third parties and data leaks or other data breaches. They may also have the right to access their personal data at any time, the right to erasure of their personal data (pursuant to the right to be forgotten), the right to restrict **processing** of their personal data and the right to **portability** of their personal data.

Deployment models – various ways in which cloud computing is organized based on the control and sharing of physical or virtual resources:

(a) **Public cloud** where **cloud computing services** are potentially available to any interested customer and resources are controlled by the provider;

(b) **Community cloud** where **cloud computing services** exclusively support a specific group of related customers with shared requirements, and where resources are controlled by at least one member of that group;

(c) **Private cloud** where **cloud computing services** are used exclusively by a single customer and resources are controlled by that customer;

(d) **Hybrid cloud** where at least two different cloud deployment models are used.

Downtime or outages – the time when the cloud computing services are not available to the customer. That time is excluded from the calculation of **uptime** or availability. Time for maintenance and upgrades is usually included in downtime.

First response time – the time between the customer reporting an incident and the provider's initial response to it.

Follow-the-sun – a model in which the workload is distributed among different geographical locations to more efficiently balance resources and demand. The purpose of the model may be to provide round-the-clock services and to minimize the average distance between servers and end-users in an effort to reduce **latency** and maximize the speed with which data can be transmitted from one device to another (data transfer rate (DTR) or throughput).

IaaS – types of **cloud computing services** with which the customer can obtain and use processing, storage or networking resources. The customer does not manage or control the underlying physical or virtual resources, but does have control over operating systems, storage, and deployed applications that use the physical or virtual resources. The customer may also have limited ability to control certain networking components (e.g., host firewalls).

Insolvency representative – a person or body authorized in insolvency proceedings to administer the reorganization or the liquidation of the assets of the insolvent provider that are subject to the insolvency proceedings.

Interoperability – the ability of two or more systems or applications to exchange information and to mutually use the information that has been exchanged.

IP licences – agreements between an IP rights owner (the licensor) and a person authorized to use those IP rights (the licensee). They usually impose restrictions and obligations on the extent and manner in which the licensee or third parties may use the licenced property. For example, software and visual content (designs, layouts and images) may be licensed for specific use, not allowing copying, modification or enhancement, and be restricted to a certain medium. The licences may be limited to a particular market (e.g., national or (sub)regional), number of users or may be time-bound. Sub-licensing may not be permitted. The licensor may require reference to be made to the IP rights owner each time the IP rights are used.

Latency – from the customer's perspective, the delay between a user's request and a provider's response to it. It affects how usable the **cloud computing services** actually are.

Layered cloud computing services – where the provider is not the owner of all or any computing resources that it uses for provision of the cloud computing services to its customers but is itself the customer of all or some **cloud computing services**. For example, the provider of **PaaS** or **SaaS** types of service may use storage and server infrastructure (data centres, data servers) owned or provided by another entity. As a result, one or more sub-providers may be involved in providing the cloud computing services to the customer. The customer may not know which layers are involved in the provision of services at a given time, which makes identification and management of risks difficult. **Layered cloud computing services** are common in particular in **SaaS**.

Lock-in – where the customer is dependent on a single provider because costs of switching to another provider are substantial. Costs in this context are to be understood in the broadest sense as encompassing not only monetary expenses but also effort, time and relational aspects. Risks of application and data lock-ins may be high in **SaaS** and **PaaS**. Data may exist in formats specific to the provider's cloud system that will not be usable in other systems. In addition, the provider may use a proprietary application or system to organize customer's data requiring adjustment of licensing terms to allow operation outside the provider's network. In **PaaS**, there could also be runtime lock-in since runtimes (i.e., software designed to support the execution of computer programs written in a specific programming language) are often heavily customized (e.g., such aspects as allocating or freeing memory, debugging, etc.). **IaaS** lock-in varies depending on the specific infrastructure services consumed, but may also lead to application lock-in if there is dependence on specific policy features (e.g., access controls) or data lock-in if more data is moved to the cloud for storage.

Metadata – basic information about data (such as author, when the data was created, when it was modified and file size). It makes finding and using the data easier and may be required to ensure the authenticity of the record over time. It can be generated by the customer or the provider.

PaaS – types of **cloud computing services** with which the customer can deploy, manage and run in the cloud customer-created or customer-acquired applications using one or more existing programing languages and execution environments supported by the provider.

Performance parameters – quantitative (with numerical targets or metrics or performance range) or qualitative (with service quality assurances) parameters. They may refer to conformity with applicable standards, including the date of expiry of any conformity certification. To be meaningful, they would aim at measuring performance that is important to the customer and should do so in an easy and auditable way. They could be different depending on the risks involved and business needs (e.g., the criticality of certain data, services or applications and the corresponding priority for recovery). For example, a non-mission critical system that is designed to use the cloud for archival purposes will not need the same **uptime** or other **SLA** terms as mission critical or real-time operations.

Persistency of data storage – the probability that data stored in the cloud will not be lost during the contract period. It can be expressed in the contract as a measureable

target against which the customer will measure steps taken by the provider to ensure persistency of data storage.

Personal data – data that can be used to identify the natural person to whom such data relates. The definition of personal data in some jurisdictions may encompass any data or information directly or indirectly linked or relating to an identified or identifiable individual (the **data subject**).

[Personal data] processing – collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction, of data.

Portability – ability to easily transfer data, applications and other content from one system to another (i.e., at low cost, with minimal disruption and without being required to re-enter data, re-engineer processes or re-program applications). This might be achieved if it is possible to retrieve the data in the format that is accepted in another system or with a simple and straightforward transformation using commonly available tools.

Post-incident steps – measures to be taken after a security incident by the provider, the customer or both, including by involving a third party. They may include isolation or quarantine of affected areas, performance of root cause analysis and production of an incident analysis report by the affected party or jointly with the other party or by an independent third party.

Recovery point objectives (RPOs) – the maximum time period prior to an unplanned interruption of services during which changes to data may be lost as a consequence of recovery. If RPO is specified in the contract as two hours before the interruption of services, that would mean that all data would be accessible after recovery in the form it existed two hours before the interruption occurred.

Recovery time objectives (RTO) – the time frame within which all cloud computing services and data must be recovered following an unplanned interruption.

Reversibility – process for the customer to retrieve its data, applications and other related content from the cloud and for the provider to delete the customer data and other related content after an agreed period.

SaaS – types of **cloud computing services** with which the customer can use the provider's applications in the cloud.

Sector specific regulation – financial, health, public sector or other specific sector or profession regulations (e.g., attorney-client privilege, medical professional secrecy) and rules for handling classified information (broadly understood as information to which access is restricted by law or regulation to particular classes of persons).

Security incident notification – a notification served to affected parties, State authorities or the public at large about a security incident. It may include circumstances and the cause of the incident, type of affected data, the steps to be taken to resolve the incident, the time at which the incident is expected to be resolved and any contingency plan to employ while the incident is being resolved. It may also include information on failed breaches, attacks against specific targets (per customer user, per specific application, per specific physical machine), trends and statistics.

Service level agreement (SLA) – part of the cloud computing contract between the provider and the customer that identifies the cloud computing services covered by the contract and how they should be delivered (the **performance parameters**) [cross-link].

Standardized commoditized multi-subscriber cloud solutions – cloud computing services provided to an unlimited number of customers as a mass product or commodity on non-negotiable standard terms of the provider. Broad disclaimers and waivers of provider's liability are common in this type of solution. The customer may be in a position to compare different providers and their contracts and select among

those available on the market the most suitable for its needs, but not to negotiate a contract.

Uptime – time when the cloud computing services are accessible and usable.

Written or **in writing –** information that must be accessible so as to be usable for subsequent reference. It encompasses information on paper and in an electronic communication. “Accessible” means that information in the form of computer data should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained. “Usable” covers both human use and computer processing.

C. Note by the Secretariat on legal issues related to identity management and trust services

(A/CN.9/WG.IV/WP.149)

[Original: English]

Contents

I. Introduction

1. At its forty-eighth session, in 2015, the Commission requested the Secretariat to conduct preparatory work on legal aspects of identity management and trust services, including through the organization of colloquia and expert group meetings, for future discussion at the Working Group level following the completion of work on electronic transferable records on the basis of a proposal submitted to the Commission for its consideration (A/CN.9/854).[1]

2. At that session, the Commission also asked the Secretariat to share the result of such preparatory work with Working Group IV, with a view to seeking recommendations on the exact scope, possible methodology and priorities for the consideration of the Commission at its forty-ninth session.[2]

3. At its forty-ninth session, in 2016, the Commission had before it a note by the Secretariat on legal issues related to identity management and trust services (A/CN.9/891) summarizing the discussions during the UNCITRAL Colloquium on Legal Issues Related to Identity Management and Trust Services held in Vienna on 21 and 22 April 2016 and complemented by other material.

4. At that session, the Commission agreed that the topics of identity management and trust services, as well as of cloud computing, should be retained on the work agenda of the Working Group and that it would be premature to prioritize between the two topics. The Commission confirmed its decision that the Working Group could take up work on those topics upon completion of the work on the Model Law on Electronic Transferable Records. In that context, the Secretariat, within its existing resources, and the Working Group were asked to continue to update and conduct preparatory work on the two topics including their feasibility in parallel and in a flexible manner and report back to the Commission so that it could make an informed decision at a future session, including the priority to be given to each topic.[3]

5. At its fifty-fourth session (Vienna, 31 October–4 November 2016), the Working Group held a preliminary exchange of view on its possible future work on legal aspects of identity management and trust services.

6. At that session the Working Group agreed that such future work should be limited to the use of identity management systems for commercial purposes and that it should not take into account the private or public nature of the identity management services provider. The Working Group also agreed that, while work on identity management could be taken up before work on trust services, the identification and definition of terms relevant for identity management and trust services should take place simultaneously given the close relationship between the two. It was further agreed that focus should be placed on multi-party identity systems and on natural and

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 354–355 and 358.

[2] Ibid., para. 358.

[3] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 229.

legal persons, without excluding consideration of two-party identity systems and of physical and digital objects when appropriate. In addition, it was agreed that the Working Group should continue its work by further clarifying the goals of the project, specifying its scope, identifying applicable general principles and drafting necessary definitions (A/CN.9/897, paras. 118–120 and 122).

7. At its fifty-fifth session (New York, 24–28 April 2017), the Working Group discussed various aspects of its possible future work on legal aspects of identity management and trust services. In particular, at that session the Working Group discussed the objectives of the project, the general principles inspiring the project and the possible subjects to be addressed by future work.

8. At its fiftieth session, in 2017, after discussion the Commission reaffirmed the mandate given to the Working Group at its forty-ninth session, in 2016 (see para. 4 above). It agreed to revisit that mandate at its fifty-first session, in particular if the need arose to prioritize between the topics or to give a more specific mandate to the Working Group as regards its work in the area of identity management and trust services. The Secretariat was requested to consider convening expert group meetings as it deemed necessary to expedite the work in both areas and ensure the productive use of conference resources by the Working Group. States and international organizations were invited to share with the Working Group and the Secretariat their expertise in the areas of work assigned to the Working Group.

9. The Secretariat convened an expert group meeting on legal aspects of identity management and trust services in Vienna on 23 and 24 November 2017. This note, based on comments made on that occasion as well as other relevant material, is submitted to the Working Group to facilitate further discussion on the scope and goals of possible future work in that field.

II. Relevant Issues for Future Work on Legal Aspects of Identity Management and Trust Services

10. The fundamental importance of identity management ("IdM") and trust services for all types of electronic transaction has been repeatedly noted. In particular, the desirability of preparing adequate legal tools to facilitate mutual legal recognition and, more generally, clarify the legal status of IdM and trust services has been suggested. Hence, support has been expressed for conducting work in support of establishing an enabling environment for IdM and trust services.

11. The emergence of different approaches, reflected in national and regional legislation, has also been noted. Taking into account existing legislation, it has been suggested that guidance should be given to prevent fragmentation that could hinder cross-border transactions. In that respect, the interrelation between mutual legal recognition and technical interoperability has been stressed.

12. However, the view has also been expressed that any project in the field should have a clearly recognizable impact on legal issues. In that respect, it was indicated that the overarching goal should be to identify legal obstacles to the use of IdM and trust services and prepare tools to overcome them.

13. With respect to work on IdM, two possible approaches have been identified. The first approach suggests that guidance should be given on fundamental issues related to the legal effects of IdM, including, but not limited to, cross-border ones (A/CN.9/902, para. 34). The second approach recommends focusing on cross-border issues, in the context of a commonly-understood framework of reference (A/CN.9/902, para. 32).

14. The two approaches share common elements, including applicable general principles. Those general principles have been identified as: technological neutrality, including with respect to economic and system models; functional equivalence, to the extent applicable; non-discrimination against the use of electronic means; and party autonomy (A/CN.9/902, paras. 52, 54 and 63).

15. Moreover, both approaches focus on addressing matters specific to IdM and trust services. Other laws, e.g. laws generally applicable to commercial transactions or to electronic transactions, would not be affected. Moreover, parties to a commercial transaction may decide to agree on specific IdM rules. Those contractual rules may be particularly relevant in the context of federated IdM systems. Both approaches aim at supporting enforceability of contractual rules.

16. With respect to the first approach, suggesting that guidance should be given on fundamental issues related to the legal effects of IdM, several possibly relevant topics have been identified. Those topics include: legal recognition, mutual recognition, attribution of identity information, attribution of actions, liability and risk allocation, and transparency. Those topics may be relevant also for a discussion of legal issues related to trust services. The Working Group may wish to recall its preliminary discussion of those topics (A/CN.9/902, paras. 66–85).

17. Should that approach be followed, it was suggested that work could commence by identifying cases where IdM was used. In that respect, it should be noted that identification may be required for different purposes. Reference is often made to regulatory compliance. One example of such requirement is the application of "Know Your Customer" (KYC) rules in the finance, telecom and other business sectors. Another example may be found in the field of electronic procurement, where the correct identification of potential vendors is necessary, for instance, to prevent fraud and collusion and to enforce debarment.

18. Moreover, identification may be required for the validity of a commercial document. For instance, the law applicable to a bill of lading may require the identification of certain parties (see e.g. art. 15 of the Hamburg Rules[4] and art. 36 of the Rotterdam Rules[5]).

19. Lastly, parties to a transaction may have an interest in identifying each other online accurately and may agree on the use of certain procedures and methods to achieve that goal. The source of that duty to identify is therefore contractual.

20. Another potentially relevant issue under this approach is the desirability and feasibility of formulating a functional equivalence rule for the notion of "identification" on the basis of paper-based documents or similar credentials.

21. The second approach envisages facilitating a common understanding on how existing IdM systems, including their legal framework, may interact. Under that approach, existing identification schemes would not be affected; however, a tool would be created to achieve mutual legal recognition among those schemes.

22. Discussions on that second approach highlighted how a model based on a centrally-managed licensing system may pose challenges at the global level. In particular, governance of that licensing system could be complex and costly. Moreover, a centrally-managed system may not be reacting to developments as quickly as technological evolution may require, thus possibly hindering innovation. Hence, it was suggested that alternative solutions should be explored.

23. One suggestion made reference to the possibility of mapping IdM systems according to a common template. Referring to generic description of levels of assurance could ensure that exercise would be outcome-based, which, in turn, would preserve the application of the principle of technological neutrality. Guidance could be provided also on the mapping exercise, which could be carried out by any concerned party, including private and commercial entities.

24. Elements possibly relevant for the mapping exercise may be identified in the Commission Implementing Regulation (EU) 2015/1502, operating in the framework of the eIDAS Regulation.[6] Those elements are: enrolment, electronic identification

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[4] United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3.

[5] General Assembly resolution 63/122, annex.

[6] Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

means management, authentication, and management and organization. Each element includes several sub-elements.

25. The legal effects of the mapping exercise would be defined by the scheme in which the IdM tool is supposed to operate. In that respect, the Working Group may wish to consider the desirability and feasibility of possible discussions on definitions of levels of assurance and legal consequences thereof. Similarly, the Working Group may wish to consider if, and to what extent, guidance could be provided on specifications and procedures to be followed in the mapping exercise.

26. A practical example may illustrate how the mapping exercise might work. As noted above, KYC requirements are common in various business sectors. Those requirements may not be satisfied by using identity credentials issued in a different jurisdiction without a formal mechanism for mutual recognition of IdM schemes. In the absence of such mechanism, the foreign credentials could be mapped against generic descriptions of levels of assurance. It would thus be possible to verify whether the suggested foreign identity credentials could satisfy the requirements for the level of assurance needed for KYC purposes.

27. The level of assurance for enrolment where KYC requirements are applied may be higher than the level of assurance required for carrying out remote banking transactions, and significantly higher than those required for accessing a mobile telephone. Under the suggested approach, different foreign credentials could be used in a flexible manner to satisfy the various identification needs.

28. Certain issues may be relevant in defining the scope of possible future work of the Working Group regardless of the recommended approach. One such issue is whether the scope of work should be limited to commercial transactions, or extend to transactions with other entities, to the extent that those are relevant for business (e.g., identification in the context of paperless trade facilitation), or cover all forms of identification regardless of the nature of the transaction.

29. In that respect, it may be useful to take into consideration the distinction between primary determination of identity (also called foundational identity) and secondary determination of identity (also called transactional or functional identity). The primary determination of identity may raise complex issues of status attribution. However, commercial transactions may rely, in full or in part, on a secondary determination of identity. The actual legal consequences of identity verification would be determined by factual and other relevant circumstances of the specific transaction.

30. With regard to possible future work on legal issues relating to trust services, support was expressed for closely coordinating that work with work on IdM. The suggestion was also made that such work should consider an open-ended list of trust services based on a common definition of “trust service”.

31. The Working Group may recall the Commission’s request to the Working Group to continue updating and conducting preparatory work on legal aspects of IdM and trust services, including with respect to feasibility, and to report back to the Commission to enable it to make an informed decision at its next session (see paras. 4 and 8 above).

32. In light of that request, the Working Group may wish to formulate a recommendation to the Commission on future work in the field of IdM and trust services. That recommendation might indicate the details of the work to be undertaken, the form it might take and how it might best be progressed, including the possibility of adopting a flexible approach to working methods. In formulating that recommendation, the Working Group may wish to take into account:

(a) The potential legal effect of such work on removing obstacles to the broader use of IdM and trust services and preventing the creation of new obstacles;

(b) Types of electronic transactions to be covered, in particular involvement of non-commercial entities;

(c) Possible legal treatment of legal recognition, attribution of identity information, attribution of actions, liability and risk allocation, and transparency in the context of IdM and trust services; and

(d) Cross-border aspects, namely mutual recognition and elements relevant for a mapping exercise such as enrolment, electronic identification means management, authentication, and management and organization.

33. Additional considerations on legal aspects of IdM and trust services may be found in documents A/CN.9/WG.IV/WP.141, A/CN.9/WG.IV/WP.144, A/CN.9/WG.IV/WP.145 and A/CN.9/WG.IV/WP.146 as well as in documents A/CN.9/891 and A/CN.9/902.

D. Note by the Secretariat on legal issues related to identity management and trust services: terms and concepts relevant to identity management and trust services

(A/CN.9/WG.IV/WP.150)

[Original: English]

Contents

I. Introduction

1. At its forty-eighth session, in 2015, the Commission instructed the Secretariat to conduct preparatory work on identity management and trust services, cloud computing and mobile commerce, including through the organization of colloquia and expert group meetings, for future discussion at the Working Group level. The Commission also asked the Secretariat to share the result of that preparatory work with Working Group IV, with a view to seeking recommendations on the exact scope, possible methodology and priorities for the consideration of the Commission at its forty-ninth session.[1]

2. At its forty-ninth session, in 2016, the Commission had before it a note by the Secretariat on legal issues related to identity management and trust services (A/CN.9/891) summarizing the discussions during the UNCITRAL Colloquium on Legal Issues Related to Identity Management and Trust Services held in Vienna on 21 and 22 April 2016 and complemented by other material. The Commission was also informed that work on contractual aspects of cloud computing had started at the expert level on the basis of a proposal (A/CN.9/856) submitted at the forty-eighth session of the Commission, in 2015.

3. At that session, the Commission agreed that the topics of identity management and trust services, as well as of cloud computing, should be retained on the work agenda of the Working Group and that it would be premature to prioritize between the two topics. The Commission confirmed its decision that the Working Group could take up work on those topics upon completion of the work on the Model Law on Electronic Transferable Records. In that context, the Secretariat, within its existing resources, and the Working Group were asked to continue to update and conduct preparatory work on the two topics including their feasibility in parallel and in a flexible manner and report back to the Commission so that it could make an informed decision at a future session, including the priority to be given to each topic.[2]

4. At its fiftieth session, in 2017, after discussion the Commission reaffirmed the mandate given to the Working Group at its forty-ninth session, in 2016 (see para. 3 above). It agreed to revisit that mandate at its fifty-first session, in particular if the need arose to prioritize between the topics or to give a more specific mandate to the Working Group as regards its work in the area of identity management and trust services.[3]

5. At its fifty-fifth session (New York, 24–28 April 2017), the Working Group had before it a note listing terms and concepts relevant to identity management and trust

[1] *Official Records of the General Assembly*, *Seventieth Session, Supplement No. 17* (A/70/17), para. 358.
[2] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 229.
[3] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), para. 127.

services (A/CN.9/WG.IV/WP.143). At that session, the Working Group asked the Secretariat to revise that note by including definitions and concepts listed in paragraph 20 of document A/CN.9/WG.IV/WP.144.[4]

6. This note contains the definition of a number of terms relevant for identity management and trust services. The terms are presented with a view to enabling discussions based on a common understanding of fundamental notions; they are not presented in order to suggest a discussion on legally binding definitions of those notions. Similarly, the terms are not intended to provide an indication on the scope of the future work of UNCITRAL in the field of identity management and trust services.

7. The source of the defined terms, where available, is explicitly indicated. Due to different sources, the same term may include more than one definition. If no source is indicated, the definition was suggested during expert consultations. Preference was given to terms defined internationally. Additional sources of defined terms are available, especially at the national level.

8. The defined terms are listed in different sections for ease of presentation only and without prejudice to the determinations of the Working Group on their relevance for discussions on the legal aspects of identity management or of trust services.

9. The defined terms have different origins and therefore should not be read as a coherent set of interconnected terms. Rather, each term should be read separately as a stand-alone definition and as such is presented as a possible reference for the discussions of the Working Group. When available, the source of the defined term is indicated so that additional information could be gathered from the original source document.

10. Synonyms are indicated for convenience only in light of usage. Not all synonyms are terms defined in this note.

11. The terms are listed in alphabetical order in the English language version of this note. The same order is maintained in other language versions to ensure correspondence of paragraphs and therefore facilitate reference during the Working Group discussions.

II. Terms and concepts relevant to identity management and trust services

A. Definitions relevant to identity management

12. “Assurance level” means a level of confidence in the binding between an entity and the presented identity information. Source: Rec. ITU-T X.1252. Synonyms: identity assurance, level of assurance.

13. “Attribute” means an item of information or data associated with a subject. Examples of attributes include information such as name, address, age, gender, title, salary, net worth, driver’s license number, social security number, email address, mobile number, and data such as the subject’s network presence, the device used by the subject, the subject’s usual home location as known by a network, etc. (for a human being); corporate name, principal office address, registration name, jurisdiction of registration, etc. (for a legal entity); make and model, serial number, location, capacity, device type, etc. (for a device). Synonym: identity attribute.

14. “Attribute provider” means a business or government entity that acts as a source of one or more attributes of a subject’s identity. An attribute provider is often the entity responsible for assigning, collecting, or maintaining such attributes. Examples of attribute providers include a government agency that maintains a birth registry or title registry, a national credit bureau, a business that maintains a commercial marketing database or a corporate registry, and entities such as mobile operators,

[4] A/CN.9/902, para. 92.

banks, utilities and healthcare providers that hold verified user data and that either verify or provide these attributes to third parties (possibly, subject to user consent).

15. "Authentication" means (a) a process used to achieve sufficient confidence in the binding between the entity and the presented identity. Source: Rec. ITU-T X.1252; (b) the process of associating the claimed identity of a subject with the actual subject by confirming the subject's association with a credential either directly (active authentication) or through the environment in which the subject is interacting ("passive authentication" or "adaptive authentication"). For example, entering a secret password that is associated with a username is assumed to authenticate that the individual entering the secret password is the person to whom the username was issued. Likewise, comparing a person presenting a passport to the picture appearing on the passport is used to authenticate (i.e., confirm) that that person is the person described in the passport; (c) an electronic process that enables the electronic identification of a natural or legal person, or the origin and integrity of data in electronic form to be confirmed. Source: eIDAS, article 3(5). (See also A/CN.9/WG.IV/WP.144, para. 20.)

16. "Authentication assurance" means the degree of confidence reached in the authentication process that the communication partner is the entity that it claims to be or is expected to be. Note: the confidence is based on the degree of confidence in the binding between the communicating entity and the identity that is presented. Source: Rec. ITU-T X.1252. Note: in some cases, the notions of "identity assurance" and "authentication assurance" are viewed as separate components of the overall concept of "level of assurance".

17. "Authentication factor" means (a) a piece of information and process used to authenticate or verify the identity of an entity. Source: ISO/IEC 19790. Note: authentication factors are divided into four categories: (i) something an entity has (e.g., device signature, passport, hardware device containing a credential, private key); (ii) something an entity knows (e.g., password, PIN); (iii) something an entity is (e.g., biometric characteristic); or (iv) something an entity typically does (e.g., behaviour pattern). Source: Rec. ITU-T X.1254; (b) a factor confirmed as being bound to a person, which falls into any of the following categories: (i) 'possession-based authentication factor' means an authentication factor where the subject is required to demonstrate possession of it; (ii) 'knowledge-based authentication factor' means an authentication factor where the subject is required to demonstrate knowledge of it; (iii) 'inherent authentication factor' means an authentication factor that is based on a physical attribute of a natural person, and of which the subject is required to demonstrate that they have that physical attribute. Source: Commission Implementing Regulation (EU) 2015/1502, Annex, article 1(2).

18. "Authenticator" means something that is used to verify the relationship between a subject and a credential. An active authenticator is usually something the subject knows (such as a secret password), something the subject has (such as a smartcard), or something the subject is (such as a photo or other biometric information), and is used to tie the subject to an identity credential. For example, a password functions as an authenticator for a username, a picture functions as an authenticator for a passport or driver's license. A passive authenticator is usually something the environment knows, e.g. the mobile network knows that the user is connected to the network, is in the usual location, is using the usual mobile device, has not been barred from using the network, etc.

19. "Authoritative source" means (a) a repository which is recognized as being an accurate and up-to-date source of information. Source: Rec. ITU-T X.1254; (b) any source irrespective of its form that can be relied upon to provide accurate data, information and/or evidence that can be used to prove identity. Source: Commission Implementing Regulation (EU) 2015/1502, Annex, article 1(1). (See also A/CN.9/WG.IV/WP.144, para. 20.)

20. "Authorization" means (a) a process of granting rights and privileges to an authenticated subject based on criteria usually determined by the relying party. For example, once a subject is authenticated, he or she might be granted access to a

confidential database. Source: A/CN.9/WG.IV/WP.120, annex; (b) the granting of rights and, based on these rights, the granting of access. Source: Rec. ITU-T Y.2720 and Rec. ITU-T X.800.

21. "Credential" means (a) a set of data presented as evidence of a claimed identity and/or entitlements. Source: Rec. ITU-T X.1252; (b) data in digital or tangible form presented as evidence of a claimed identity of a subject. Examples of paper-based credentials include passports, birth certificates, driver's licenses, and employee identity cards. Examples of digital credentials include usernames, smart cards, mobile identity and digital certificates. Source: A/CN.9/WG.IV/WP.120, annex. Synonyms: electronic identification means, identity credential.

22. "Credential provider" or "Credential service provider" means (a) an entity that issues credentials to subjects; (b) a trusted actor that issues and/or manages credentials. Note: the Credential Service Provider (CSP) may encompass Registration Authorities (RAs) and verifiers that it operates. A CSP may be an independent third party, or it may issue credentials for its own use. Source: Rec. ITU-T X.1254.

23. "Electronic identification" means the process of using person identification data in electronic form uniquely representing either a natural or legal person, or a natural person representing a legal person. Source: eIDAS, article 3(1). (See also A/CN.9/WG.IV/WP.144, para. 20.)

24. "Electronic identification means" means a material and/or immaterial unit containing person identification data and which is used for authentication for an online service. Source: eIDAS, article 3(2). (See also A/CN.9/WG.IV/WP.144, para. 20.)

25. "Electronic identification scheme" means a system for electronic identification under which electronic identification means are issued to natural or legal persons, or natural persons representing legal persons. Source: eIDAS, article 3(4). (See also A/CN.9/WG.IV/WP.144, para. 20.)

26. "Enrolment" means (a) the process of inauguration of an entity into a context. Note 1: enrolment may include verification of the entity's identity and establishment of a contextual identity. Note 2: also, enrolment is a pre-requisite to registration. In many cases, the latter is used to describe both processes. Source: Rec. ITU-T X.1252; (b) the process by which credential providers (or their agents) verify the identity claims of a subject before issuing a credential to such subject.

27. "Entity" means something that has separate and distinct existence and that can be identified in a context. Note: an entity can be a physical person, an animal, a juridical person, an organization, an active or passive thing, a device, a software application, a service, etc., or a group of these entities. In the context of telecommunications, examples of entities include access points, subscribers, users, network elements, networks, software applications, services and devices, interfaces, etc. Source: Rec. ITU-T X.1252. An entity may have multiple identifiers.

28. "Federation" means (a) an association of users, service providers, and identity service providers. Source: Rec. ITU-T X.1252; (b) a group of identity providers, relying parties, subjects and others that agree to operate under compatible policies, standards, and technologies specified in system rules (or a trust framework) in order that subject identity information provided by identity providers can be understood and trusted by relying parties. Synonyms: identity federation, multi-party identity system.

29. "Identification" means the process of collecting, verifying, and validating sufficient identity attributes about a specific subject to define and confirm its identity within a specific context. Synonyms: identity proofing, registration.

30. "Identifier" means (a) one or more attributes used to identify an entity within a context. Source: Rec. ITU-T X.1252; (b) one or more attributes that uniquely characterize an entity in a specific context. Source: Rec. ITU-T X.1254.

31. "Identity" means (a) a set of attributes related to an entity. Source: ISO/IEC 24760; (b) information about a specific subject in the form of one or more attributes that allow the subject to be sufficiently distinguished within a particular

context; (c) a set of the attributes about a person that uniquely describes the person within a given context. Synonym: digital identity.

32. “Identity assertion” means an electronic record originating with an identity provider and sent to a relying party that contains the subject’s identifier (e.g., name, account number, mobile number, location, etc.), authentication status, and applicable identity attributes. The attributes are typically personal and non-personal information about the subject that is relevant to the transaction required by the relying party.

33. “Identity assurance” means the degree of confidence in the process of identity validation and verification used to establish the identity of the entity to which the credential was issued, and the degree of confidence that the entity that uses the credential is that entity or the entity to which the credential was issued or assigned. Source: Rec. ITU-T X.1252. Synonyms: assurance level; level of assurance. Note: in some cases, the notions of “identity assurance” and “authentication assurance” are viewed as separate components of the overall concept of “level of assurance”.

34. “Identity federation” means a group of identity providers, relying parties, subjects and others that agree to operate under compatible policies, standards, and technologies specified in system rules (or a trust framework) in order that subject identity information provided by identity providers can be understood and trusted by relying parties. See also: federation; multi-party identity system.

35. “Identity management” means (a) a set of processes to manage the identification, authentication, and authorization of individuals, legal entities, devices, or other subjects in an online context. Source: A/CN.9/854, paragraph 6; (b) a set of functions and capabilities (e.g., administration, management and maintenance, discovery, communication exchanges, correlation and binding, policy enforcement, authentication and assertions) used for: (i) assurance of identity information (e.g., identifiers, credentials, attributes); (ii) assurance of the identity of an entity; and (iii) enabling business and security applications. Source: Rec. ITU-T Y.2720.

36. “Identity proofing” means (a) the process of collecting, verifying, and validating sufficient identity attribute information about a specific subject (a person, legal entity, device, digital object, or other entity) to define and confirm its identity within a specific context. Identity proofing may be carried out through self-assertion or against existing records; (b) a process which validates and verifies sufficient information to confirm the claimed identity of the entity. Source: Rec. ITU-T X.1252; (c) a process by which a registration authority (RA) captures and verifies sufficient information to identify an entity to a specified or understood level of assurance. Source: Rec. ITU-T X.1254. Synonyms: identification; registration.

37. “Identity provider” means (a) an entity responsible for the identification of persons, legal entities, devices, and/or digital objects, the issuance of corresponding identity credentials, and the maintenance and management of such identity information for subjects. Source: A/CN.9/WG.IV/WP.120, annex; (b) an entity that creates, maintains and manages trusted identity information of other entities (e.g., users/subscribers, organizations and devices) and offers identity-based services based on trust, business and other types of relationship. Source: Rec. ITU-T Y.2720. Synonym: credential service provider; identity service provider.

38. “Identity system” means an online environment for identity management transactions governed by a set of system rules (also referred to as a trust framework) where individuals, organizations, services, and devices can trust each other because authoritative sources establish and authenticate their identities. Source: A/CN.9/WG.IV/WP.120, annex. An identity system involves (a) a set of rules, methods, procedures and routines, technology, standards, policies, and processes, (b) applicable to a group of participating entities, (c) governing the collection, verification, storage, exchange, authentication, and reliance on identity attribute information about an individual person, a legal entity, device, or digital object, (d) for the purpose of facilitating identity transactions. Synonyms: identity management system (“IdM system”); identity federation; electronic identification scheme; information security management system.

39. “Identity transaction” means any transaction involving two or more participants which involves establishing, verifying, issuing, asserting, revoking, communicating, or relying on identity information.

40. “Identity verification” means the process of confirming that a claimed identity is correct by comparing the offered claims of identity with previously proven information. Source: Rec. ITU-T X.1252.

41. “Information security management system” means a set of processes and procedures designed to manage to acceptable levels risks related to information security. Source: Commission Implementing Regulation (EU) 2015/1502, Annex, article 1(1).

42. “Level of assurance” means a designation of the degree of confidence in the identification and authentication processes – i.e., (a) the degree of confidence in the vetting process used to establish the identity of an entity to whom a credential was issued, and (b) the degree of confidence that the entity using the credential is the entity to whom the credential was issued. The assurance reflects the reliability of methods, processes and technologies used. Some level of assurance schemes define levels of assurance by number, i.e., Levels 1 to 4, where Level 1 is the lowest assurance level, and Level 4 is the highest. Other schemes designate assurance levels as “low,” “substantial” and “high”. Synonyms: assurance level; identity assurance; trust level.

43. “Multifactor authentication” means authentication with at least two independent authentication factors. Note: authentication factors are divided into four categories: (a) something an entity has (e.g., device signature, passport, hardware device containing a credential, private key); (b) something an entity knows (e.g., password, PIN); (c) something an entity is (e.g., biometric characteristic); or (d) something an entity typically does (e.g., behaviour pattern). Source: ISO/IEC 19790; Rec. ITU-T X.1254.

44. “Multi-party identity system” means an identity system, also referred to as an identity federation, in which a subject can use an identity credential issued by any one of several identity providers to authenticate multiple unrelated relying parties; An identity system that allows the use of identity credentials issued, and identity information asserted, by one or more identity providers with multiple relying parties. Source: A/CN.9/WG.IV/WP.120, annex. Synonym: identity federation.

45. “Participant” means any person or legal entity that participates in an identity system or an identity transaction using such system. Participants include subjects, identity providers, attribute providers, credential providers, relying parties, identity system operators, and others. Like participants in a credit card system, participants in an identity system typically agree contractually to a set of system rules (often referred to as a trust framework) applicable to their role.

46. “Person identification data” means a set of data enabling the identity of a natural or legal person, or a natural person representing a legal person to be established. Source: eIDAS, article 3(3). (See also A/CN.9/WG.IV/WP.144, para. 20.)

47. “Proofing” means the verification and validation of information when enrolling new entities into identity systems. Source: Rec. ITU-T X.1252. Synonyms: identity proofing, identification.

48. “Pseudonym” means an identifier whose binding to an entity is not known or is known to only a limited extent, within the context in which it is used. Note: a pseudonym can be used to avoid or reduce privacy risks associated with the use of identifier bindings which may reveal the identity of the entity. Source: Rec. ITU-T X.1252.

49. “Registration” means a process in which an entity requests and is assigned privileges to use a service or resource. Note: enrolment is a pre-requisite to registration. Enrolment and registration functions may be combined or separate. Source: Rec. ITU-T X.1252.

50. “Registration authority” means an entity that provides enrolment and/or identity proofing services in the context of a federated (i.e., multi-party) identity system, usually for an identity provider.

51. “Relying party” means (a) the person or legal entity that relies on an identity credential or identity assertion to make a decision as to what action to take in a given application context, such as to process a transaction or grant access to information or a system. Source: A/CN.9/WG.IV/WP.120, annex; (b) an entity that relies on an identity representation or claim by a requesting/asserting entity within some request context. Source: Rec. ITU-T X.1252; (c) a natural or legal person that relies upon an electronic identification or a trust service. Source: Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (“eIDAS”), article 3(6).

52. “Repository” means an interface that accepts deposits of digital entities, enables their retention, and provides secure access to the digital entities via their identifiers. Source: Rec. ITU-T X.1255.

53. “Role” means a type (or category) of participant in an identity system, such as a subject, identity provider, credential provider, relying party, etc. A participant may have multiple roles. For example, with respect to the identification of its employees, an employer may function as both an identity provider and a relying party.

54. “Self-asserted identity” means an identity that an entity declares to be its own. Source: Rec. ITU-T X.1252.

55. “Subject” means the person, legal entity, device, or digital object (i.e., the entity) that is identified in a particular identity credential and that can be authenticated and vouched for by an identity provider. Source: A/CN.9/WG.IV/WP.120, annex. Synonyms: user; data subject.

56. “System rules”: see trust framework.

57. “Trust” means the firm belief in the reliability and truth of information or in the ability and disposition of an entity to act appropriately, within a specified context. Source: Rec. ITU-T X.1252.

58. “Trust framework” means (a) the system rules for an identity system consisting of the business, technical, and legal rules that govern the participation in and operation of a specific identity system. They are typically privately developed (e.g., by the identity system operator of a specific identity system), and made binding and enforceable on the participants via contract. Source: A/CN.9/WG.IV/WP.120, annex; (b) a set of requirements and enforcement mechanisms for parties exchanging identity information. Source: Rec. ITU-T X.1254; (c) an IdM system where a set of verifiable commitments made by each of the various parties in a transaction to their counter parties, and these commitments necessarily include: (i) controls to help ensure commitments are met and (ii) remedies for failure to meet such commitments. Source: Rec. ITU-T X.1255. Synonyms: system rules; operating rules; scheme rules.

59. “Trust framework provider” means the entity or organization that creates or adopts the system rules and associated contractual structure for a specific identity system. The trust framework provider may also certify the participants that are in compliance with those system rules. For example, credit and debit card issuers may fulfill a similar role in the credit and debit card world; they set forth the system rules and enforce compliance.

60. “Trusted third party” means (a) an authority or its agent, trusted by other actors with respect to other activities (e.g., security related activities). Source: Rec. ITU-T X.1254; (b) an entity accepted by all parties to a transaction as an impartial and trustworthy intermediary to facilitate interactions between and among the parties.

61. “User” means (a) a subject of a credential; a consumer of the services offered by a relying party; (b) any entity that makes use of a resource, e.g., system, equipment, terminal, process, application, or corporate network. Source: Rec. ITU-T X.1252.

62. "Validation" means the process of verifying and confirming that an identity credential is valid (e.g., that it has not expired or been revoked).

63. "Verification" means (a) the process of checking information by comparing the provided information with previously corroborated information. Source: Rec. ITU-T X.1254; (b) the process or instance of establishing the authenticity of something. Note: verification of (identity) information may encompass examination with respect to validity, correct source, original, (unaltered), correctness, binding to the entity, etc. Source: Rec. ITU-T X.1252.

B. Definitions relevant to trust services

64. The following definitions may be particularly relevant in discussions on the legal aspects of trust services. However, a number of the definitions listed as relevant to the discussions on legal aspects of identity management may also be relevant for the discussions on the legal aspects of trust services (see above, para. 8).

65. "Certificate for website authentication" means an attestation that makes it possible to authenticate a website and links the website to the natural or legal person to whom the certificate is issued. Source: eIDAS, article 3(38). (See also A/CN.9/WG.IV/WP.144, para. 20.)

66. "Certification service provider" means a person that issues certificates and may provide other services related to electronic signatures. Source: UNCITRAL Model Law on Electronic Signatures, article 2(e).[5]

67. "Electronic document" means any content stored in electronic form, in particular text or sound, visual or audiovisual recording. Source: eIDAS, article 3(35). (See also A/CN.9/WG.IV/WP.144, para. 20.)

68. "Electronic registered delivery service" means a service that makes it possible to transmit data between third parties by electronic means and provides evidence relating to the handling of the transmitted data, including proof of sending and receiving the data, and that protects transmitted data against the risk of loss, theft, damage or any unauthorized alterations. Source: eIDAS, article 3(36). (See also A/CN.9/WG.IV/WP.144, para. 20.)

69. "Electronic seal" means data in electronic form, which is attached to or logically associated with other data in electronic form to ensure the latter's origin and integrity. Source: eIDAS, article 3(25). (See also A/CN.9/WG.IV/WP.144, para. 20.)

70. "Electronic signature" means (a) data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign. Source: eIDAS, article 3(10) (see also A/CN.9/WG.IV/WP.144, para. 20); (b) data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message. Source: UNCITRAL Model Law on Electronic Signatures, article 2(a). Note: article 9(3)(a) of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)[6] refers to indication of the signatory's intention in respect of the information contained in the electronic communication.

71. "Electronic time stamp" means data in electronic form which binds other data in electronic form to a particular time establishing evidence that the latter data existed at that time. Source: eIDAS, article 3(33). (See also A/CN.9/WG.IV/WP.144, para. 20.)

72. "Qualified trust service" means a trust service that meets the applicable requirements laid down in this [Convention] [Model Law]. Source: A/CN.9/WG.IV/WP.144, para. 20.

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[5] United Nations publication, Sales No. E.02.V.8.

[6] General Assembly resolution 60/21, annex.

73. “Relying party” means (a) a person that may act on the basis of a certificate or an electronic signature. Source: UNCITRAL Model Law on Electronic Signatures, article 2(f); (b) a natural or legal person that relies upon an electronic identification or a trust service. Source: A/CN.9/WG.IV/WP.144, para. 20.

74. “Signatory” means (a) a natural person who creates an electronic signature. Source: eIDAS, article 3(9). (See also A/CN.9/WG.IV/WP.144, para. 20); (b) a person that holds signature creation data and acts either on its own behalf or on behalf of the person it represents. Source: UNCITRAL Model Law on Electronic Signatures, article 2(d).

75. “Trust service” means an electronic service normally provided for remuneration which consists of: (a) the creation, verification, and validation of electronic signatures, electronic seals or electronic time stamps, electronic registered delivery services and certificates related to those services, or (b) the creation, verification and validation of certificates for website authentication; or (c) the preservation of electronic signatures, seals or certificates related to those services. Source: eIDAS, article 3(16).

76. “Trust service provider” means a natural or a legal person who provides one or more trust services [either as a qualified or as a non-qualified trust service provider]. Source: eIDAS, article 3(19). (See also A/CN.9/WG.IV/WP.144, para. 20.)

77. “Time stamp” means a reliable time variant parameter which denotes a point in time with respect to a common reference. Source: Rec. ITU-T X.1254.

78. “Validation” means the process of verifying and confirming that an electronic signature or a seal is valid. Source: eIDAS, article 3(41). (See also A/CN.9/WG.IV/WP.144, para. 20.)

E. Note by the Secretariat on contractual aspects of cloud computing: proposal by the United States of America

(A/CN.9/WG.IV/WP.151)

[Original: English]

The United States of America submitted to the Secretariat a paper for consideration at the fifty-sixth session of the Working Group. The paper is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex

1. The United States of America expresses its appreciation to the Secretariat for its efforts in drafting A/CN.9/WG.IV/WP.148, entitled "Contractual aspects of cloud computing." While the United States of America has not seen a need for a checklist of main issues of cloud computing contracts, it has heard other delegations express support for such a document. Given this support by other delegations, the delegation of the United States has not objected to work on a checklist.

2. The United States of America believes that UNCITRAL documents should not attempt to provide legal advice or seem to favour one type of transacting party over another. A neutral approach is called for by paragraph 15 of A/CN.9/902, the report of the Working Group's fifty-fifth session, which states "After discussion, the Working Group decided to recommend to the Commission the preparation of a checklist of major issues that contracting parties might wish to address in cloud services contracts. In light of its nature, the checklist should not offer best practice guidance or recommendations. The need for preparation of guidance materials or model contractual clauses could be considered at a later stage." However, because WP.148 appears to provide legal advice and to favour one type of transacting party over another, the United States delegation cannot support the current draft and believes that it needs significant revision.

3. There are numerous examples of text that raise the aforementioned concerns. For the sake of brevity, this paper identifies some of the provisions of the draft checklist that appear to provide legal advice and that, moreover, appear to provide such guidance to only one party entering into a cloud computing contract (*i.e.*, the customer):

- Paragraph 43, which includes "The customer may lack any remedy under those contracts since the breach of professional best efforts provisions may be difficult to determine. To avoid such situations, the customer would be interested in including in the SLA quantitative and qualitative performance parameters with specific metrics, quality assurances and performance measurement methodology."
- Paragraph 77, which includes "Where no option to negotiate exists, the customer may need at least to review any IP clauses to determine whether the provider offers sufficient guarantees and allows the customer appropriate tools to protect and enjoy its IP rights and avoid lock-in risks …"
- Paragraph 100, which includes "Providers' standard terms may contain the right of the provider to suspend services at its discretion at any time. The customer may wish to restrict such unconditional right by not permitting suspension except for clearly limited cases (e.g., in case of the fundamental breach of the contract by the customer, for example non-payment)."
- Paragraph 116, which includes "Customer data loss or misuse, personal data protection violations and IP rights infringement in particular could lead to potentially high liability of the customer to third parties or give rise to regulatory fines. Imposing a more stringent liability regime on the provider where those cases are due to the provider's fault or negligence may be justified."

4. The United States delegation will be prepared to raise and discuss additional concerns at the fifty-sixth session of Working Group IV.

5. Should the Working Group recommend continuation of work on a draft checklist of contractual issues relating to cloud computing contracts, and should the Commission accept that recommendation, the delegation of the United States would expect a neutral text that simply highlights the legal issues that may be present in such contracts, without appearing to assist one particular type of party to these contracts.

V. INSOLVENCY LAW

A. Report of the Working Group on Insolvency Law on the work of its fifty-second session (Vienna, 18–22 December 2017)

(A/CN.9/931)

[Original: English]

Contents

Paragraphs

I. Introduction

A. Facilitating the cross-border insolvency of multinational enterprise groups

1. At its forty-fourth session (December 2013), the Working Group agreed to continue its work on cross-border insolvency of multinational enterprise groups[1] by developing provisions on a number of issues, some of which would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency and part three of the UNCITRAL Legislative Guide on Insolvency Law and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. The Working Group discussed this topic at its forty-fifth (April 2014) (A/CN.9/803), forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864), forty-ninth (May 2016) (A/CN.9/870), fiftieth (December 2016) (A/CN.9/898) and fifty-first (May 2017) (A/CN.9/903) sessions and continued its deliberations at the fifty-second session.

B. Recognition and enforcement of insolvency-derived judgments

2. At its forty-seventh session (2014), the Commission approved a mandate for Working Group V to develop a model law or model legislative provisions providing

[1] A/CN.9/763, paras. 13–14; A/CN.9/798, para. 16; see the mandate given by the Commission at its forty-third session (2010): *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17, para. 259(a)).

for the recognition and enforcement of insolvency-related judgments.[2] The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864), forty-ninth (May 2016) (A/CN.9/870), fiftieth (December 2016) (A/CN.9/898) and fifty-first (May 2017) (A/CN.9/903) sessions and continued its deliberations at the fifty-second session.

C. Obligations of directors of enterprise group companies in the period approaching insolvency

3. At its forty-fourth session, the Working Group agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in that area and that solutions would be of great benefit to the operation of efficient insolvency regimes (A/CN.9/798, para. 23). At the same time, the Working Group noted that there were issues that needed to be considered carefully so that solutions would not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that an examination of how part four of the Legislative Guide could be applied in the enterprise group context and identification of additional issues (e.g. conflicts between a director's duty to its own company and the interests of the group) would be helpful (A/CN.9/798, para. 23). The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835) and forty-ninth (May 2016) (A/CN.9/870) sessions. Revisions to the text contained in document A/CN.9/WG.V/WP.153 were noted at the fifty-second session.

II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its fifty-second session in Vienna from 18–22 December. The session was attended by representatives of the following States Members of the Working Group: Armenia, Austria, Belarus, Brazil, Bulgaria, Canada, Chile, China, Côte d'Ivoire, Czechia, El Salvador, France, Germany, Greece, Indonesia, Israel, Italy, Japan, Kenya, Kuwait, Mexico, Pakistan, Panama, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, and the United States of America.

5. The session was attended by observers from the following States: Algeria, Belgium, Bolivia (Plurinational State of), Croatia, Cyprus, Dominican Republic, Estonia, Gambia, Lithuania, Luxembourg, Mali, Malta, Morocco, Netherlands, Saudi Arabia, Serbia, Slovenia, Syrian Arab Republic and Viet Nam.

6. The session was also attended by observers from the European Union.

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

(a) *Organizations of the United Nations system*: World Bank Group (WB);

(b) *Invited international intergovernmental organizations*: European Investment Bank (EIB), Gulf Cooperation Council (GCC), and Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Commercial Finance Association (CFA), European Banking Federation (EBF), European Law Institute (ELI), European Law Students' Association (ELSA), Fondation pour le Droit Continental, Groupe de réflexion sur l'insolvabilité et sa prévention (GRIP 21), Ibero-American Institute of International

[2] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

and Economic Law, INSOL Europe, INSOL International, Instituto Iberoamericano de derecho concursal (IIDC), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA), and Union internationale des avocats (UIA).

8. The Working Group elected the following officers:

Chairman: Wisit Wisitsora-At (Thailand)

Rapporteur: Caroline Egesa Tusingwire (Uganda)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.149);

(b) A note by the Secretariat on the cross-border recognition and enforcement of insolvency-related judgments: draft model law (A/CN.9/WG.V/WP.150);

(c) A note by the Secretariat on the cross-border recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law (A/CN.9/WG.V/WP.151);

(d) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: draft legislative provisions (A/CN.9/WG.V/WP.152);

(e) Note by the Secretariat on directors' obligations in the period approaching insolvency: enterprise groups (A/CN.9/WG.V/WP.153); and

(f) A proposal for future work submitted by the United States (A/CN.9/WG.V/WP.154).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of: (a) the recognition and enforcement of insolvency-related judgments; (b) facilitating the cross-border insolvency of multinational enterprise groups; and (c) directors' obligations in the period approaching insolvency.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group commenced its deliberations on the recognition and enforcement of insolvency-related judgments on the basis of documents A/CN.9/WG.V/WP.150 and A/CN.9/WG.V/WP.151, followed by the cross-border insolvency of multinational enterprise groups on the basis of document A/CN.9/WG.V/WP.152. The Working Group also briefly considered directors' obligations in the period approaching insolvency, noting the revised text contained in document A/CN.9/WG.V/WP.153 and heard a brief introduction to the proposal by the United States of America for possible future work on civil asset tracing and recovery, as contained in document A/CN.9/WG.V/WP.154.

12. The Working Group completed its work by considering a revised text of the draft model law on the recognition and enforcement of insolvency-related judgments, reflecting the deliberations and decisions of the Working Group indicated below. The revised draft text is contained in the annex to this report.

IV. Cross-border recognition and enforcement of insolvency-related judgments: draft model law (A/CN.9/WG.V/WP.150)

13. The Working Group commenced its discussions on the topic by reviewing the text of the draft model law contained in document A/CN.9/WG.V/WP.150.

Preamble

14. The Working Group agreed:

(a) To add the words "recognition and" before enforcement in subparagraph 1(a);

(b) To change the chapeau of paragraph 2 to "This Law is not intended:";

(c) To revise subparagraph 2(a) to read: "To restrict provisions of the law of this State that would permit the recognition and enforcement of an insolvency-related judgment";

(d) To retain the word "replace" and to delete "[or displace]" in subparagraph 2(b); and

(e) To delete the words "to which the judgment is related" at the end of subparagraph 2(d).

15. A proposal to add subparagraph (e) from the preamble of the Model Law on Cross-Border Insolvency (MLCBI) did not receive sufficient support.

Article 1. Scope of application

16. The Working Group agreed to delete the words "in a proceeding taking place". With that change, the Working Group approved the substance of article 1.

Article 2. Definitions

17. The Working Group approved the substance of subparagraphs (a), (b) and (c) as drafted. With respect to subparagraph (d), the Working Group agreed:

(a) To delete the word "foreign" and simply refer to "insolvency-related judgment";

(b) To revise subparagraph (d)(i) as follows: "Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed" and to include in the draft guide to enactment a reference to the origin of the compromise reached on this wording;

(c) To delete subparagraph (iii) and address that issue in the guide to enactment;

(d) To delete the phrase "[and subparagraphs (i), (ii) and (iii) shall apply irrespective of whether or not the proceeding to which the judgment is related has [been concluded] [closed].]" and paragraph 3;

(e) To delete the chapeau and substance of paragraph 1 from the text and to reflect its content in the guide to enactment; and

(f) To retain paragraph 2 in the text.

18. The Secretariat was requested to take those revisions into account in preparing the next draft of the definition.

Article 3. International obligations of this State

19. The Working Group approved the substance of draft article 3, paragraph 1, and agreed that the words in parentheses in paragraph 2 should be deleted.

Article 4. Competent court or authority; Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State

20. The Working Group approved the substance of articles 4 and 5 as drafted.

Article 6. Additional assistance under other laws

21. The Working Group agreed to delete the words "to a foreign insolvency representative" from draft article 6.

Article 7. Public policy exception

22. A proposal to delete the word "manifestly" as being too subjective did not receive support and the substance of draft article 7 was approved as drafted.

Article 8. Interpretation

23. The Working Group approved the substance of article 8 as drafted.

Article 9. Effect and enforceability of an insolvency-related foreign judgment in the originating State

24. The Working Group observed that the heading of article 9 should be aligned with its content and approved the substance of article 9, paragraph 1 as drafted. With respect to paragraph 2, the following proposals were made:

(a) To add the words "whether ordinary or extraordinary" after the phrase "subject of review";

(b) In line with the observation in paragraph 13 of document A/CN.9/WG.V/WP.150, to remove the concept of conditional recognition;

(c) To add "at its discretion or upon the request of an interested party" after the phrase "the court may"; and

(d) To replace the second sentence with text along the lines of "In such cases, the court may impose such conditions as it may deem fit."

25. After discussion, there was insufficient support in the Working Group for adoption of any of the changes proposed for paragraph 2. Reference was made to paragraph 75 of the draft guide to enactment contained in document A/CN.9/WG.V/WP.151, which clarified what was meant by "ordinary review".

26. There was support in the Working Group for a new paragraph 3 along the following lines: "A refusal under paragraph 2 does not prevent a subsequent application for recognition or enforcement of the judgment." After further consideration, the Working Group agreed that paragraph 1 should form article 9 with the heading "Effect and enforceability of an insolvency-related judgment" and that paragraph 2, together with the new paragraph 3, should form a new article 9 bis with the heading "Effect of review in the originating State on recognition and enforcement".

Article 10. Procedure for seeking recognition and enforcement of an insolvency-related foreign judgment

27. The Working Group agreed that paragraph 2 should be (a) "and" (b) "or" (c), as explained in paragraph 16 of document A/CN.9/WG.V/WP.150. There was further agreement to revise subparagraph 2(b) by adding the phrase "where applicable" before "is enforceable", and by retaining the term "pending" without square brackets in subparagraph 2(b), while deleting "[current]".

28. In response to a question about the meaning of paragraph 4, it was explained that the current drafting would be sufficiently flexible to allow a State to require legalization; it was suggested that that point could be clarified in the guide to enactment.

29. The Working Group also agreed to replace paragraph 5 with text along the following lines: "When recognition and enforcement are sought, the party against whom relief is sought has the right to be heard."

Article 11. Provisional relief

30. The Working Group approved the substance of article 11 as drafted.

Article 12. Decision to recognize and enforce an insolvency-related foreign judgment

31. The Working Group agreed to substitute "insolvency representative" for "person or body" in subparagraph (b), and to insert a new subparagraph (d) as follows: "(d) Recognition and enforcement is sought from a court referred to in article 4, or the question of recognition arises by way of defence or as an incidental question before such a court."

Article 13. Grounds to refuse recognition and enforcement of an insolvency-related foreign judgment

32. The following proposals for revision of subparagraphs (a) to (g) were made:

(a) To replace the opening phrase in the chapeau "Subject to article 7" with the phrase "In addition to the ground set forth in article 7";

(b) To delete subparagraph (b) or to provide an explanation in the guide to enactment that addressed the level of proof or evidence required from the party invoking the exception;

(c) To replace the word "between" in subparagraph (d) with the word "involving";

(d) To replace "the debtor's insolvency proceedings" with "any insolvency proceedings to which the judgment is related" in subparagraph (e);

(e) To replace subparagraph (f) with:

"The judgment:

"(i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and

"(ii) The interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued."

(f) To replace subparagraph (g)(ii) with the following: "The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that the defendant argued on the merits before the court without objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that such an objection would not have succeeded under that law;" and

(g) To retain the word "incompatible" in subparagraph (g)(iv) without square brackets and to delete the word "[inconsistent]".

33. The Working Group accepted the proposals listed above in subparagraphs (a), (b), (c), (e), (f) and (g). With respect to subparagraph (d), a further proposal was made to replace article 13, subparagraph (e), with text along the following lines: "Recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings, including by conflicting with a stay or other order that could be recognized or enforced in this State." That proposal was taken up by the Working Group.

34. A proposal to replace "may" in the chapeau of article 13 with "shall" did not receive sufficient support. It was noted, however, that the guide to enactment could

explain that in some legal traditions, once one of the grounds enumerated in article 13 was found, the court must refuse recognition and enforcement.

35. The Working Group agreed to the changes to subparagraph (h) proposed in paragraph 31 of document A/CN.9/WG.V/WP.150, subject to a variation of the last words of subparagraph (h)(ii) to read "at the time the proceeding in the originating State commenced." A further proposal made to expand the reference to "assets" in subparagraph (h)(ii) to include causes of action that were properly brought in the originating State received insufficient support.

36. In response to a question as to whether subparagraph 13(h) was limited to States that had enacted the MLCBI, it was observed that there was nothing to prevent non-enacting States from adapting that provision to their own use, and that that matter might be addressed in the guide to enactment.

Article 14. Equivalent effect

37. The Working Group noted that in the most recent text emanating from the November 2017 Special Commission on Recognition and Enforcement of Foreign Judgments of the Hague Conference on Private International Law, the provision equivalent to article 14 had been deleted. Having deleted the article, the Special Commission decided that the Explanatory Report to the draft convention should: (a) note that it was inherent in the concept of recognition of a judgment that the same claim (or cause of action) could not be re-litigated in another Contracting State (*res judicata*); and (b) refer to the material in paragraph 89 of the Hartley-Dogauchi Report.[3]

38. Notwithstanding that deletion, the Working Group agreed to retain article 14 in the text and to keep both options in square brackets in the text, thus providing enacting States with a choice. Further explanation of that choice could be provided in the guide to enactment.

Article 15. Severability

39. The Working Group approved the substance of article 15 as drafted.

Article X. Recognition of an insolvency-related judgment under [*insert a cross reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency*]

40. After discussion, the Working Group approved the substance of article X as drafted, noting the need for a detailed explanation of its rationale and implementation in the guide to enactment.

Circulation of the draft text for comment

41. The Secretariat was requested to circulate the text of the draft model law as contained in the annex to this report to States for comment in early 2018. The text would be further reviewed at the forthcoming fifty-third session of the Working Group in order to submit it to the Commission for possible adoption at its fifty-first session in 2018.

V. Cross-border recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law (A/CN.9/WG.V/WP.151)

42. The Working Group agreed to note where revision of or addition to the material in the guide to enactment was required, bearing in mind that the guide to enactment would be updated to reflect the revisions agreed to the text of the model law in the current session. The following suggestions for amendment were made:

[3] 2005 Choice of Court Convention: Explanatory Report by Trevor Hartley and Masato Dogauchi.

(a) In paragraph 2, to expand on the reasons for the development of the text;

(b) To shorten paragraph 5;

(c) In paragraph 7, to add further material on the issue of insolvency-relatedness;

(d) In paragraph 39, to address the relevance of article X (possibly also expanding the reference to article X in paragraph 29) and to delete the penultimate sentence;

(e) In paragraph 40, to resolve uncertainty as to the meaning of the second sentence;

(f) In paragraph 41, to include additional examples of other judgments that might raise public policy considerations;

(g) In paragraph 52, to delete the last sentence and to reorder the explanation as follows: to first explain why a judgment commencing an insolvency proceeding was excluded and then to discuss judgments issued on commencement, for example, the order appointing an insolvency representative, and why they should be considered insolvency-related judgments;

(h) In paragraph 54, to consider the possible addition of further examples, such as a judgment requiring the examination of a director located in a third jurisdiction;

(i) In paragraphs 57 to 59 relating to article 3, to include reference to binding international agreements with entities other than States;

(j) In paragraph 69, to include an explanation that differences between this text and the MLCBI were not intended to indicate that a new approach was being taken under this text or that the idea of procedural fairness was not included under article 6 of the MLCBI;

(k) In paragraph 74, to reconsider the example to ensure that it did not unnecessarily raise the issue of enforcement;

(l) In paragraph 78, to further consider whether additional material was required;

(m) In paragraph 80, to indicate that, while the decision commencing an insolvency proceeding was not a judgment that could be recognized under this model law, it should nevertheless be provided as evidence of the existence of the insolvency proceeding to which the judgment related;

(n) In paragraph 86, to clarify the party to whom notice should be provided;

(o) In paragraph 90, to delete the phrase “as a matter of course”;

(p) In paragraph 113, to consider providing further explanation of what the concept of “participation” might entail; and

(q) In paragraph 121, to consider providing additional guidance to lawmakers on how article X might be integrated into domestic law.

43. The Working Group was invited to provide the Secretariat with any suggested text to address the above issues.

VI. Facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.152)

44. The Working Group commenced its discussions on the topic by reviewing the text of the draft legislative provisions contained in document A/CN.9/WG.V/WP.152, beginning with chapter 5, article 21.

[Part A]

Chapter 5. Treatment of foreign claims

Article 21. Commitment to and approval of the treatment of foreign claims in accordance with the applicable law: non-main proceedings [Treatment of foreign claims in this State in accordance with applicable law: non-main proceedings] [Commitment on the treatment of foreign claims to minimize commencement of non-main proceedings]

45. The Working Group agreed to replace the word "commitment" with "undertaking" (in all articles in chapter 5). Preference was expressed in favour of variant 2 of article 21, although there were suggestions that it could be redrafted to include both the idea of facilitating the treatment of claims and of minimizing the commencement of non-main proceedings. After discussion, it was suggested that paragraph 1 of variant 2 be used and that the title should reflect those revisions.

46. The following text was proposed for further consideration by the Working Group:

"**Undertaking on the treatment of foreign claims**

"To minimize the commencement of non-main proceedings and facilitate the treatment of claims in an enterprise group insolvency, a claim that could be brought by a creditor of an enterprise group member in a non-main proceeding in another State may be treated in a main proceeding commenced in this State in accordance with treatment it would be accorded in the non-main proceeding, provided:"

47. With respect to the question raised in paragraph 54 of document A/CN.9/WG.V/WP.152, the Working Group was reminded of the conclusion taken during its fifty-first session as referred to in paragraph 131 of document A/CN.9/903. Some delegations observed that the main proceeding and the non-main proceeding referred to in article 21 were proceedings that could relate to both the same group member or to different group members.

Article 21 bis. Powers of the court of this State with respect to a commitment under article 21

48. The Working Group expressed a preference for variant 2, with the deletion of the words in square brackets. It was noted that the guide to enactment would explain the relevance of article 19 in respect of this provision. A suggestion to delete reference to the stay in subparagraph (b) was not supported.

[Part B]

Supplemental provisions

Article 22. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: main proceedings [Treatment of foreign claims in this State in accordance with applicable law: main proceedings] [Commitment on the treatment of foreign claims to minimize commencement of main proceedings]

49. On the basis of the compromise that had been reached in the Working Group in a previous session, a proposal to delete the headings "[Part B]" and "Supplemental provisions" did not receive support (see A/CN.9/864, paras. 38–53).

50. The revisions proposed by the Secretariat in paragraph 57 of document A/CN.9/WG.V/WP.152 were supported, and the Working Group agreed that the title of article 22 should be aligned with the revised title of article 21. It was noted that the word "would" in the first line of the provision should be replaced with "could".

Article 22 bis. Powers of a court of this State with respect to a commitment under article 22

51. The Working Group expressed a preference for variant 2, with the deletion of the words in square brackets. It was noted that the guide to enactment would explain

the relevance of article 19 in respect of this provision. The question was raised as to whether the withdrawal of the words "or decline to commence" could contribute to the general acceptance of the supplemental provisions. This question did not elicit any comments from the Working Group.

Article 23. Additional relief

52. The question was raised as to whether additional relief should be made available under section 23 regardless of whether a State chose to enact the supplemental provisions. It was stated that on the basis of the compromise referred to in paragraph 49 above, additional relief for situations covered by article 23 would only be available if the supplemental provisions were adopted. The Working Group approved the substance of article 23 as drafted.

[Part A]

Chapter 4. Recognition of a foreign planning proceeding and relief

Article 14. Application for recognition of a foreign planning proceeding

53. As a matter of drafting, it was noted that paragraph 2 should indicate subparagraphs (a), (b) or (c) as alternatives. A proposal to replace paragraph 2 with the previous iteration in document A/CN.9/WG.V/WP.146 did not receive sufficient support. By way of clarification, it was recalled that proof of commencement of the proceeding that became the planning proceeding was not required on the basis that such commencement was a necessary precondition for appointment of the group representative.

54. With respect to paragraph 3, in response to the question raised in paragraph 27 of document A/CN.9/WG.V/WP.152, the Working Group agreed that the word "evidence" in subparagraph (a) should be replaced with "a statement".

55. With respect to the issues raised in paragraph 29 of document A/CN.9/WG.V/WP.152, the Working Group agreed to retain subparagraph 3(c) as drafted, except with respect to the issue raised in paragraph 30 of document A/CN.9/WG.V/WP.152; there was support for replacing "involved" with "subject to or participating in that proceeding", and discussing the difference between those two categories of group members in the guide to enactment.

Article 15. [Interim] [Provisional] relief that may be granted upon application for recognition of a foreign planning proceeding

56. The Working Group agreed to retain "Provisional" in the title without square brackets and to delete "[Interim]", to delete "appropriate" in paragraph 1, and to delete the words "[in any jurisdiction]" in paragraph 4 (and in article 17, paragraph 3, and article 13, paragraph 2).

57. With respect to the questions raised in paragraphs 21 and 22 of document A/CN.9/WG.V/WP.152 (which applied to articles 13, 15 and 17), it was agreed that, as a text for further consideration, the words "unless not commencing an insolvency proceeding is a consequence of an undertaking given under articles 21 or 22" should be inserted at the end of paragraph 4 (and to the equivalent paragraphs of articles 13 and 17). It was agreed that additional analysis was required to ensure that that draft text would address situations arising in connection with paragraph 4 in which articles 21 and 22 did not apply.

Article 16. Decision to recognize a foreign planning proceeding

58. The Working Group agreed to retain "material" in paragraph 4 without square brackets and to delete "[substantial]", and to retain the last sentence of that paragraph without square brackets, replacing "and" with "as well as".

59. A proposal to add a provision to the effect that stakeholders should have a right to be heard, along the lines of article 10 of the draft model law on recognition and enforcement of insolvency-related judgments, did not receive sufficient support.

Article 17. Relief that may be granted upon recognition of a foreign planning proceeding

60. The Working Group approved the substance of article 17 as drafted, noting the revisions to be made to align paragraph 3 with the equivalent paragraphs of articles 13 and 15.

Article 18. Participation of a group representative in a proceeding under [*identify laws of the enacting State relating to insolvency*]

61. The Working Group approved the substance of article 18 as drafted.

Article 19. Protection of creditors and other interested persons

62. The Working Group approved the substance of article 19 as drafted, notwithstanding a proposal to change the word "creditors" in paragraph 1 to text along the lines of "various classes of creditors" in order to provide greater clarity.

Article 20. Approval of local elements of a group insolvency solution

63. The Working Group agreed in both instances in paragraph 1 to retain the phrase "in this State" and delete the square brackets, to delete the phrase "and implement" in the square bracketed text in paragraph 3, and in paragraph 4 bis to replace "implement" with "confirm". The Working Group further agreed to retain paragraph 4 bis without square brackets.

64. After discussion, the Working Group agreed on the following approach to paragraph 4: (a) that it should address the situation in which no insolvency proceeding had commenced in the enacting State; (b) that the commencement of proceedings in that State, where unnecessary, was not being encouraged; (c) that the italicized bracketed text was inadequate to address how the State would give effect to a group insolvency solution in that situation; and (d) that further protection should be specified by adding text along the following lines to replace the italicized bracketed text: "a group insolvency solution shall have effect in this State if it has received all approvals required in accordance with the laws of this State." The Working Group also agreed that the last sentence in square brackets should be retained and that a revised text of paragraph 4 should be prepared to reflect those principles.

Chapter 1. General provisions

Preamble

65. The Working Group approved the substance of the preamble as drafted.

Article 1. Scope

66. After discussion, and based on a number of proposals made, the Working Group agreed that the opening phrase of variant 2 should be replaced with text along the following lines: "This law applies to enterprise groups where insolvency proceedings have commenced for one or more of its members", and that the concepts following the word "including" in the latter part of variant 2 should be retained for future discussion.

Article 2. Definitions

67. The Working Group approved the substance of subparagraphs (a), (b) and (c) as drafted.

68. In respect of subparagraph (d), it was agreed that the phrases, "[referred to] [as defined] in subparagraph (a)," and "as defined in subparagraph (b)" should be deleted.

69. After discussion of whether the term "group representative" was sufficiently descriptive, the Working Group approved the substance of subparagraph (e) as drafted.

70. The Working Group expressed its preference to retain variant 2 of subparagraph (f) and agreed to delete variant 1.

71. The Working Group agreed to retain the substance of subparagraph (g), as drafted, for further consideration. After discussion of articles 11 and 12, a further proposal was made along the following lines:

"(g) 'Planning proceeding' means the insolvency proceeding of an enterprise group member in which a group insolvency solution is being developed and implemented, and in which a group representative has been appointed, provided that:

"(i) The insolvency proceeding is one that has been commenced in a State that is the centre of main interests of the enterprise group member;

"(ii) The enterprise group member is a necessary and integral part of a group insolvency solution; and

"(iii) One or more other enterprise group members are participating or have indicated their intention to participate."

72. That proposal received some support, although there were some reservations with respect to the reference to "intention to participate" and the requirement that the group insolvency solution "is being developed and implemented" on the basis that those concepts departed from the text that had been agreed in article 2, paragraph (g) of the existing definition. It was suggested that the definition should also accommodate a particular type of coordination proceeding that had been developed under the European Insolvency Regulation. After further discussion, the Secretariat proposed a draft text combining subparagraph (g)(i) of the proposed text with the existing definition along the following lines:

"(g) 'Planning proceeding' means an insolvency proceeding commenced in respect of an enterprise group member at its centre of main interests provided:

"(i) One or more other enterprise group members are participating in that proceeding for the purpose of developing and implementing a group insolvency solution;

"(ii) The enterprise group member subject to the proceeding is a necessary and integral part of that group insolvency solution; and

"(iii) A group representative has been appointed."

73. The Working Group supported that proposal.

74. It was noted that the guide to enactment might need to address the following: (a) the possibility of multiple planning proceedings; and (b) additional definitions that might be required depending on the nature of the final text.

75. It was agreed that the word "multinational" should be deleted wherever it appeared in the text, including the title.

Article 2 bis. Jurisdiction of the enacting State

76. The Working Group agreed to retain in subparagraph (d) the phrase "no such obligation exists" without square brackets and to delete the phrase "[there is no obligation to commence such proceedings]", and approved the substance of article 2 bis as drafted.

Article 2 ter. Public policy exceptions

77. The Working Group approved the substance of article 2 ter as drafted.

Article 2 quater. Competent court or authority

78. The Working Group approved the substance of article 2 quater as drafted.

Chapter 2. Cooperation and coordination

Article 3. Cooperation and direct communication between a court of this State and foreign courts, foreign representatives and a group representative

79. The Working Group approved the substance of article 3 as drafted.

Article 4. Cooperation to the maximum extent possible under article 3

80. The Working Group approved the substance of article 4 as drafted.

Article 5. Limitation of the effect of communication under article 3

81. The Working Group approved the substance of article 5 as drafted.

Article 6. Coordination of hearings

82. The Working Group approved the substance of article 6 as drafted.

Article 7. Cooperation and direct communication between a group representative, foreign representatives and foreign courts

83. The Working Group approved the substance of article 7 as drafted.

Article 7 bis. Cooperation and direct communication between a [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*]**, foreign courts, foreign representatives and a group representative**

84. The Working Group approved the substance of article 7 bis as drafted.

Article 8. Cooperation to the maximum extent possible under articles 7 and 7 bis

85. A proposal that the proviso in subparagraph (a) should be deleted in order to facilitate the sharing of information did not receive support. The Working Group noted, however, that the concern expressed could be addressed in the guide to enactment. The substance of article 8 was approved as drafted.

Article 9. Authority to enter into agreements concerning the coordination of proceedings

86. The Working Group approved the substance of article 9 as drafted.

Article 10. Appointment of a single or the same insolvency representative

87. The Working Group approved the substance of article 10 as drafted, and noted that the guide to enactment should address the question of conflict of interest by reference to recommendations 116 and 233 of the UNCITRAL Legislative Guide on Insolvency Law.

Article 11. Participation by enterprise group members in a proceeding under [*identify laws of the enacting State relating to insolvency*]

88. The Working Group agreed to modify paragraph 1 by inserting “for the purpose of facilitating cooperation and coordination under chapter 2” before “including” in the final phrase.

89. In respect of the first sentence of paragraph 3, the Secretariat was requested to revise the text, taking into account article 10 of the MLCBI to provide greater clarity and certainty in describing the limited jurisdiction intended by the provision. The Secretariat was also requested to place the content of the second sentence in a separate paragraph.

90. The Working Group agreed that the guide to enactment should discuss the limits that might be applicable under domestic law to a group member’s ability to opt in or out of participation in a planning proceeding under paragraph 4.

Chapter 3. Conduct of a planning proceeding in this State

Article 12. Appointment of a group representative

91. The Working Group agreed to retain the phrase “(i) and (ii)” and delete the square brackets in paragraph 1, to delete paragraph 2, to retain paragraph 3 and delete the square brackets, and to delete the text in square brackets in paragraph 4.

92. In response to the observation that article 18 did not contain the inbound authorization equivalent to subparagraph (4)(c), it was recalled, as noted in paragraph 44 of document A/CN.9/WG.V/WP.152, that that provision had been deleted at the last session of the Working Group.

Article 13. Relief available to a planning proceeding

93. The Working Group recalled that paragraph 2 of article 13 was to be revised in accordance with the equivalent paragraphs of articles 15 and 17, as noted above (see para. 57). The Working Group agreed to retain the words "or implementing" and to delete the square brackets surrounding them in paragraph 1.

VII. Obligations of directors of enterprise group companies in the period approaching insolvency

94. The Working Group noted the revised text on the obligations of directors of enterprise group members in the period approaching insolvency as contained in document A/CN.9/WG.V/WP.153 and that the text would be considered further when the work on enterprise groups was nearing completion.

VIII. Other business

95. The Working Group heard a brief introduction to a proposal by the United States for possible future work on civil asset tracing and recovery as contained in document A/CN.9/WG.V/WP.154. The Working Group exchanged preliminary views on the proposal, with a view to having a more considered discussion at a future session.

Annex

Draft model law on cross-border recognition and enforcement of insolvency-related judgments

Preamble

1. The purpose of this Law is:

(a) To create greater certainty for parties in regard to their rights and remedies for recognition and enforcement of insolvency-related judgments;

(b) To avoid the duplication of proceedings;

(c) To ensure timely and cost-effective recognition and enforcement of insolvency-related judgments;

(d) To promote comity and cooperation between jurisdictions regarding insolvency-related judgments;

(e) To protect and maximize the value of insolvency estates; and

(f) Where legislation based on the Model Law on Cross-Border Insolvency has been enacted, to complement that legislation.

2. This Law is not intended:

(a) To restrict provisions of the law of this State that would permit the recognition and enforcement of an insolvency-related judgment;

(b) To replace legislation enacting the Model Law on Cross-Border Insolvency or limit the application of that legislation;

(c) To apply to the recognition and enforcement in the enacting State of an insolvency-related judgment issued in the enacting State; or

(d) To apply to the judgment commencing the insolvency proceeding.

Article 1. Scope of application

1. This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a State that is different to the State in which recognition and enforcement are sought.

2. This Law does not apply to [...].

Article 2. Definitions

For the purposes of this Law:

(a) “Insolvency proceeding” means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a court for the purpose of reorganization or liquidation;

(b) “Insolvency representative” means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the insolvency proceeding;

(c) “Judgment” means any decision, whatever it may be called, issued by a court or administrative authority, provided an administrative decision has the same effect as a court decision. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses by the court. An interim measure of protection is not to be considered a judgment for the purposes of this Law;

(d) "Insolvency-related judgment":

(i) Means a judgment that:

a. Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and

b. Was issued on or after the commencement of that insolvency proceeding; and

(ii) Does not include a judgment commencing an insolvency proceeding.

Article 3. International obligations of this State

1. To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

2. This Law shall not apply to a judgment where there is a treaty in force concerning the recognition or enforcement of civil and commercial judgments, and that treaty applies to the judgment.

Article 4. Competent court or authority

The functions referred to in this Law relating to recognition and enforcement of an insolvency-related judgment shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*] and by any other court before which the issue of recognition is raised as a defence or as an incidental question in the course of proceedings.

Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to act in another State with respect to an insolvency-related judgment issued in this State, as permitted by the applicable foreign law.

Article 6. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance under other laws of this State.

Article 7. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State.

Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

Article 9. Effect and enforceability of an insolvency-related judgment

An insolvency-related judgment shall be recognized only if it has effect in the originating State and shall be enforced only if it is enforceable in the originating State.

Article 9 bis. Effect of review in the originating State on recognition and enforcement

1. Recognition or enforcement of an insolvency-related judgment may be postponed or refused if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired. In such

cases, the court may also make recognition or enforcement conditional on the provision of such security as it shall determine.

2. A refusal under paragraph 1 does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 10. Procedure for seeking recognition and enforcement of an insolvency-related judgment

1. An insolvency representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment may seek recognition and enforcement of that judgment in this State. The issue of recognition may also be raised as a defence or as an incidental question in the course of proceedings.

2. When recognition and enforcement of an insolvency-related judgment is sought under paragraph 1, the following shall be submitted to the court:

(a) A certified copy of the insolvency-related judgment; and

(b) Any documents necessary to establish that the insolvency-related judgment has effect and, where applicable, is enforceable in the originating State, including information on any pending review of the judgment; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence on those matters acceptable to the court.

3. The court may require translation of documents submitted pursuant to paragraph 2 into an official language of this State.

4. The court is entitled to presume that documents submitted pursuant to paragraph 2 are authentic, whether or not they have been legalized.

5. Where recognition and enforcement are sought, the party against whom relief is sought has the right to be heard.

Article 11. Provisional relief

1. From the time recognition and enforcement of an insolvency-related judgment is sought until a decision is made, where relief is urgently needed to preserve the possibility of recognizing and enforcing an insolvency-related judgment, the court may, at the request of an insolvency representative or other person entitled to seek recognition and enforcement under article 10, paragraph 1, grant relief of a provisional nature, including:

(a) Staying the disposition of any assets of any party or parties against whom the insolvency-related judgment has been issued; or

(b) Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related judgment.

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice, including whether notice would be required under this article*.]

3. Unless extended by the court, relief granted under this article terminates when a decision on recognition and enforcement of the insolvency-related judgment is made.

Article 12. Decision to recognize and enforce an insolvency-related judgment

Subject to articles 7 and 13, an insolvency-related judgment shall be recognized and enforced provided:

(a) The requirements of article 9, paragraph 1 with respect to effectiveness and enforceability are met;

(b) The person seeking recognition and enforcement of the insolvency-related judgment is an insolvency representative within the meaning of article 2, subparagraph (b), or another person entitled to seek recognition and enforcement of the judgment under article 10, paragraph 1;

(c) The application meets the requirements of article 10, paragraph 2; and

(d) Recognition and enforcement is sought from a court referred to in article 4, or the question of recognition arises by way of defence or as an incidental question before such a court.

Article 13. Grounds to refuse recognition and enforcement of an insolvency-related judgment

In addition to the ground set forth in article 7, recognition and enforcement of an insolvency-related judgment may be refused if:

(a) The party against whom the proceeding giving rise to the judgment was instituted:

(i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or

(ii) Was notified of the institution of that proceeding in a manner that is incompatible with fundamental principles of this State concerning service of documents;

(b) The judgment was obtained by fraud;

(c) The judgment is inconsistent with a judgment issued in this State in a dispute involving the same parties;

(d) The judgment is inconsistent with an earlier judgment issued in another State in a dispute involving the same parties on the same subject matter, provided the earlier judgment fulfils the conditions necessary for its recognition and enforcement in this State;

(e) Recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings, including by conflicting with a stay or other order that could be recognized or enforced in this State;

(f) The judgment:

(i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and

(ii) The interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

(g) The originating court did not satisfy one of the following conditions:

(i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;

(ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that the defendant argued on the merits before the court without objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that such an objection to jurisdiction would not have succeeded under that law;

(iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or

(iv) The court exercised jurisdiction on a basis that was not incompatible with the law of this State;

States that have enacted legislation based on the Model Law on Cross-Border Insolvency might wish to enact subparagraph (h)

(h) The judgment originates from a State whose insolvency proceeding is not or would not be recognizable under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*], unless:

(i) The insolvency representative of a proceeding that is or could have been recognized under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*] participated in the proceeding in the originating State to the extent of engaging in the substantive merits of the cause of action to which that proceeding related; and

(ii) The judgment relates solely to assets that were located in the originating State at the time the proceeding in the originating State commenced.

Article 14. Equivalent effect

1. An insolvency-related judgment recognized or enforceable under this Law shall be given the same effect it [has in the originating State] [would have had if it had been issued by a court of this State].

2. If the insolvency-related judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

Article 15. Severability

Recognition and enforcement of a severable part of an insolvency-related judgment shall be granted where recognition and enforcement of that part is sought, or where only part of the judgment is capable of being recognized and enforced under this Law.

States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency will be aware of judgments that may have cast doubt on whether judgments can be recognized and enforced under article 21 of the Model Law. States may therefore wish to consider enacting the following provision:

Article X. Recognition of an insolvency-related judgment under [*insert a cross reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*]

Notwithstanding any prior interpretation to the contrary, the relief available under [*insert a cross reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment.

B. Note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft model law

(A/CN.9/WG.V/WP.150)

[Original: English]

Contents

I. Introduction

1. At its forty-seventh session (2014), the Commission gave Working Group V (Insolvency Law) a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgments.[1]

2. At its forty-sixth session in December 2014, Working Group V (Insolvency Law) considered a number of issues relevant to the development of a legislative text on the recognition and enforcement of insolvency-related judgments, including the types of judgments that might be covered, procedures for recognition and grounds to refuse recognition. The Working Group agreed that the text should be developed as a stand-alone instrument, rather than forming part of the UNCITRAL Model Law on

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

Cross-Border Insolvency (the Model Law), but that the Model Law provided an appropriate context for the new instrument.

3. At its forty-seventh session, the Working Group considered the first draft of a model law to be given effect through enactment by a State (A/CN.9/WG.V/WP.130). The content and structure of the draft text drew upon the Model Law, as suggested by the Working Group at its forty-sixth session (A/CN.9/829, para. 63) and sought to give effect to the conclusions of the Working Group at its forty-sixth session relating to the types of judgment to be included (A/CN.9/829, paras. 54 to 58), procedures for obtaining recognition and enforcement (A/CN.9/829, paras. 65 to 67) and the grounds for refusal of recognition (A/CN.9/829, paras. 68 to 71).

4. At its forty-seventh session, the Working Group had a preliminary exchange of views on draft articles 1 to 10 of the text and made a number of proposals with respect to the drafting (A/CN.9/835, paras. 47-69); draft articles 11 and 12 of that text were not reached due to lack of time and were included as draft articles 12 and 13 of the text considered at the forty-ninth session (A/CN.9/WG.V/WP.138). At its forty-eighth, forty-ninth, fiftieth and fifty-first sessions (A/CN.9/WG.V/WP.135, 138, 143 and 145 respectively), the Working Group considered revised versions of the draft text, which reflected the decisions and proposals made at the forty-seventh, forty-eighth, forty-ninth and fiftieth sessions respectively (A/CN.9/835, 864, 870 and 898 respectively).

5. The draft text below reflects the discussion and conclusions at the fifty-first session and the revisions the Secretariat was requested to make as set forth in document A/CN.9/903, together with various suggestions and proposals arising from the Secretariat's work on the draft text. Notes on the draft articles are set out following the text of the article.

6. The Working Group may wish to consider the use of the phrases "recognition and enforcement" and "recognition or enforcement" throughout the draft text to determine whether the correct formulation is used in each case. In that regard, the Working Group might note paragraphs 22 to 24 of the draft guide to enactment contained in document A/CN.9/WG.V/WP.151, which explains the use of the phrase "recognition and enforcement", noting that enforcement is not necessarily required in all cases.

II. Draft model law on cross-border recognition and enforcement of insolvency-related judgments: revised text

Preamble

1. The purpose of this Law is:

(a) To create greater certainty for parties in regard to their rights and remedies for [recognition and] enforcement of insolvency-related judgments;

(b) To avoid the duplication of proceedings;

(c) To ensure timely and cost-effective recognition and enforcement of insolvency-related judgments;

(d) To promote comity and cooperation between jurisdictions regarding insolvency-related judgments;

(e) To protect and maximize the value of insolvency estates; and

(f) Where legislation based on the Model Law on Cross-Border Insolvency has been enacted, to complement that legislation.

2. The purpose of this Law is not:

(a) To [replace or] displace other provisions of the law of this State with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment;

(b) To replace [or displace] legislation enacting the Model Law on Cross-Border Insolvency or limit the application of that legislation;

(c) To apply to the recognition and enforcement in the enacting State of an insolvency-related judgment issued in the enacting State; or

(d) To apply to the judgment commencing the insolvency proceeding to which the judgment is related.

Notes on the Preamble

1. The preamble has been added in accordance with text proposed at the fifty-first session (A/CN.9/903, paras. 58, 62, 76). The words "recognition and" have been added to subparagraph 1(a) of the Preamble for reasons of consistency. The drafting of subparagraph (e) has been revised to the plural in order to address any confusion as to which insolvency estate is being referred to; in essence, it refers to an overarching goal of protecting and maximizing the value of insolvency estates in general.

2. It may be appropriate to align the terms used in subparagraphs 2(a) and (b) to "replace" or "displace" or to use both "replace or displace".

3. The current drafting of subparagraph 2(d) appears to be somewhat confusing because of the repetition of the word "judgment". The Working Group may wish to consider possible redrafting by replacing the first "judgment" with the word "order" or deleting the words "to which the judgment is related", thus leaving subparagraph (d) to read: "To apply to a judgment commencing an insolvency proceeding". This would align the Preamble with the drafting of article 2, subparagraph (d) 2.

Article 1. Scope of application

1. This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a proceeding taking place in a State that is different to the State in which recognition and enforcement are sought.

2. This Law does not apply to [...].

Article 2. Definitions

For the purposes of this Law:

(a) "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a court for the purpose of reorganization or liquidation;

(b) "Insolvency representative" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the insolvency proceeding;

(c) "Judgment" means any decision, whatever it may be called, issued by a court or administrative authority, provided an administrative decision has the same effect as a court decision. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses by the court. An interim measure of protection is not to be considered a judgment for the purposes of this Law;

(d) "Insolvency-related foreign judgment" means a judgment that:

(i) [Is related to] [Derives directly from or is closely connected to] [Stems intrinsically from or is materially associated with] an insolvency proceeding;

(ii) Was issued on or after the commencement of the insolvency proceeding to which it is related; and

(iii) Affects the insolvency estate;

[and subparagraphs (i), (ii) and (iii) shall apply irrespective of whether or not the proceeding to which the judgment is related has [been concluded] [closed].]

For the purposes of [this definition] [subparagraph (d)]:

1. An "insolvency-related foreign judgment" includes a judgment issued in a proceeding in which the cause of action was pursued by:

(a) A creditor with approval of the court, based upon the insolvency representative's decision not to pursue that cause of action; or

(b) The party to whom it has been assigned by the insolvency representative in accordance with the applicable law;

and the judgment on that cause of action would otherwise be enforceable under this Law; and

2. An "insolvency-related foreign judgment" does not include a judgment commencing an insolvency proceeding.

[3. Subparagraphs (d)(i), (ii) and (iii) shall apply irrespective of whether or not the proceeding to which the judgment is related has [been concluded] [closed].]

Notes on article 2

4. The definition of "judgment" in subparagraph (c) has been revised in accordance with the report of the fifty-first session (A/CN.9/903, paras. 66–67), deleting the words "on the merits", retaining the words referring to an administrative authority and revising the final sentence.

5. The definition of "insolvency-related foreign judgment" has been revised in accordance with the report of the fifty-first session (A/CN.9/903, paras. 68–73, 77), adding two additional variants in square brackets to subparagraph (d)(i); retaining the words "on or after" in subparagraph (d)(ii); deleting the words "interests of the" in subparagraph (d)(iii) and adding the clarification following subparagraph (d)(iii) to address the possibility that by the time recognition and enforcement of a judgment is sought, the related insolvency proceedings may have closed or concluded; the Working Group may wish to consider whether the reference should be to conclusion or to closure of that proceeding. Such closure should not affect recognition or enforcement of the judgment. The examples of judgments previously set forth in footnote 9 of A/CN.9/WG.V/WP.145 have been included in the draft guide to enactment (see para. 54).

6. To simplify the somewhat awkward drafting of subparagraph (d), in particular the numbering, the Working Group may wish to consider whether the words "and subparagraphs (i), (ii) and (iii) shall apply irrespective of whether or not the proceeding to which the judgment is related has been concluded" might be added as a new subparagraph to the clause beginning "For the purposes of …", as shown in square brackets in new paragraph 3.

7. The alternative words "[subparagraph (d)]" have been added to make it clear that paragraphs 1 and 2 apply only to the definition in that subparagraph.

Article 3. International obligations of this State

1. To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

2. This Law shall not apply to a judgment where there is a treaty in force concerning the recognition or enforcement of civil and commercial judgments (whether concluded before or after this Law comes into force), and that treaty applies to the judgment.

Notes on article 3

8. The Working Group agreed to retain article 3, paragraph 2 (formerly art. 3bis) without square brackets (A/CN.9/903, para. 78) and to incorporate it into article 3.

9. Since the first part of article 3, paragraph 2 refers to a treaty being "in force", the Working Group may wish to consider whether the word "concluded" should be amended to refer to the entry into force of that treaty for reasons of consistency. The relevant point in time may not be the date of conclusion of the treaty, but rather the date it entered into force; if the treaty is already in force, as specified in the opening words of the paragraph (i.e. "where there is a treaty in force …"), the date of its conclusion is potentially irrelevant.

10. A further issue that might be considered with respect to paragraph 2 is that while paragraph 1 refers to an inconsistency between the model law and the treaty, paragraph 2 does not require any such inconsistency. The Working Group may wish to consider how this provision would apply in States that may have several regimes for recognition and enforcement of judgments and in some circumstances might permit an applicant to choose the most favourable of those regimes, irrespective of whether it was treaty-based or based upon this model law; applicants in some States might prefer to use the specialized provisions provided by this model law rather than a more general treaty in force that did not include such provisions.

Article 4. Competent court or authority

The functions referred to in this Law relating to recognition and enforcement of an insolvency-related foreign judgment shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*] and by any other court before which the issue of recognition is raised as a defence or as an incidental question in the course of proceedings.

Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to act in another State with respect to an insolvency-related judgment issued in this State, as permitted by the applicable foreign law.

Notes on article 5

11. Article 5 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, para. 22), retaining language referring to authorization to act in another State and conforming the title to that language.

Article 6. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance to a foreign insolvency representative under other laws of this State.

Notes on article 6

12. In view of the fact that recognition and enforcement under article 10 and provisional relief under article 11 can both be sought by a foreign representative, as well as other qualified persons, the Working Group may wish to consider whether it might be appropriate to widen the scope of article 6 to include such persons. Alternatively, the article might be drafted in a manner that omits any reference to the party to whom the relief might be provided, for example:

> "Nothing in this Law limits the power of a court or a […] to provide additional assistance under other laws of this State."

Article 7. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State.

Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

Article 9. Effect and enforceability of an insolvency-related foreign judgment in the originating State

1. An insolvency-related foreign judgment shall be recognized only if it has effect in the originating State and shall be enforced only if it is enforceable in the originating State.

2. Recognition or enforcement of an insolvency-related foreign judgment may be postponed or refused if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired. In such cases, the court may also make recognition or enforcement conditional on the provision of such security as it shall determine.

Notes on article 9

13. The Working Group may wish to note that the most recent draft issued by the Hague Conference Special Commission on the Recognition and Enforcement of Foreign Judgments of 17 February 2017 provides only for conditional enforcement; it does not address conditional recognition. Article 4, paragraph 4 provides:

> "If a judgment referred to in paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired, the court addressed may –
>
> (a) Grant recognition or enforcement, which enforcement may be made subject to the provision of such security as it shall determine;
>
> (b) Postpone the decision on recognition or enforcement; or
>
> (c) Refuse recognition or enforcement."

14. The Working Group may wish to clarify whether the first use of the word "review" in article 9, paragraph 2 applies to both ordinary and extraordinary review, and that the time limit will only refer to ordinary review. The Working Group may also wish to consider whether the draft article should make it clear that refusal of a judgment subject to a pending review is without prejudice to a new request for recognition and enforcement of that judgment following resolution of the review.

15. The Working Group may wish to consider whether some greater clarity should be added to the final sentence of article 9, paragraph 2, in particular whether the provision of security is available on the court's own motion or at the request of a party or the insolvency representative. Article 36, paragraph 2 of the UNCITRAL Model Law on International Commercial Arbitration, for example, provides more detail:

> "(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security."

Article 10. Procedure for seeking recognition and enforcement of an insolvency-related foreign judgment

1. An insolvency representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment may seek recognition and enforcement of that judgment in this State. The

issue of recognition may also be raised as a defence or as an incidental question in the course of proceedings.

2. When recognition and enforcement of an insolvency-related foreign judgment is sought under paragraph 1, the following shall be submitted to the court:

(a) A certified copy of the insolvency-related foreign judgment; [and]

(b) Any documents necessary to establish that the insolvency-related foreign judgment has effect and is enforceable in the originating State, including information on any [current] [pending] review of the judgment; [or]

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence on those matters acceptable to the court.

3. The court may require translation of documents submitted pursuant to paragraph 2 into an official language of this State.

4. The court is entitled to presume that documents submitted pursuant to paragraph 2 are authentic, whether or not they have been legalized.

5. The court shall ensure that the party against whom relief is sought should be given the right to be heard on the application.

Notes on article 10

16. Article 10 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, paras. 28-32), deleting references to the giving of notice from subparagraph 2 and adding a new paragraph 5. The correct construction of the subparagraphs of paragraph 2 should be 2(a) and (b) or (c), rather than 2(a), (b) and (c) [emphasis added]. The Working Group may wish to consider, given the generality of the reference to "documents" in subparagraph (b), whether subparagraph (c) should refer to both subparagraphs (a) and (b) or would more appropriately be limited to subparagraph (a). If that was the case, the phrase "any other evidence of that matter acceptable to the court" could be added to subparagraph (a) and subparagraph (c) could be deleted.

17. The Working Group may wish to consider whether the word "pending" in subparagraph 2(b) more accurately describes what is intended than the word "current".

18. The Working Group may wish to consider the drafting of article 10, paragraph 5. Is it the court that is ensuring the party has the right to be heard or is it the law of the enacting State that establishes that right and the court then enables that right to be exercised by, for example, providing notice or requiring notice to be given? If it is the law of the enacting State that establishes the right (which would be consistent with the approach of Legislative Guide, see rec. 137 and part two, chapt. III, para. 116), the drafting might be amended to:

> "When recognition and enforcement are sought, the party against whom relief is sought [should have] [has] the right to be heard."

The guide to enactment could explain that the court should facilitate the party exercising that right by, for example, requiring notice of the application to be given.

19. The Working Group may also wish to consider whether a provision along the lines of article 16, paragraph 1 of the MLCBI (which provides a presumption as to the accuracy of documents provided to the recognizing court) might be a useful addition to article 10, specifying that the court is entitled to presume the correctness of the information contained in the documents provided under subparagraphs 2(a) and (b).

Article 11. Provisional relief

1. From the time recognition and enforcement of an insolvency-related foreign judgment is sought until a decision is made, where relief is urgently needed to preserve the possibility of recognizing and enforcing an insolvency-related foreign

judgment, the court may, at the request of an insolvency representative or other person entitled to seek recognition and enforcement under article 10, paragraph 1, grant relief of a provisional nature, including:

(a) Staying the disposition of any assets of any party or parties against whom the insolvency-related foreign judgment has been issued; or

(b) Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related foreign judgment.

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice, including whether notice would be required under this article*.]

3. Unless extended by the court, relief granted under this article terminates when a decision on recognition and enforcement of the insolvency-related foreign judgment is made.

Notes on article 11

20. Draft article 11 (previously art. 15) has been revised in accordance with the report of the fifty-first session (A/CN.9/903, paras. 52–53), with the addition in paragraph 2 of the phrase after the comma.

21. The Working Group may wish to consider whether the reason for granting interim relief is "to preserve the possibility of recognizing and enforcing a judgment" or whether it is more properly described as being "to preserve the possibility of satisfying or giving effect to the judgment".

Article 12. Decision to recognize and enforce an insolvency-related foreign judgment

Subject to articles 7 and 13, an insolvency-related foreign judgment shall be recognized and enforced provided:

(a) The requirements of article 9, paragraph 1 with respect to effectiveness and enforceability are met;

(b) The person seeking recognition and enforcement of the insolvency-related foreign judgment is a person or body within the meaning of article 2, subparagraph (b) or another person entitled to seek recognition and enforcement of the judgment under article 10, paragraph 1;

(c) The application meets the requirements of article 10, paragraph 2; and

(d) Recognition and enforcement is sought from, or arises by way of defence or as an incidental question before, a court referred to in article 4.

Notes on article 12

22. Article 12 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, para. 33), deleting what was previously subparagraph (e) and replacing it with a cross-reference in the chapeau to both articles 7 and 13. The Working Group may wish to consider whether article 12 should include: (i) further references to the judgment being a judgment of the kind referred to in article 2, subparagraph (d); and (ii) a cross-reference to refusal under article 9, paragraph 2 where the judgment is subject to review.

23. The Working Group may also wish to consider whether a provision along the lines of article 17, paragraph 4 of the MLCBI dealing with modification or termination of recognition when it can be shown that the grounds for granting recognition were fully or partially lacking or have ceased to exist is required in the draft model law or whether article 9 is sufficient to address that issue (see also para. 75 of the draft guide to enactment in document A/CN.9/WG.V/WP.151).

24. Since article 2, subparagraph (b) is a definition of the "insolvency representative", it may be clearer to use that term in article 12, subparagraph (b) and delete the words "person or body".

25. The drafting of subparagraph (d) might require some revision since it is only the question of recognition that arises by way of defence:

> "(d) Recognition and enforcement is sought from a court referred to in article 4, or the question of recognition arises by way of defence or as an incidental question before such a court."

Article 13. Grounds to refuse recognition and enforcement of an insolvency-related foreign judgment

Subject to article 7, recognition and enforcement of an insolvency-related foreign judgment may be refused if:

(a) The party against whom the proceeding giving rise to the judgment was instituted:

(i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or

(ii) Was notified of the institution of that proceeding in a manner that is incompatible with fundamental principles of this State concerning service of documents;

(b) The judgment was obtained by fraud;

(c) The judgment is inconsistent with a judgment issued in this State in a dispute involving the same parties;

(d) The judgment is inconsistent with an earlier judgment issued in another State in a dispute between the same parties on the same subject matter, provided the earlier judgment fulfils the conditions necessary for its recognition and enforcement in this State;

(e) Recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings or would conflict with a stay or other order issued in insolvency proceedings relating to the same debtor commenced in this State or another State;

(f) The judgment determines whether:

[(i) An asset is part of, should be turned over to, or was properly disposed of by the insolvency estate;]

[(ii) A transaction involving the debtor or assets of the insolvency estate should be avoided because it upset the principle of equitable treatment of creditors or improperly reduced the value of the estate; or]

(iii) A plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be granted, or a voluntary or out-of-court restructuring agreement should be approved;

and the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

(g) The originating court did not satisfy one of the following conditions:

(i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;

(ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that the defendant argued on the merits before the court without contesting jurisdiction within the time frame provided in the law of the originating State, unless it was evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;

(iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or

(iv) The court exercised jurisdiction on a basis that was not [inconsistent] [incompatible] with the law of this State;

States that have enacted legislation based on the Model Law on Cross-Border Insolvency might wish to enact subparagraph (h)

(h) The judgment originates from a State whose proceeding is not recognizable under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*], unless:

(i) The insolvency representative of a proceeding that is or could have been recognized under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*] participated in the originating proceeding to the extent of engaging in the substantive merits of the claim to which that proceeding related; and

(ii) The judgment relates solely to assets that were located in the originating State at the time that proceeding commenced.

Notes on article 13

26. Article 13 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, paras. 34–48, 79–82) as indicated in the following notes. The words "subject to article 7" have been added to the chapeau. In subparagraph (b), the words "in connection with a matter of procedure" have been deleted.

27. In subparagraph (e), the words "be inconsistent" have been replaced with the word "conflicts" (A/CN.9/903, para. 79). The Working Group may wish to consider whether a clearer formulation of subparagraph (e) might be to refer to "the insolvency proceedings to which the judgment is related or other insolvency proceedings concerning the same debtor". As drafted, it is not clear whether the reference to "the debtor's insolvency proceedings" means the judgment debtor or some other debtor.

28. Subparagraphs (f)(i) and (ii) have been added in square brackets for future consideration (A/CN.9.903, paras. 80–81). Subparagraph (f)(iii) has been revised to include the description of the types of judgment previously included in article 2, subparagraph (e)(v) (A/CN.9/903, para. 42) and the word "recognized" has been replaced with the word "granted" to clarify the meaning of the subparagraph – typically, the judgment in question will grant the discharge rather than determine that the discharge should be recognized. A more direct manner of drafting the subparagraph might be to provide that:

"The judgment (i) confirms a plan of reorganization or liquidation, (ii) grants a discharge of the debtor or of a debt, or (iii) approves a voluntary or out-of-court restructuring agreement."

Similar changes could be made to subparas. (i) and (ii) if they are to be retained.

29. Subparagraphs (g)(i) and (ii) have been revised in accordance with the text proposed at the fifty-first session (A/CN.9/903, para. 43). The Working Group may wish to consider whether the drafting of the proviso at the end of subparagraph (g)(ii) might be clarified or simplified by adopting drafting along the lines of the proviso at the end of subparagraph (a)(i). If the test in subparagraph (g)(ii) means that it would be evident to the receiving court that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded because the law of the originating State did not permit such an objection or such an exercise, the drafting used in subparagraph (a)(i) would be appropriate. In subparagraph (g)(iv), it may be more appropriate to refer to incompatibility with the law of the receiving State, rather than to inconsistency with that law.

30. An alternative formulation of the introduction to subparagraph (h) might be: "*Optional provision for States that have enacted legislation based on the Model Law on Cross-Border Insolvency*."

31. Subparagraph (h) has been replaced with text and revisions agreed at the fifty-first session (A/CN.9/903, paras. 45, 82). The Working Group may wish to consider some additional drafting issues on subparagraph (h):

(a) In the chapeau, to add the word "insolvency" before the word "proceeding" and to add the words "or would not be" after the words "is not";

(b) In subparagraph (i), to replace the word "claim" with the phrase "cause of action"; the word "claim" is not used in the draft text, while the phrase "cause of action" is used in article 2, subparagraph (d) 1 (the definition of "insolvency-related foreign judgment"); and

(c) In subparagraph (b), to replace the words "that proceeding" with the words "the originating proceeding" to give greater clarity to the drafting.

Article 14. Equivalent effect

1. An insolvency-related foreign judgment recognized or enforceable under this Law shall be given the same effect it [has in the originating State] [would have had if it had been issued by a court of this State].

2. If the insolvency-related foreign judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

Notes on article 14

32. The words in square bracket at the end of article 14, paragraph 1 have been added pursuant to a decision at the fifty-first session (A/CN.9/903, para. 83), on the basis that while some States export the effect given to the judgment in the originating State as reflected in the existing text, other States give the judgment the effect it would have had had it been issued in the recognizing State, as reflected in the additional text in square brackets. Both possibilities are included for further consideration.

Article 15. Severability

Recognition and enforcement of a severable part of an insolvency-related foreign judgment shall be granted where recognition and enforcement of that part is sought, or where only part of the judgment is capable of being recognized and enforced under this Law.

States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency will be aware of judgments that may have cast doubt on whether judgments can be recognized and enforced under article 21 of the Model Law. States may therefore wish to consider enacting the following provision:

Article X. Recognition of an insolvency-related judgment under [*insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*]

Notwithstanding any prior interpretation to the contrary, the relief available under [*insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment.

Notes on article X

33. Article X has been revised in accordance with the text proposed at the fifty-first session (A/CN.9/903, paras. 56, 84–85).

C. Note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law

(A/CN.9/WG.V/WP.151)

[Original: English]

Contents

I. Introduction

1. The draft text set out below provides guidance on application and interpretation of the draft model law on recognition and enforcement of insolvency-related judgments, which is set out in document A/CN.9/WG.V/WP.150. It follows the same format as the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI), and draws upon that Guide as applicable; a number of the articles of the draft model law are the same as, or similar to, articles of the MLCBI and the relevant explanations for those articles set out below are therefore based upon the explanations contained in the MLCBI Guide.

2. It is intended that the text of the articles of the model law will be included in the final version of the guide to enactment once the drafting of those articles is finalized. This document should thus be read together with A/CN.9/WG.V/WP.150, which contains the current draft of the articles. As far as possible, the draft guide is based upon the text as revised following the fifty-first session of Working Group V (May 2017) and does not reflect further changes proposed for consideration at the fifty-second session.

II. DRAFT Guide to Enactment of the UNCITRAL Model Law on recognition and enforcement of insolvency-related judgments

I. Purpose and origin of the Model Law

A. Purpose of the Model Law

1. The UNCITRAL Model Law on recognition and enforcement of insolvency-related judgments, adopted in … is designed to assist States to equip their laws with provisions that will provide a framework for recognizing and enforcing insolvency-related foreign judgments, thus facilitating the conduct of cross-border insolvency proceedings and complementing the UNCITRAL Model Law on Cross-Border Insolvency (the MLCBI).

B. Origin of the Model Law

2. The suggestion to take up work on this topic had its origin in certain judicial decisions[1] that led to uncertainty concerning the ability of some courts, in the context of recognition proceedings under the MLCBI, to recognize and enforce judgments given in the course of foreign insolvency proceedings, such as judgments issued in avoidance proceedings, on the basis that neither article 7 nor 21 of the MLCBI explicitly provided the necessary authority.

3. Moreover, in those States that had enacted article 8 of the MLCBI concerning international effect, decisions by foreign courts determining the lack of such explicit authority in the MLCBI for recognition and enforcement of insolvency-related foreign judgments might have been regarded as persuasive authority. The absence of any applicable international convention or other regime to address the recognition and enforcement of insolvency-related judgments, together with a concern that the uncertainty created by the judgments might have had a chilling effect on further adoption of the MLCBI, led to the proposal in 2014 to develop a model law or model legislative provisions on the recognition and enforcement of insolvency-related foreign judgments.

4. The law of recognition and enforcement of judgments is arguably becoming more and more important in a world in which persons and assets can easily be moved across borders. Although there is a general tendency towards more liberal recognition of foreign judgments, it is reflected in treaties requiring such recognition in specific subject areas (e.g. conventions relating to family matters, transportation and nuclear accidents) and in a narrower interpretation of the exceptions to recognition in treaties and domestic laws. Under applicable national regimes, some States will only enforce foreign judgments pursuant to a treaty regime, while others will enforce foreign judgments more or less to the same extent as local judgments. Between those two positions there are many different national approaches. However, very few States have recognition and enforcement regimes that specifically address insolvency-related judgments. Even in States that do have such regimes, they may not cover all orders that might broadly be considered to relate to insolvency proceedings.

5. With respect to an international regime dealing more generally with recognition and enforcement of judgments, in 1992, the Hague Conference commenced work on two key aspects of private international law in cross-border litigation in civil and commercial matters: the international jurisdiction of courts and the recognition and enforcement of judgments abroad (the Judgments Project). The focus of the Judgments Project was initially on developing a broad convention to replace a 1971 Convention developed by the Hague Conference, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, which would deal with the two issues noted above. Two draft instruments were prepared – the 1999 preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (1999 preliminary draft Convention) and the 2001 Interim Text. The project was then scaled down to focus on international cases involving choice of court agreements, leading to the Convention of 30 June 2005 on Choice of Court Agreements (2005 Choice of Court Convention), which entered into force on 1 October 2015. In 2011, exploratory work was undertaken to assess the merits of resuming the project to develop a global judgments convention. In 2015 an expert group completed work on a Proposed Draft Text and in 2016 a Special Commission was held to prepare a draft convention. A second Special Commission was held in February 2017 and a third in November 2017. [*to be updated*]

6. Insolvency decisions are typically excluded from the Hague Conference instruments, on the grounds, for example, that those matters may be seen as very specialized and best dealt with by specific international arrangements, or as closely intertwined with issues of public law. Article 1, subparagraph 5, of the 1971 Hague Convention, for example, provides that the convention does not apply to "questions

[1] For example, Rubin v Eurofinance SA, [2012] UKSC 46 (on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 971); CLOUT case No. 1270. See also decision of the Supreme Court of Korea of 25 March 2010 (case No.: 2009Ma1600).

of bankruptcy, composition or analogous proceedings, including decisions which may result therefrom and which relate to the validity of the acts of the debtor." Article 2, subparagraph 2 (e), of the 2005 Choice of Court Convention provides that it does not apply to "insolvency, composition and analogous matters". The draft text on recognition and enforcement of judgments is based on the exclusion in the 2005 Convention (art. 2, subpara. 2 (e)), with the additional exclusion of "resolution of financial institutions".

7. In the context of the Hague Conference texts, the term "insolvency"[2] is intended to cover both the bankruptcy of individual persons and the winding up or liquidation of corporate entities which are insolvent. It does not cover the winding up or liquidation of corporations for reasons other than insolvency, which is addressed in article 2, subparagraph 2 (m). It does not matter whether the process is initiated or carried out by creditors or by the insolvent person or entity itself with or without the involvement of a court. The term "composition" refers to procedures in which the debtor may enter into agreements with creditors in respect of a moratorium on the payment of debts or on the discharge of those debts. The term "analogous proceedings" covers a broad range of other methods in which insolvent persons or entities can be assisted to regain solvency while continuing to trade, such as chapter 11 of the United States Federal Bankruptcy Code and Part II of the United Kingdom Insolvency Act 1986.

C. Preparatory work and adoption

8. In 2014, the Commission gave Working Group V (Insolvency Law) a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgments.[3] The Model Law was negotiated between December 2014 and …, the Working Group having devoted part of … sessions (46th -) to work on the project.

9. The final negotiations on the draft text took place during the … session of UNCITRAL, held in … from … to … UNCITRAL adopted the Model Law by consensus on …. In addition to the 60 States members of UNCITRAL, representatives of … observer States and … international organizations participated in the deliberations of the Commission and the Working Group. Subsequently, the General Assembly adopted resolution …/… of … (see annex), in which it expressed its appreciation for UNCITRAL completing and adopting the Model Law.

II. Purpose of the Guide to Enactment

10. The Guide to Enactment is designed to provide background and explanatory information on the Model Law and its interpretation and application. That information is primarily directed to executive branches of Governments and legislators preparing the necessary legislative revisions, but may also provide useful insight to those charged with interpretation and application of the Model Law, such as judges, and other users of the text, such as practitioners and academics. Such information might also assist States in considering which, if any, of the provisions might be adapted to address particular national circumstances.

11. The present Guide was considered by Working Group V at its fifty-second (December 2017) and … sessions. It is based on the deliberations and decisions of the Working Group at those sessions and of the Commission at its … session, when the Model Law was adopted.

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[2] Convention of 30 June 1005 on Choice of Court Agreements: Explanatory Report by Trevor Hartley and Masato Dogauchi, [56]. There is an identical provision in art. 1 (2) (e) of the preliminary draft Convention of 1999, and its scope is further examined at paras. 38 to 39 of the Nygh/Pocar Report.

[3] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

III. A model law as a vehicle for the harmonization of laws

12. A model law is a legislative text recommended to States for incorporation into their national law. Unlike an international convention, a model law does not require the State enacting it to notify the United Nations or other States that may have also enacted it.

A. Flexibility of a model law

13. In incorporating the text of a model law into its legal system, a State may modify or elect not to incorporate some of its provisions. In the case of a convention, the possibility of changes being made to the uniform text by the States parties (normally referred to as "reservations") is much more restricted; in particular, trade law conventions usually either totally prohibit reservations or allow only specified ones. The flexibility inherent in a model law, on the other hand, is particularly desirable in those cases when it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as a national law. Some modifications may be expected, in particular, when the uniform text is closely related to the national court and procedural system.

B. Fitting the Model Law into existing national law

14. With its scope limited to recognition and enforcement of insolvency-related foreign judgments, the Model Law is intended to operate as an integral part of the existing law of the enacting State.

15. The only new legal term introduced in the Model Law is specific to its subject matter, namely "insolvency-related foreign judgment". Other terms, such as "insolvency representative" and "insolvency proceeding" are used in other UNCITRAL insolvency texts and are unlikely to be in conflict with terminology in existing law. Moreover, where the expression used is likely to vary from country to country, the Model Law, instead of using a particular term, indicates the meaning of the term in italics within square brackets and calls upon the drafters of the national law to use the appropriate term.

16. The Model Law preserves the possibility of excluding or limiting any action on the basis of overriding public policy considerations, although it is expected that the public policy exception will be rarely used (article 7).

17. The flexibility that enables the Model Law to be adapted to the legal system of the enacting State should be utilized with due consideration for the need for uniformity in its interpretation (see paras. … below) and for the benefits to the enacting State of adopting modern, generally acceptable international practices in insolvency-related matters. Modification means that the degree of, and certainty about, harmonization achieved through a model law may be lower than in the case of a convention. Therefore, in order to achieve a satisfactory degree of harmonization and certainty, it is recommended that States make as few changes as possible when incorporating the Model Law into their legal systems. This will assist in making the national law as transparent and predictable as possible for foreign users. The advantage of uniformity and transparency is that it will make it easier for enacting States to demonstrate the basis of their national law on recognition and enforcement of insolvency-related foreign judgments.

18. If the enacting State decides to incorporate the provisions of the Model Law into an existing national insolvency statute, the title of the enacted provisions would have to be adjusted accordingly and the word "Law", which appears at various places in the title and in the text of the Model Law, would have to be replaced by the appropriate expression.

C. Use of terminology

"*Insolvency*"

19. Acknowledging that different jurisdictions might have different notions of what falls within the term "insolvency proceedings", the Model Law does not define the term "insolvency". However, as used in the Model Law, "insolvency proceeding" refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent, with the goal of liquidating or reorganizing the debtor as a commercial entity. A judicial or administrative proceeding to wind up a solvent entity where the goal is to dissolve the entity and other foreign proceedings not falling within article 2, subparagraph (a) are not insolvency proceedings within the scope of the Model Law. Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2, subparagraph (a) of the Model Law only if the debtor is insolvent or in severe financial distress. The use of the term "insolvency" in the Model Law is consistent with its use in other UNCITRAL insolvency texts, specifically the MLCBI and the Legislative Guide.[4]

20. It should be noted that in some jurisdictions the expression "insolvency proceedings" has a narrow technical meaning in that it may refer, for example, only to collective proceedings involving a company or a similar legal person or only to collective proceedings against a natural person. No such distinction is intended to be drawn by the use of the term "insolvency" in the Model Law, since the Model Law is designed to be applicable to foreign judgments related to proceedings addressing the insolvency of both natural and legal persons as the debtor. If, in the enacting State, the word "insolvency" may be misunderstood as referring to one particular type of collective proceeding, another term should be used to refer to the proceedings covered by the Law.

"State"

21. The words "this State" are used throughout the Model Law to refer to the entity that enacts the Model Law (i.e. the enacting State). The term should be understood as referring to a State in the international sense and not as referring to, for example, a territorial unit in a State with a federal system. The words "originating State" are also used throughout the Model Law to refer to the State in which the insolvency-related foreign judgment was issued.

"Recognition and enforcement"[5]

22. The Model Law refers to "recognition and enforcement" of an insolvency-related judgment as a single concept, however that drafting approach should not be regarded as requiring enforcement of all judgments that have been recognized where enforcement is not required.

23. Under some national laws, recognition and enforcement are two separate processes and may be covered by different laws. In some federal jurisdictions, for example, recognition may be subject to national law, while enforcement is subject to the law of a territorial or sub-federal unit. Recognition may have the effect of making the foreign judgment a local judgment that can then be enforced under local law. Thus while enforcement may presuppose recognition of a foreign judgment, it goes beyond recognition. Confusion may be caused in some States as to whether both can be achieved through a single application or whether two separate applications are required. The Model Law does not specifically address that procedural requirement, but provisions that might be of specific relevance to the issue of enforcement should be noted, for example, article 9, paragraph 2 which refers to conditional recognition or enforcement.

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[4] Introd., para. 12 (s): "'Insolvency': when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets."

[5] See paras. 73 and 74 below for further explanation of the meaning of these terms.

24. In the case of some judgments, recognition might be sufficient and enforcement may not be needed, for example, for declarations of rights or some non-monetary judgments, such as the discharge of a debtor or a judgment determining that the defendant did not owe any money to the plaintiff. The receiving court may simply recognize that finding and if the plaintiff were to sue the defendant again on the same claim before that court, the recognition already accorded would be enough to dispose of the case. Thus while enforcement must be preceded by recognition, recognition need not always be accompanied or followed by enforcement.

Documents referred to in this Guide

(a) "MLCBI": UNCITRAL Model Law on Cross-Border Insolvency (1997);

(b) "Guide to Enactment and Interpretation": Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency as revised and adopted by the Commission on 18 July 2013;

(c) "Practice Guide": UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009);

(d) "Legislative Guide": UNCITRAL Legislative Guide on Insolvency Law (2004), including parts three (2010) and four (2013);

(e) "Judicial Perspective": UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (updated 2013);

(f) 2005 Choice of Court Convention: Hague Conference on Private International Law Convention of 30 June 2005 on Choice of Court Agreements; and

(g) Hartley/Dogauchi report: Explanatory Report on the 2005 Choice of Court Convention by Trevor Hartley and Masato Dogauchi.

IV. Main features of the Model Law

A. Scope of application

25. The Model Law applies to an insolvency-related foreign judgment that was issued in a proceeding taking place in a State different to the State in which recognition and enforcement is sought. That would include a foreign judgment for which recognition and enforcement is sought in the enacting State, where both the proceeding giving rise to the judgment and the insolvency proceeding to which it relates are taking place in another State. It would also include a foreign judgment for which recognition and enforcement is sought in the enacting State, which is also the State in which the insolvency proceeding to which the judgment relates is taking place.

B. Types of judgment covered

26. To fall within the scope of the Model Law a foreign judgment needs to possess certain attributes. These are, firstly, that it is [related to] [derives directly from or is closely connected to] [stems intrinsically from or is materially associated with] an insolvency proceeding (as defined in art. 2, subpara. (a)) and, second, that it was issued on or after the commencement of that insolvency proceeding (the definition does not however include the judgment commencing an insolvency proceeding, as noted in the preamble, subpara. 2 (d) and in art. 2, para. (d) 2). An interim measure of protection is not to be considered a judgment for the purposes of the Model Law.

27. The Model Law clarifies that the cause of action giving rise to the judgment may be pursued by the debtor or the insolvency representative in the insolvency proceeding. It may also be pursued by a creditor, with the approval of the court, in circumstances where the insolvency representative has decided not to pursue that cause of action, or by a party to whom the cause of action was assigned by the insolvency representative in accordance with applicable law. In both instances, the judgment must be otherwise enforceable under the Model Law.

28. For the information of enacting States, a number of examples of the types of judgment that might fall within the definition of "insolvency-related foreign judgment" are provided below; the list is not intended to be exhaustive (see para. …).

C. Relationship between the Model Law and the MLCBI

29. The subject matter of the Model Law is related to that of the MLCBI; both texts use similar terminology and definitions (e.g. the definition of "insolvency proceeding" is based upon the definition of "foreign proceeding" in the MLCBI), a number of the general articles of the MLCBI are repeated in the Model Law (arts. 3 to 8) and the Preamble, as well as articles 13, subparagraph (h) and X, refer specifically to the relationship of the text of the Model Law to the MLCBI. The Preamble, as noted below (para. ...), clarifies that the Model Law is not intended to replace or displace legislation enacting the MLCBI. States that have enacted or are considering enacting the MLCBI may wish to note the following guidance on the complementary nature of the two texts.

30. The MLCBI applies to the recognition of specified foreign insolvency proceedings (that is, those that are a type of proceeding covered by the definition of "foreign proceeding" and can be considered to be either a foreign main or a foreign non-main proceeding). Other types of proceeding, such as those commenced on the basis of presence of assets or those that are not a collective proceeding (as explained in paras. 69–72 of the Guide to Enactment and Interpretation of the MLCBI) do not fall within the types of proceeding eligible for recognition under the MLCBI. The Model Law, in comparison, addresses the recognition and enforcement of insolvency-related judgments, that is, judgments that bear the necessary relationship, as defined in article 2, subparagraph (d), to an insolvency proceeding (as defined in art. 2, subpara. (a)), although the decision commencing the insolvency proceeding, which is the subject of the MLCBI's recognition regime, is specifically excluded from the definition of "insolvency-related judgment" for the purposes of the Model Law (Preamble, subpara. 2 (d) and art. 2, para. (d) 2).

31. Like the MLCBI, the Model Law establishes a framework for seeking cross-border recognition, in this case of an insolvency-related judgment. That procedure seeks to establish a clear, simple procedure that avoids unnecessary complexity, such as requirements for legalization. Like the analogous provisions for provisional relief in the MLCBI, the Model Law also provides for provisional relief to preserve the possibility of recognizing and enforcing an insolvency-related judgment between the time recognition and enforcement are sought and the time the court issues its decision. Like the MLCBI, the Model Law also seeks to establish certainty with respect to the outcome of the recognition and enforcement procedure, so that if the relevant documents are provided, the judgment satisfies the requirements for effectiveness and enforceability in the originating State, the person seeking recognition and enforcement is the appropriate person and there are insufficient or no grounds for refusing recognition and enforcement, the judgment should be recognized and enforced.

32. As discussed in more detail in the article-by-article remarks below, the Model Law permits recognition of an insolvency-related foreign judgment to be refused when the judgment originates from a State whose insolvency proceeding is not susceptible of recognition under the MLCBI; this may be because that State is neither the location of the insolvency debtor's centre of main interests (COMI) nor of an establishment of the debtor. This principle is contained in article 13, subparagraph (h), which is an optional provision for consideration by States that have enacted (or are considering enactment of) the MLCBI. The substance of the article provides an exception to that general principle, which permits recognition of a judgment issued in a State that is neither the location of the COMI nor of an establishment of the debtor, where the judgment relates only to assets that were located in the issuing State, provided certain conditions are met. The exception could facilitate the recovery of additional assets for the insolvency estate, as well as the resolution of disputes relating to those assets. Such an exception is not available in the MLCBI.

33. A requirement for protection of the interests of creditors and other interested persons, including the debtor is included in both the Model Law and the MLCBI, but in different situations. The MLCBI requires the recognizing court to ensure that those interests are considered when granting, modifying or terminating provisional or discretionary relief under the MLCBI. As the Guide to Enactment and Interpretation of the MLCBI explains, the idea underlying that requirement (art. 22) is that there should be a balance between relief that might be granted to the foreign representative and the interests of the persons that may be affected by that relief.[6] The Model Law is more narrowly focused; the issue of such protection is relevant only in so far as article 13, subparagraph (f) gives rise to a ground for refusing recognition and enforcement where those interests were not adequately protected in the proceeding giving rise to certain types of judgment, for example a judgment confirming a plan of reorganization. As discussed further below (see paras. …), the rationale is that the types of judgment specified in article 13, subparagraph (f) directly affect the rights of creditors and other stakeholders collectively. Although other types of insolvency-related judgments that resolve bilateral disputes between two parties may also affect creditors and other stakeholders, those effects are typically indirect (e.g., via the judgment's effect on the size of the insolvency estate) and in those circumstances a separate analysis of the adequate protection of third-party interests is not considered to be necessary and could lead to unnecessary litigation and delay.

34. Another element of the relationship between the Model Law and the MLCBI concerns article X, which concerns the interpretation of article 21 of the MLCBI. This is a further optional provision that States which have enacted the MLCBI may wish to consider. Pursuant to the clarification provided by article X, the discretionary available relief under the MLCBI to support a recognized foreign proceeding (covering both main and non-main proceedings) should be interpreted as including the recognition and enforcement of a judgment, notwithstanding any interpretation to the contrary.

V. Article-by-article remarks

Title

"Model Law"

35. If the enacting State decides to incorporate the provisions of the Model Law into an existing national statute, the title of the enacted provisions would have to be adjusted accordingly, and the word "Law", which appears in various articles, would have to be replaced by the appropriate phrase.

36. In enacting the Model Law, it is advisable to adhere as much as possible to the uniform text in order to make the national law as transparent as possible for foreign users of the national law (see also section III above).

Preamble

37. Paragraph 1 of the Preamble is drafted to provide a succinct statement of the basic policy objectives of the Model Law. It is not intended to create substantive rights, but rather to provide a general orientation for users of the Model Law and to assist with its interpretation.

38. In States where it is not customary to include in legislation an introductory statement of the policy on which the legislation is based, consideration might nevertheless be given to including a statement of objectives as contained in the Preamble to the Model Law either in the body of the statute or in a separate document, in order to provide a useful reference for interpretation of the law.

39. Paragraph 2 of the Preamble is intended to clarify certain issues concerning the relationship of the Model Law to other national legislation dealing with the recognition of insolvency proceedings that might also address the recognition of

[6] See Guide to Enactment and Interpretation, paras. 196–199.

insolvency-related judgments, including, for example, the MLCBI (see also art. 13, subpara. (h)), where it has been enacted. It is clear from subparagraph 2 (f) of the Preamble that the Model Law is intended to complement the MLCBI and subparagraph 2 (c) of the Preamble clarifies that the Model Law is not intended to replace [or displace] legislation enacting the MLCBI or to limit the interpretation of that legislation. So, for example, where a State interprets that legislation as facilitating the recognition of insolvency-related judgments, enactment of the Model Law should not automatically supersede that legislation unless that result is intended by the State. Subparagraph 2 (d) of the Preamble confirms that the Model Law is not intended to apply to a judgment commencing an insolvency proceeding, as that judgment is the subject of recognition under the MLCBI.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 48
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 16, 58, 76
A/CN.9/WG.V/WP.150

Article 1. Scope of application

Paragraph 1

40. Article 1, paragraph 1 confirms that the Model Law is intended to address the recognition and enforcement in one State of an insolvency-related judgment issued in a different State i.e. in a cross-border context. It should be noted, however, that the insolvency proceeding to which the judgment is related might be taking place in the State in which recognition and enforcement are sought or in another State. The Law is limited in its application to a foreign judgment related to an insolvency proceeding, as those terms are defined in article 2.

Paragraph 2

41. Article 1, paragraph 2 indicates that the enacting State might decide to exclude certain types of judgment, such as those raising public policy considerations. These might include, for example, judgments concerning foreign revenue claims. With a view to making the national law based on this Model Law more transparent for the benefit of foreign users, exclusions from the scope of the law might usefully be mentioned in paragraph 2.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 49–53
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 55–60
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 32
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [1]
A/CN.9/898, para. 11
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 16, 59–63
A/CN.9/WG.V/WP.150

Article 2. Definitions

Subparagraph (a) "Insolvency proceeding"

42. This definition draws upon on the definition of "foreign proceeding" in the MLCBI.[7] A judgment will fall within the scope of the Model Law if it is related to an insolvency proceeding that meets the definition in article 2, subparagraph (a). The attributes required for that proceeding to fall within the definition include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding. For a proceeding to be considered an "insolvency proceeding" it must possess all of these elements. The definition refers to assets that "are or were subject to control" to address the situation where the insolvency proceeding has closed at the time recognition of the insolvency-related judgment is sought. This is discussed in more detail below with respect to the definition of "insolvency-related foreign judgment" (see para. …).

43. A detailed explanation of the elements required for a proceeding to be considered an "insolvency proceeding" is provided in the Guide to Enactment and Interpretation of the MLCBI.[8]

Subparagraph (b) "Insolvency representative"

44. This definition draws upon the definition of "foreign representative" in the MLCBI[9] and "insolvency representative" in the Legislative Guide.[10] Article 2, subparagraph (b) recognizes that the insolvency representative may be a person authorized in insolvency proceedings to administer those proceedings and, in the case of proceedings taking place in a State other than the enacting State, the "insolvency representative" may also include a person authorized specifically for the purposes of representing those proceedings.

45. The Model Law does not specify that the insolvency representative must be authorized by a court and the definition is thus sufficiently broad to include appointments that might be made by a special agency other than the court. It also includes appointments made on an interim basis. An appointment on that basis is included to reflect the practice in many countries of often, or even usually, commencing insolvency proceedings on an "interim" or "provisional" basis. Except for being labelled as interim, those proceedings meet all the other requisites of the definition of "insolvency proceeding" in article 2, subparagraph (a). Such proceedings are often conducted for weeks or months as "interim" proceedings under the administration of persons appointed on an "interim" basis, and only at some later time would the court issue an order confirming the continuation of the proceedings on a non-interim basis. The definition in subparagraph (b) is sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings.

Subparagraph (c) "Judgment"

46. The Model Law adopts a broad definition of what constitutes a judgment, explaining what the term might include in the second sentence of article 2,

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[7] MLCBI, art. 2 (a): (a) "'Foreign proceeding' means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."

[8] Guide to Enactment and Interpretation, paras. 69–80.

[9] Ibid., art. 2 (d): "'Foreign representative' means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."

[10] Legislative Guide, Introd., subpara. 12 (v): "'Insolvency representative': a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate."

subparagraph (c). The focus is upon judgments issued by a court, which might generally be described as an authority exercising judicial functions or by an administrative authority, provided the decision of the latter has the same effect as a court decision. Administrative authorities are included on the basis that some insolvency regimes are administered by specialized authorities and decisions issued by those authorities in the course of insolvency proceedings merit recognition on the same basis as judicial decisions. However, while the Model Law applies to judgments issued by the court that is competent to control or supervise an insolvency proceeding, not all States have specialized courts with insolvency jurisdiction and there are many instances in which a judgment covered by the Model Law could be issued by a court that did not have such competence. This is also supported by the focus upon "insolvency-related" judgments. For those reasons, the definition is intentionally broader than the use of the word "court" in both the MLCBI and the Legislative Guide.[11]

47. The reference to costs and expenses of the court has been added to restrict the enforcement of costs orders to those given in relation to judgments that can be recognized and enforced under the Model Law.

48. Interim measures of protection should not be considered to be judgments for the purposes of the Law. The Model Law does not define what is intended by the term "interim measures". In the international context, few definitions of what constitute interim, provisional, protective or precautionary measures exist and legal systems differ on how those measures should be characterized.

49. Interim measures may serve two principal purposes: to maintain the status quo pending determination of the issues at trial and to provide a preliminary means of securing assets out of which an ultimate judgment may be satisfied. In addition, they may share certain characteristics; for example, they are temporary in nature, they may be sought on an urgent basis, or they may be issued on an ex parte basis. However, if an order for such measures is confirmed after the respondent has been served with the order and had the opportunity to appear and seek the discharge of the order, it may cease to be regarded as a provisional or interim measure.

50. Legal effects that might apply by operation of law, such as a stay applicable automatically on commencement of insolvency proceedings pursuant to the relevant law relating to insolvency, may not, without more, be considered a judgment for the purposes of the Model Law.

Subparagraph (d) "Insolvency-related foreign judgment"

51. The types of judgment to be covered by the Model Law are those that can be considered to be [related to] [deriving directly from or closely connected to] [stemming intrinsically from or materially associated with] an insolvency proceeding (as defined in art. 2, subpara. (a)), that are issued by a court or relevant administrative authority on or after the commencement of that insolvency proceeding and that have an effect upon the insolvency estate of the debtor. An insolvency-related judgment would include any equitable relief, including the establishment of a constructive trust, provided in that judgment or required for its enforcement, but would not include a judgment imposing a criminal penalty.

52. Judgments issued on commencement of insolvency proceedings would include any judgments that might in some jurisdictions be described as first day orders and could be made at the time the proceedings commenced, but would not typically include the decision commencing the insolvency proceeding. This exclusion is confirmed by paragraph 2 of the definition. The decision commencing an insolvency

[11] Ibid., Introd., para. 8: For purposes of simplicity, the Legislative Guide uses the word "court" in the same way as art. 2, subpara. (e), of the MLCBI to refer to "a judicial or other authority competent to control or supervise" insolvency proceedings. An authority which supports or has specified roles in insolvency proceedings, but which does not have adjudicative functions with respect to those proceedings, would not be regarded as within the meaning of the term "court" as that term is used in the Guide. The MLCBI, art. 2 subpara. (e), provides: (e) "'Foreign court' means a judicial or other authority competent to control or supervise a foreign proceeding."

proceeding is specifically the subject of recognition under the MLCBI. It might be noted that should recognition of the commencement decision be required, it is most likely to be in circumstances where the relief available under the MLCBI is also required. Should a commencement decision be susceptible of recognition under this Model Law, it would carry no possibility of obtaining automatic or discretionary relief of the kind available under articles 20 and 21 of the MLCBI.

53. The words following article 2, subparagraph (d) (iii) of the definition of "insolvency-related foreign judgment" clarify that an insolvency-related foreign judgment issued after the proceedings to which it relates have closed, can still be considered an insolvency-related judgment for the purposes of the Model Law. In some jurisdictions, for example, actions for avoidance may be pursued after a reorganization plan has been approved and confirmed by the court, where that confirmation is considered the conclusion of the proceedings. Insolvency laws take different approaches to conclusion of insolvency proceedings, as discussed in the Legislative Guide, part two, chapter VI, paragraphs 16–19.

54. The following list, which is not intended to be exhaustive, provides some examples of the types of judgment that might be considered insolvency-related foreign judgments:

(a) A judgment dealing with constitution and disposal of assets of the insolvency estate, such as whether an asset is part of, should be turned over to, or was properly (or improperly) disposed of by the insolvency estate;

(b) A judgment determining whether a transaction involving the debtor or assets of its insolvency estate should be avoided because it upset the principle of equitable treatment of creditors (preferential transactions) or improperly reduced the value of the estate (transactions at an undervalue);

(c) A judgment determining that a representative or director of the debtor is liable for action taken when the debtor was insolvent or in the period approaching insolvency, and the cause of action relating to that liability was one that could be pursued by or on behalf of the debtor's insolvency estate under the law relating to insolvency, in line with part four of the Legislative Guide;

(d) A judgment determining that sums not covered by (a) or (b) above are owed to or by the debtor or its insolvency estate; some States may consider that a judgment would fall into this category only where the cause of action relating to the recovery or payment of those sums arose after the commencement of insolvency proceedings in respect of the debtor; or

(e) A judgment (i) confirming a plan of reorganization or liquidation, (ii) granting a discharge of the debtor or of a debt, or (iii) approving a voluntary or out-of-court restructuring agreement. The types of agreement referred to in subparagraph (iii) are typically not regulated by the insolvency law and may be reached through informal negotiation to address a consensual modification of the claims of all participating creditors. In this Model Law, the reference is to such agreements that are ultimately referred to the court for approval in formal proceedings, such as an expedited proceeding of the type addressed in the Legislative Guide.[12]

55. Article 2, subparagraph (d) 1 of the definition clarifies that the cause of action leading to the judgment need not necessarily be pursued by the debtor or its insolvency representative. "Cause of action" should be interpreted broadly to refer to the subject matter of the litigation. The insolvency representative may have decided not to pursue the action, but rather to assign it to a third party or to permit it to be pursued by creditors with the approval of the court. The fact that the cause of action was pursued by another party will not affect the recognizability or enforceability of any resulting judgment, provided it is of a type otherwise enforceable under the Model Law.

[12] Ibid., see chap. IV, section B.

56. Subparagraph (d) 2, as noted above (paras. …), confirms that the definition does not include the decision commencing an insolvency proceeding on the basis that it is the subject of a recognition regime under the MLCBI. Other decisions, such as the decision appointing the insolvency representative, are not excluded from the Model Law, as recognition of that appointment is often a critical factor in demonstrating that the insolvency representative has standing to apply for recognition and enforcement of the judgment (art. 10) or for relief associated with such recognition and enforcement (art. 11).

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 54–60
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 61–70
A/CN.9/WG.V/WP.138
A/CN.9/WG.V/WP.140, paras. 3–5
A/CN.9/870, paras. 53–60
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [2]–[13]
A/CN.9/898, paras. 48–60
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 16, 64–73, 77
A/CN.9/WG.V/WP.150

Article 3. International obligations of this State

57. Article 3, paragraph 1, expressing the principle of supremacy of international obligations of the enacting State over internal law, has been modelled on similar provisions in other model laws prepared by UNCITRAL, including the MLCBI.

58. Article 3, paragraph 2 provides that where there is a treaty in force for the enacting State and that treaty applies to the recognition and enforcement of civil and commercial judgments, if the judgment in question falls within the terms of the treaty then the treaty should cover its recognition and enforcement, rather than the Model Law. The article confirms that the treaty will prevail irrespective of the time at which it came into force for the enacting State relative to the enactment of the Model Law i.e. whether before or after that enactment and entry into force. Binding legal obligations issued by regional economic integration organizations that are applicable to members of that organization might be treated as obligations arising from an international treaty.

59. In some States binding international treaties are self-executing. In other States, however, those treaties, with certain exceptions, are not self-executing as they require internal legislation in order to become enforceable law. In view of the normal practice of the latter group of States with respect to international treaties and agreements, it might be inappropriate or unnecessary to enact article 3 or it might be appropriate to enact it in a modified form.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 61–63
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [14]–[15]
A/CN.9/898, paras. 13–17
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 17–20, 78
A/CN.9/WG.V/WP.150

Article 4. Competent court or authority

60. The competence for the judicial functions dealt with in the Model Law may lie with different courts in the enacting State and the enacting State would tailor the text of the article to its own system of court competence. The value of article 4, as enacted in a given State, would be to increase the transparency and ease of use of the legislation for the benefit of, in particular, foreign insolvency representatives and others authorized under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment. If, in the enacting State, any of the functions relating to recognition and enforcement of an insolvency-related foreign judgment are performed by an authority other than a court, the State would insert in article 4, and in other appropriate places in the enacting legislation, the name of the competent authority.

61. In defining jurisdiction in matters mentioned in article 4, the implementing legislation should not unnecessarily limit the jurisdiction of other courts in the enacting State. In particular, as the article makes clear, the issue of recognition may be raised by way of defence or as an incidental question in a proceeding in which the main issue for determination is not that of recognition and enforcement of such a judgment. In those cases, that issue may be raised in a court other than the court specified in accordance with the first part of article 4.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 64
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [16]–[17]
A/CN.9/898, paras. 18–20
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 21
A/CN.9/WG.V/WP.150

Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State

62. The intent of article 5 is to ensure insolvency representatives or other authorities appointed in insolvency proceedings commenced in the enacting State are authorized to act abroad with respect to an insolvency-related judgment. An enacting State in which insolvency representatives are already equipped to act in that regard may decide to forgo inclusion of article 5, although retaining that article would provide clear statutory evidence of that authority and assist foreign courts and other users of the law.

63. Article 5 is formulated to make it clear that the scope of the power exercised abroad by the insolvency representative would depend upon the foreign law and courts. Action that the insolvency representative appointed in the enacting State may wish to take in a foreign country will be action of the type dealt with in the Model Law, such as seeking recognition or enforcement of an insolvency-related judgment or associated relief, but the authority to act in a foreign country does not depend on whether that country has enacted legislation based on the Model Law.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138

A/CN.9/870, para. 65
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [16]
A/CN.9/898, para. 21
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 22
A/CN.9/WG.V/WP.150

Article 6. Additional assistance under other laws

64. The purpose of the Model Law is to increase and harmonize cross-border assistance available in the enacting State to foreign insolvency representatives with respect to the recognition and enforcement of an insolvency-related foreign judgment. However, since the law of the enacting State may, at the time of enacting the Law, already have in place various provisions under which a foreign insolvency representative could obtain that assistance and since it is not the purpose of the Law to replace or displace those provisions to the extent that they provide assistance that is additional to or different from the type of assistance dealt with in the Model Law, the enacting State may consider whether article 6 is needed to make that point clear. Article X is also relevant in this regard in so far as it provides clarification as to the scope of article 21 of the MLCBI and the relief that should be available under that article.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 66
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [16]
A/CN.9/898, para. 21
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 23
A/CN.9/WG.V/WP.150

Article 7. Public policy

65. As the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted in article 7.

66. In some States the expression “public policy” may be given a broad meaning in that it might relate in principle to any mandatory rule of national law. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees; in those States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when to do so would contravene those fundamental principles.[13]

67. The purpose of the expression “manifestly”, which is also used in many other international legal texts as a qualifier of the expression “public policy”, is to emphasize that public policy exceptions should be interpreted restrictively and that article 7 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State. In some States, that may include situations where the security or sovereignty of the State has been infringed.

68. For the applicability of the public policy exception in the context of the Model Law it is important to note that a growing number of jurisdictions recognize a

[13] For relevant cases under the MLCBI see, for example, the Judicial Perspective III.B.5 “The ‘public policy’ exception”.

dichotomy between the notion of public policy as it applies to domestic affairs, as well as the notion of public policy as it is used in matters of international cooperation and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public policy. This dichotomy reflects the realization that international cooperation would be unduly hampered if "public policy" were to be understood in an expansive manner.

69. The second part of the provision referring to procedural fairness is intended to focus attention on serious procedural failings. It was drafted to accommodate those States with a relatively narrow concept of public policy (and which treat procedural fairness and natural justice as distinct from public policy) that may wish to include language about procedural fairness in legislation enacting the Model Law.[14]

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.138
A/CN.9/870, para. 67
A/CN.9/WG.V/WP.143
A/CN.9/898, para. 21
A/CN.9/WG.V/WP.143/Add.1, notes [18]–[19]
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 24
A/CN.9/WG.V/WP.150

Article 8. Interpretation

70. A provision similar to the one contained in article 8 appears in a number of private law treaties (e.g. art. 7, para. 1, of the United Nations Convention on Contracts for the International Sale of Goods). More recently, it has been recognized that such a provision would also be useful in a non-treaty text, such as a model law, on the basis that a State enacting a model law would have an interest in its harmonized interpretation. Article 8 is modelled on the corresponding article of the MLCBI.

71. Harmonized interpretation of the Model Law is facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system, under which the UNCITRAL secretariat publishes abstracts of judicial decisions (and, where applicable, arbitral awards) that interpret conventions and model laws emanating from UNCITRAL (for further information about the system, see para. … below).

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 68
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [16]
A/CN.9/898, para. 22
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 25
A/CN.9/WG.V/WP.150

Article 9. Effect and enforceability of an insolvency-related foreign judgment in the originating State

72. Article 9, paragraph 1, provides that a judgment will only be recognized if it has effect in the originating State, and will only be enforced if it is enforceable in the originating State.[15] Having effect generally means that the judgment is legally valid

[14] Cf. article 9 (e) of the 2005 Choice of Court Convention; Hartley/Dogauchi report, paras. 189–190.
[15] Cf. article 8 (3) of the 2005 Choice of Court Convention; Hartley/Dogauchi report, para. 171.

and operative. If it does not have effect, it will not constitute a valid determination of the parties' rights and obligations. It is possible that a judgment is effective in the originating State without being enforceable because, for example, it has been suspended pending the outcome of an appeal. If a judgment does not have effect or is not enforceable in the originating State or if it ceases to have effect or be enforceable in the originating State, it should not be recognized or enforced (or continue to be recognized or enforced) in another State under the Model Law. The question of effect and enforceability must thus be determined by reference to the law of the originating State, recognizing that different States have different rules on finality and conclusiveness of judgments.

73. This discussion raises the distinction between recognition of a judgment and its enforcement.[16] As noted above, recognition means that the receiving court will give effect to the originating court's determination of legal rights and obligations reflected in the judgment. For example, if the originating court held that the plaintiff had, or did not have, a certain right, the receiving court would accept that determination. Enforcement, on the other hand, means the application of the legal procedures of the receiving court to ensure compliance with the judgment issued by the originating court. Thus, if the originating court ruled that the defendant owed the plaintiff a certain sum of money, the receiving court would ensure that the money was paid to the plaintiff. Since that would be legally indefensible if the defendant did not owe that sum of money to the plaintiff, a decision to enforce the judgment must, for the purposes of the Model Law, be preceded or accompanied by recognition of the judgment.

74. In contrast, recognition need not be accompanied or followed by enforcement. For example, if the originating court held that one party owed money to the other or that one party had a certain right, the receiving court may simply recognize that finding. If the same claim was further pursued in the receiving State, recognition of the foreign judgment would be sufficient to dispose of the case.

75. The use of the word "review" might have different meanings depending on national law; in some jurisdictions, it might initially include both the possibility of a review by the issuing court, as well as review by an appellate court. For example, an originating court may have a short period before an appeal is made to a higher court in which to review its own judgment; once the appeal is made, the originating court no longer has that ability. Both situations would be covered by the use of the word "review". "Ordinary review" describes, in some legal systems, a review that is subject to a time limit and conceived as an appeal with a full review (of facts and law). It differentiates those cases from "extraordinary" reviews, such as an appeal to a court of human rights or internal appeals for violation of fundamental rights.

76. Article 9, paragraph 2 provides that if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review has not expired, the receiving court has the discretion to adopt various approaches to the judgment. For example, it can refuse to recognize the judgment; postpone recognition and enforcement until it is clear whether the judgment is to be affirmed; set aside or amended in the originating State; proceed to recognize the judgment, but postpone enforcement; or recognize and enforce the judgment. This flexibility allows the court to deal with a variety of different situations, including, for example, where the judgment debtor pursues an appeal in order to delay enforcement, where the appeal may otherwise be considered frivolous or the judgment may be provisionally enforced in the originating State. If the court decides to recognize and enforce the judgment notwithstanding the review or to recognize the judgment but postpone enforcement, the court can require the provision of some form of security to ensure that the relevant party is not prejudiced pending the outcome of the review. If the judgment is subsequently set aside or amended or ceases to become effective or enforceable in the originating State, the receiving State should rescind or amend any recognition or enforcement granted in accordance with relevant procedures established under domestic law.

[16] Ibid., para. 170.

77. If the court decides to refuse recognition and enforcement because of the pending review, it should not prevent a new request for recognition and enforcement once that review had been determined. Refusal in that instance would mean dismissal without prejudice.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 69, 72
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [20]–[21]
A/CN.9/898, paras. 23–24
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 26–27
A/CN.9/WG.V/WP.150

Article 10. Procedure for seeking recognition and enforcement of an insolvency-related foreign judgment

78. Article 10 defines the core procedural requirements for recognition and enforcement of an insolvency-related foreign judgment. In incorporating the provision into national law, it is desirable not to encumber the process with additional requirements beyond those referred to. Articles 10 and 11 are intended to provide a simple, expeditious structure to be used for obtaining recognition and enforcement.

Paragraph 1

79. Recognition and enforcement of an insolvency-related foreign judgment can be sought by either an insolvency representative or a person authorized to act on behalf of an insolvency proceeding within the meaning of article 2, subparagraph (b). It may also be sought by any person entitled under the law of the originating State to seek such recognition and enforcement. Such a person might include a creditor whose interests are affected by the judgment. Paragraph 1 repeats article 4, noting that the question of recognition may also be raised by way of defence or as an incidental question in the course of a proceeding. In such cases, enforcement may not be required. Where the issue arises in those circumstances, the requirements of article 10 should be met in order to obtain recognition of the judgment. Moreover, the person raising the question in that manner should be a person referred to in the first sentence of article 10, paragraph 1.

Paragraph 2

80. Article 10, paragraph 2 lists the documents or evidence that must be produced by the party seeking recognition and enforcement of an insolvency-related judgment. Subparagraph 2 (a) requires the production of a certified copy of the judgment. What constitutes a "certified copy" should be determined by reference to the law of the State in which the judgment was issued. Subparagraph 2 (b) requires the provision of any documents necessary to satisfy the condition that the judgment is effective and enforceable in the originating State, including information as to any current review of the judgment (see para. … on art. 9, para. 2 above), which could include information concerning the time limits for review.

81. In order to avoid refusal of recognition because of non-compliance with a mere technicality (e.g. where the applicant is unable to submit documents that in all details meet the requirements of art. 10, subparas. 2 (a) and (b)), subparagraph (c) allows evidence other than that specified in subparagraphs 2 (a) and (b) to be taken into account. That provision, however, does not compromise the court's power to insist on the presentation of evidence acceptable to it. It is advisable to maintain that flexibility in enacting the Model Law.

Paragraph 3

82. Paragraph 3 entitles, but does not compel, the court to require a translation of some or all of the documents submitted under paragraph 2. If that discretion is compatible with the procedures of the court, it may facilitate a decision being made on the application at the earliest possible time if the court is in a position to consider the request without the need for translation of the documents. The Model Law presumes that documents submitted in support of recognition and enforcement need not be authenticated in any special way, in particular by legalization: according to article 10, paragraph 4, the court is entitled to presume that those documents are authentic whether or not they have been legalized. "Legalization" is a term often used for the formality by which a diplomatic or consular agent of the State in which the document is to be produced certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp on the document.

Paragraph 4

83. It follows from article 10, paragraph 4, (according to which the court "is entitled to presume" the authenticity of documents submitted pursuant to paragraph 2) that the court retains discretion to decline to rely on the presumption of authenticity in the event of any doubt arising as to that authenticity or to conclude that evidence to the contrary prevails. This flexible solution takes into account the fact that the court may be able to assure itself that a particular document originates from a particular court even without it being legalized, but that in other cases the court may be unwilling to act on the basis of a foreign document that has not been legalized, in particular when documents emanate from a jurisdiction with which it is not familiar. The presumption is useful because legalization procedures may be cumbersome and time-consuming (e.g. because in some States they involve various authorities at different levels).

84. In respect of the provision relaxing any requirement of legalization, the question may arise whether that is in conflict with the international obligations of the enacting State. Several States are parties to bilateral or multilateral treaties on mutual recognition and legalization of documents, such as the Convention Abolishing the Requirement of Legalisation for Foreign Documents of 1961 [United Nations, Treaty Series, vol. 527, No. 7625] adopted under the auspices of the Hague Conference on Private International Law and providing specific, simplified procedures for the legalization of documents originating from signatory States. In many instances, however, the treaties on legalization of documents, like letters rogatory and similar formalities, leave in effect laws and regulations that have abolished or simplified legalization procedures; therefore, a conflict is unlikely to arise. For example, as stated in article 3, paragraph 2, of the above-mentioned convention:

> "However, [legalisation] cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more Contracting States have abolished or simplified it, or exempt the document itself from legalisation."

85. According to article 3 of the Model Law, if there is still a conflict between the Model Law and a treaty, the treaty will prevail.

Paragraph 5

86. Article 10, paragraph 5, requires the court to ensure that the party against whom the relief provided in the judgment is sought has the right to be heard on the application for recognition and enforcement. To ensure that the right can be enforced, the judgment debtor will require notice of the application for recognition and enforcement and of the details of the hearing. The Model Law leaves it up to the law of the enacting State to determine how that notice should be provided.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 62–63
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 72–75
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 70–71
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [22]–[25]
A/CN.9/898, paras. 25–26
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 28–32
A/CN.9/WG.V/WP.150

Article 11. Provisional relief

87. Article 11 deals with "urgently needed" relief that may be ordered at the discretion of the court and is available as of the moment recognition is sought. The rationale for making such relief available is to preserve the possibility that if the judgment is recognized and enforced, assets will be available to satisfy it, whether they are assets of the debtor in the insolvency proceeding to which the judgment relates or of the judgment debtor. The urgency of the measures is alluded to in the opening words of paragraph 1, while subparagraph 1 (a) restricts the stay to the disposition of assets of any party against whom the judgment was issued. Subparagraph 1 (b) provides for other relief, both legal and equitable, to be granted provided it is within the scope of the judgment for which recognition is sought. As drafted, paragraph 1 should be flexible enough to encompass an ex parte application for relief, where local law permits such a request. This is also reflected in paragraph 2.

Paragraph 2

88. The laws of many States contain requirements for notice to be given (either by the insolvency representative upon the order of the court or by the court itself) when relief of the type mentioned in article 11 is granted, except where it is sought on an ex parte basis (if that is permitted in the enacting State). Paragraph 2 is the appropriate place for the enacting State to make provision for such notice where it is required.

Paragraph 3

89. Relief available under article 11 is provisional in that, as provided in paragraph 3, it terminates when the issue of recognition is decided, unless extended by the court. The court might wish to do so, for example, to avoid a hiatus between any provisional measure issued before recognition and any measure that might be issued on or after recognition.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 82–83
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [40]
A/CN.9/898, para. 45
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 52–53
A/CN.9/WG.V/WP.150

Article 12. Decision to recognize and enforce an insolvency-related foreign judgment

90. The purpose of article 12 is to establish clear and predictable criteria for recognition and enforcement of an insolvency-related foreign judgment. If (a) the judgment is an "insolvency-related foreign judgment" (as defined in art. 2, subpara. (d)); (b) the requirements for recognition and enforcement have been met (i.e. the judgment is effective and enforceable in the originating State under art. 9); (c) recognition is sought by a person referred to in article 10, paragraph 1; (d) the documents or evidence required under article 10, paragraph 2 have been provided; (e) recognition is not contrary to public policy (art. 7); and (f) the judgment is not subject to any of the grounds for refusal (art. 13), recognition should be granted as a matter of course.

91. In deciding whether an insolvency-related foreign judgment should be recognized and enforced, the receiving court is limited to the preconditions set out in the Model Law. No provision is made for the receiving court to embark on a consideration of the merits of the foreign court's decision to issue the insolvency-related foreign judgment or issues related to the commencement of the insolvency proceeding to which the judgment is related. Nevertheless, in reaching its decision on recognition, the receiving court may have due regard to any decisions and orders made by the originating court and to any information that may have been presented to the originating court. Those orders or decisions are not binding on the receiving court in the enacting State, which is required to satisfy itself independently that the insolvency-related foreign judgment meets the requirements of article 2. Nevertheless, the court is entitled to rely, pursuant to the presumption in article 10, paragraph 4 (see para. …), on the information in the certificates and documents provided in support of the request for recognition. In appropriate circumstances that information would assist the receiving court in its deliberations.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 64
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 76–77
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 73
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [26]–[27]
A/CN.9/898, paras. 27–29
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 33
A/CN.9/WG.V/WP.150

Article 13. Grounds to refuse recognition and enforcement of an insolvency-related foreign judgment

92. Article 13 sets out the specific grounds on which recognition and enforcement of an insolvency-related foreign judgment might be refused. The list of grounds is intended to be exhaustive, so that grounds not mentioned would not apply. As noted above, provided the judgment meets the conditions of article 12, recognition is not prohibited under article 7, and the grounds set forth in article 13 do not apply, recognition of the judgment should follow. Although article 7 provides the basis for refusing recognition on the ground of public policy, article 13 repeats that limitation to emphasize the existence of that ground in addition to those specified in article 13. By indicating that recognition and enforcement may be refused, article 13 makes it clear that, even if one of the provisions of article 13 is applicable, the court is not obliged to refuse recognition and enforcement. In principle, the onus of establishing one or more of the grounds set out under article 13 rests upon the party opposing recognition or enforcement of the judgment.

Subparagraph (a) – notification of proceedings giving rise to the insolvency-related foreign judgment

93. Article 13, subparagraph (a) permits the court to refuse recognition and enforcement if the defendant in the proceeding giving rise to the insolvency-related foreign judgment was not properly notified of that proceeding. Two rules are involved: the first, in subparagraph (a) (i), is concerned with the interests of the defendant; the second, in subparagraph (a) (ii), is concerned with the interests of the receiving State.[17]

94. Subparagraph (a) (i) addresses failure to notify the defendant in sufficient time and in such a manner as to enable them to arrange a defence. This provision encompasses notification not only of the fact of the institution of the proceedings, but also of the essential elements of the claims made against the defendant in order to enable them to arrange their defence. The use of the word "notified" has no technical legal meaning, and simply requires the defendant to be placed in a position to inform him or herself of the claim and the content of the documentation relating to the institution of the proceedings. The test of whether notification has been given in sufficient time is purely a question of fact which depends on the circumstances of each case. The procedural rules of the originating court may afford guidance as to what might be required to satisfy the requirement, but would not be conclusive. Unfamiliarity with the local law and language and problems in finding a suitable lawyer may require a longer period than is prescribed under the law and practice of the originating court. The notification should also be effected "in such a manner" as to enable the defendant to arrange a defence, which may require that documents written in a language that the defendant is unlikely to understand will have to be accompanied by an accurate translation. The defendant would have to show not merely that notice was insufficient, but that the fact of insufficiency deprived them of a substantial defence or evidence which, as a matter of certainty and not merely of speculation, would have made a material difference to the outcome of the originating litigation. If that is not the case, it cannot be argued that the defendant was not enabled to arrange a defence.

95. The rule in subparagraph (a) (i) does not apply if the defendant entered an appearance and presented their case without contesting notification, even if they had insufficient time to prepare their case properly. This is to prevent the defendant raising issues at the enforcement stage that they could have raised in the original proceedings. In such a situation, the obvious remedy would have been for the defendant to seek an adjournment of the originating proceeding. If they failed to do this, they should not be entitled to put forward the lack of proper notification as a ground for non-recognition of the ensuing judgment. This rule does not apply if it was not possible to contest notification in the court of origin.

96. Subparagraph (a) (ii) addresses notification in a manner that was incompatible with fundamental principles of the receiving State concerning service of documents, but only applies where the receiving State is the State in which that notification took place. Many States have no objection to the service of a foreign writ on their territory without any participation by their authorities, as it is seen as a matter of conveying information. A foreign person can serve a writ in those jurisdictions simply by going there and handing it to the relevant person. Other States take a different view, considering that the service of a writ is a sovereign or official act and thus service on their territory without permission is an infringement of sovereignty. Permission would normally be given through an international agreement laying down the procedure to be followed. Such States would be unwilling to recognize a foreign judgment if the writ was served in a way that was regarded as an infringement of their sovereignty. Subparagraph (a) (ii) takes account of this point of view by providing that the court addressed may refuse to recognize and enforce the judgment if the writ was notified to the defendant in the receiving State in a manner that was incompatible with fundamental principles of that State concerning service of documents. Procedural

[17] Cf. art. 9, subparas. (c) (i) to (ii) of the 2005 Choice of Court Convention; this explanation is based on the Hartley/Dogauchi report, paras. 185–187.

irregularities that are capable of being cured retrospectively by the court in the receiving State would not be sufficient to justify refusal under this ground.

Subparagraph (b) – fraud

97. Article 13, subparagraph (b) sets out the ground of refusal that the judgment was obtained by fraud, which refers to a fraud committed in the course of the proceedings giving rise to the judgment.[18] It can be a fraud, which is sometimes collusive, as to the jurisdiction of the court. More often, it is a fraud practised by one party to the proceedings on the court or on the other party by producing false evidence or deliberately suppressing material evidence. Fraud involves a deliberate act; mere negligence does not suffice. Examples might include where the plaintiff deliberately serves the writ, or causes it to be served, on the wrong address; where the requesting party (typically the plaintiff) deliberately gives the party to be notified (typically the defendant) incorrect information as to the time and place of the hearing; or where either party seeks to corrupt or mislead a judge, juror or witness, or deliberately conceals key evidence. While in some legal systems fraud may be considered as falling within the scope of the public policy provision, this is not true for all legal systems. Accordingly, this provision is included as a form of clarification.

Subparagraphs (c)-(d) – inconsistency with another judgment

98. Article 13, subparagraphs (c) and (d) concern the situation in which there is a conflict between the judgment for which recognition and enforcement is sought and another judgment given in a dispute between the same parties.[19] Subparagraphs (c) and (d) are satisfied where the two judgments are inconsistent, where inconsistency would mean that the findings of fact or conclusions of law in relation to the same issues on which the judgments are based are mutually exclusive. The subparagraphs, however, operate in different ways.

99. Article 13, subparagraph (c) is concerned with the case where the inconsistent judgment was issued by a court in the receiving State. In such a situation, the receiving court is permitted to give preference to a judgment issued by a court in its own State, even if that judgment was issued after the conflicting judgment was issued by the originating court. For this provision to be satisfied, the parties must be the same, but it is not necessary for the cause of action to be the same. The requirement that the parties must be the same will be satisfied if the parties bound by the judgments are the same, even if the parties to the proceedings giving rise to the judgment are different, for example, where one judgment is against a particular person and the other judgment is against the successor to that person.[20]

100. Article 13, subparagraph (d) is concerned with the situation in which both judgments were issued by foreign courts. In that situation, a judgment may be refused recognition and enforcement only if (a) it was given after the conflicting judgment, so that priority in time is a relevant consideration; (b) the parties to the dispute are the same; (c) the subject matter is the same; and (d) the earlier conflicting judgment fulfils the conditions necessary for its recognition in the enacting State, whether under this Law, other national law or under a convention regime.

Subparagraph (e) – interference with insolvency proceedings

101. The first part of the subparagraph addresses the desirability of avoiding interference with the conduct and administration of the insolvency proceeding to which the judgment is related or other insolvency proceedings concerning the same insolvency debtor. The concept of interference is somewhat broad and may cover instances where recognition of the insolvency-related foreign judgment might upset cooperation between multiple insolvency proceedings or result in giving effect to a

[18] Cf. article 9, para. (d) of the 2005 Choice of Court Convention; Hartley/Dogauchi report, para. 188.

[19] Cf. article 9, paras. (f) and (g) of the 2005 Choice of Court Convention; the explanation of these grounds is based on the Hartley/Dogauchi report, paras. 191–193.

[20] Hartley/Dogauchi report, footnote 231.

judgment on a matter or cause of action that should have been pursued in the jurisdiction of the insolvency proceeding (e.g. because the insolvency proceeding is the main proceeding or is taking place in the State in which the assets that are the subject of the judgment are located). However, this ground should not be used as a basis for selective recognition of foreign judgments. It would not be justified as the sole reason for denying recognition and enforcement because, for example, it would deplete the value of the insolvency estate.

102. The second part of the subparagraph addresses the situation of concurrent insolvency proceedings, where insolvency proceedings have commenced in the receiving State or another State (distinct from the State of the proceeding giving rise to the judgment). Those insolvency proceedings must relate to the same debtor i.e. the debtor that is the subject of the insolvency proceeding to which the judgment is related. Inconsistency with a stay would typically arise where the stay permitted the commencement or continuation of individual actions to the extent necessary to preserve a claim, but did not permit subsequent recognition and enforcement of any ensuing judgment or where the stay did not permit the commencement or continuation of such individual actions and the proceeding giving rise to the judgment was commenced after the issue of the stay (and was thus potentially in violation of the stay).

Subparagraph (f) – judgments implicating the interests of creditors and other stakeholders

103. Subparagraph (f) would only apply to the judgments specified i.e., judgments directly affecting the rights of creditors and other stakeholders. The provision allows the receiving court to refuse recognition of such judgments where the interests of those parties were not taken into account and adequately protected in the proceeding giving rise to the judgment. The creditors and other stakeholders referred to would only be those whose interests might be affected by the foreign judgment. A creditor whose interests remain unaffected by, for example, a plan of reorganization or a voluntary restructuring agreement (e.g., because their claims are paid in full) would not have a right to oppose recognition and enforcement of a judgment under the provision.

104. Subparagraph (f) does not apply more generally to other types of insolvency-related judgments that resolve bilateral disputes between two parties. Even though such judgments may also affect creditors and other stakeholders, those effects are only indirect (e.g., via the judgment's effect on the size of the insolvency estate). In those instances, permitting a judgment debtor to resist recognition and enforcement by citing third-party interests could unnecessarily generate opportunities for wasteful relitigation of the cause of action giving rise to the judgment. For example, if a court in jurisdiction A determined that the debtor owned a particular asset and issued a judgment against a local creditor resolving that ownership dispute, and the insolvency representative then sought to enforce that judgment in jurisdiction B, the creditor should not be able to resist enforcement in B by raising arguments about the interests of other creditors and stakeholders that are not relevant to that dispute.

Subparagraph (g) – basis of jurisdiction of the originating court

105. Article 13, subparagraph (g) permits refusal of recognition and enforcement if the originating court did not satisfy one of the conditions listed in subparagraphs (i) to (iv); in other words, if the originating court exercised jurisdiction on a ground other than the ones listed, recognition and enforcement may be refused. As such, subparagraph (g) works differently to the other subparagraphs of article 13, each of which create a freestanding discretionary ground on which the court may refuse recognition and enforcement of a judgment; under subparagraph (g) one of the grounds must be met or recognition and enforcement of the judgment can be refused.

106. Subparagraph (g) can thus be seen as a broad exception, permitting refusal on grounds of inadequate jurisdiction in the originating court (as determined by the receiving court) with "safe harbours" that render the provision inapplicable if the originating court satisfies any one of them.

107. Subparagraph (g) (i) provides that the originating court's exercise of jurisdiction must be seen as adequate if the judgment debtor explicitly consented to that exercise of jurisdiction.

108. Subparagraph (g) (ii) provides that the originating court's exercise of jurisdiction must be seen as adequate if the judgment debtor submitted to the jurisdiction of the originating court by presenting their case without objecting to jurisdiction within any time frame applicable to such an objection, unless it was evident that such an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under the law of the originating State. In the above circumstances, the judgment debtor cannot resist recognition and enforcement by claiming that the originating court did not have jurisdiction. The method of raising the objection to jurisdiction is a matter for the law of the originating State. The decision by the defendant not to contest the jurisdiction must be made freely and on an informed basis. While the receiving court may not be under any obligation to satisfy itself independently that this was the case, it does not prevent a receiving court, in an appropriate case, from making inquiries where matters giving rise to concern become apparent.

109. Subparagraph (g) (iii) provides that the originating court's exercise of jurisdiction must be seen as adequate if it exercised jurisdiction on a basis on which the receiving court could have exercised jurisdiction if an analogous dispute had taken place in the receiving State. If the law of the receiving State would have permitted a court to exercise jurisdiction in parallel circumstances, the receiving court cannot refuse recognition and enforcement on the basis that the originating court did not properly exercise jurisdiction.

110. Subparagraph (g) (iv) is similar to subparagraph (g) (iii), but broader. While subparagraph (g) (iii) is limited to jurisdictional grounds explicitly permitted under the law of the receiving State, subparagraph (g) (iv) applies to any additional jurisdictional grounds which, while not explicitly grounds upon which the receiving court could have exercised jurisdiction, are nevertheless not incompatible with the law of the receiving State. The purpose of subparagraph (g) (iv) is to discourage courts from refusing recognition and enforcement of a judgment in cases in which the originating court's exercise of jurisdiction was not unreasonable, even if the precise basis of jurisdiction would not be available in the receiving State, provided it was not incompatible with the central tenets of procedural fairness in the receiving State.

Subparagraph (h) – judgments originating in certain States and relating only to assets

111. This subparagraph is an optional provision that States enacting the MLCBI might wish to consider adopting. It relies upon the MLCBI framework of recognition of specific types of foreign proceedings (i.e. main or non-main proceedings) and addresses the situation of a judgment issued in a State that is not the location of either the COMI or an establishment of the debtor, where the judgment relates only to assets that were located in that State at the time the originating proceeding commenced. In those circumstances it may be useful for that judgment to be recognized because, for example, it resolves issues of ownership that are relevant to the insolvency estate and that could only be resolved in that jurisdiction, rather than in the jurisdiction of the debtor's COMI or establishment. By facilitating the recognition and enforcement of such judgments, the Model Law could facilitate the recovery of additional assets for the insolvency estate, as well as the resolution of disputes relating to those assets. The provision is nevertheless designed to help ensure that the Model Law framework is not undermined by the recognition and enforcement of judgments resolving issues that should have been resolved in the State where the debtor has or had its COMI or an establishment.

112. The chapeau of article 13, subparagraph (h) establishes the key principle that recognition of an insolvency-related foreign judgment can be refused when the judgment originates from a State whose insolvency proceeding is not susceptible of recognition under the MLCBI; this may because that State is neither the location of the insolvency debtor's COMI nor of an establishment. The language of the chapeau does not require an insolvency proceeding to have actually commenced in the State

from which the judgment originates, only that were such a proceeding to commence in that State it would be susceptible of recognition. For example, an insolvency debtor has its COMI in State A and an establishment in State B, but only a main proceeding in A has commenced and no non-main insolvency proceeding has yet commenced in B. Some other litigation in B results in an insolvency-related judgment that is relevant to the insolvency estate. The insolvency representative from A wants to seek recognition or enforcement of the insolvency-related judgment from B in State C, which has enacted the Model Law and the MLCBI. The court in C would see that the judgment comes from a State whose [insolvency] proceeding would be recognizable under the MLCBI (i.e. the debtor has an establishment in B and a non-main proceeding could thus be commenced), even though no such recognizable proceeding has yet commenced in B. The receiving court thus cannot refuse recognition on the basis of article 13, subparagraph (h).

113. Subparagraphs (h) (i) and (ii) outline two conditions that must be met in order to establish an exception to the general principle of non-recognition. Subparagraph (h) (i) requires the insolvency representative of an insolvency proceeding that is or could have been recognized under the law giving effect to the MLCBI in the enacting State (i.e. the insolvency representative of a main or non-main proceeding) to have participated in the proceeding giving rise to the judgment, where that participation involved engaging with the substantive merits of the cause of action being pursued. Subparagraph (h) (ii), which adds to the requirement in subparagraph (h) (i), requires the judgment in question to have related only to assets that were located in the State in which the judgment was issued at the time of commencement of the proceeding giving rise to the judgment.

114. With regard to the reference to "assets", the broad definition of "assets of the debtor" (meaning the insolvency debtor) in the Legislative Guide[21] might be noted, even though it may not be applicable to all circumstances arising under the current tex. It may be sufficiently broad to cover, for example, intellectual property registered in the originating State where it is neither the debtor's COMI nor a State in which the debtor has an establishment.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 65–69
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 76–77
A/CN.9/WG.V/WP.138
A/CN.9/WG.V/WP.140, paras. 6–9
A/CN.9/870, paras. 73, 76, 79
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [28]–[37]
A/CN.9/898, paras. 27–29
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 34–48, 79–82
A/CN.9/WG.V/WP.150

Article 14. Equivalent effect

115. Article 14, paragraph 1 provides that an insolvency-related foreign judgment recognized and enforceable under the Model Law should be given the same effect in the receiving State [as it had in the originating State i.e. the effect in the originating State is exported to the receiving State] [as it would have had if it been issued in the receiving State i.e. the effect would be equivalent to the effect such a judgment would have if issued in the receiving State].

[21] Legislative Guide, Introd., para. 12 (b): "'Assets of the debtor': property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor's interests in encumbered assets or in third party-owned assets."

116. Paragraph 2 provides that where the insolvency-related foreign judgment provides for relief that is not available or not known in the receiving State, the court should provide relief that has equivalent effects (as opposed to relief that is merely "formally" equivalent), and give effect to the judgment to the extent permissible under its national law. The receiving court is not required to provide relief that is not available under its national law, but is authorized, as far as is possible, to adapt the relief granted by the originating court to a measure known in the receiving court, but not exceeding the effects the relief granted in the judgment would have under the law of the originating State. This provision enhances the practical effectiveness of judgments and aims at ensuring that the successful party receives meaningful relief.

117. Two types of situations can trigger this provision. First, where the receiving State does not know the relief granted in the originating court. For example, [*provide an insolvency-related example*].

118. Secondly, where the receiving State knows a type of relief that is "formally", but not "substantively" equivalent. Although provisional measures are not to be considered as insolvency-related foreign judgments for the purposes of the Model Law, a stay preventing a defendant from disposing of his or her assets may provide an illustration of how this article operates, as such a stay can have *in personam* or *in rem* effects, depending on the jurisdiction. Where recognition of a stay issued by a State that characterizes stays as having *in rem* effects is sought in a State that only grants such orders *in personam* effects, article 14 would be satisfied by the receiving court enforcing the stay, but only with *in personam* effects. On the other hand, when the originating court issued a stay with only *in personam* effects and recognition of this order was sought in a State whose national law granted such a stay *in rem* effects, the receiving court would not comply with article 14 if it enforced the stay with *in rem* effects in accordance with national law, as that would go beyond the effects granted under the law of the originating State.[22]

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.138
A/CN.9/870, para. 78
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [38]
A/CN.9/898, para. 43
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 49, 83
A/CN.9/WG.V/WP.150

Article 15. Severability

119. Article 15 aims to increase the predictability of the Model Law and encourages reliance on the judgment in cases where recognition or enforcement of the judgment as a whole might not be possible.[23] In those circumstances, the receiving court should not be able to refuse recognition and enforcement of one part of the judgment on the basis that another part is not recognizable and enforceable; the severable part of the judgment should be treated in the same manner as a judgment that is wholly recognizable and enforceable.

120. Recognition and enforcement of the judgment as a whole might not be possible where some of the orders included in the judgment fall outside the scope of the Model Law, are contrary to the public policy of the receiving State or, because they are interim orders, are not yet enforceable in the originating State. It may also be the case that only some parts of the judgment are relevant to the receiving State. In such cases, the severable part of a judgment could be recognized and enforced, if that part is

[22] See para. 207, Explanatory note providing background on the proposed draft text and identifying outstanding issues, Prel. Doc. No. 2, April 2016, prepared by the Permanent Bureau of the Hague Conference on private international law for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments.

[23] See art. 15, 2005 Choice of Court Convention; Hartley/Dogauchi report, para. 217.

capable of standing alone. This would normally depend on whether recognizing and enforcing only that part of the judgment would significantly change the obligations of the parties. Where this question raises issues of law, they would be determined by the law of the receiving State.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 80–81
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [39]
A/CN.9/898, para. 44
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 50–51
A/CN.9/WG.V/WP.150

Article X. Recognition of an insolvency-related judgment under [*insert a cross reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*]

121. As noted above (para. …), it has been suggested, under some interpretations of the MLCBI, that since the provisions on relief (principally art. 21) make no specific reference to the recognition and enforcement of an insolvency-related judgment, recognition and enforcement of such a judgment is not available as a form of relief. The purpose of article X is to clarify the interpretation of article 21 as meaning that the relief available under article 21 of the MLCBI includes recognition and enforcement of an insolvency-related judgment. If article 21 is interpreted in that manner, any relief granted would be subject to the applicable provisions of the MLCBI (e.g. art. 22).

Discussion in UNCITRAL and the Working Group

A/CN.9/898, paras. 40–41
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 54–57, 84–85
A/CN.9/WG.V/WP.150

VI. Assistance from the UNCITRAL Secretariat

A. Assistance in drafting legislation

122. The UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the Model Law. Further information may be obtained from the UNCITRAL secretariat (mailing address: Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria; telephone: (+43-1) 26060-4060; fax: (+43-1) 26060-5813; email: uncitral@uncitral.org; Internet home page: http://www.uncitral.org).

B. Information on the interpretation of legislation based on the Model Law

123. The Model Law is included in the Case Law on UNCITRAL Texts (CLOUT) information system, which is used for collecting and disseminating information on case law relating to the conventions and model laws developed by UNCITRAL. The purpose of the system is to promote international awareness of those legislative texts and to facilitate their uniform interpretation and application. The Secretariat publishes abstracts of decisions in the six official languages of the United Nations and the full, original decisions are available, upon request. The system is explained in a user's guide that is available on the above-mentioned Internet home page of UNCITRAL.

D. Note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: draft legislative provisions

(A/CN.9/WG.V/WP.152)

[Original: English]

Contents

I. Introduction

1. At its forty-fourth session in December 2013, following a three-day colloquium, the Working Group agreed to continue its work on the cross-border insolvency of multinational enterprise groups[1] by developing provisions on a number of issues that would extend the existing articles of the UNCITRAL Model Law on Cross-Border Insolvency (the MLCBI) and part three of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide), as well as involving reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. While the Working Group considered that those provisions might, for example, form a set of model provisions or a supplement to the existing MLCBI, it noted that the precise form they might take could be decided as the work progressed.

2. At its forty-fifth (April 2014), forty-sixth (December 2014) and forty-seventh (May 2015) sessions, the Working Group considered the goals of a text that might be developed to facilitate the cross-border insolvency of multinational enterprise groups; the key elements of such a text, including those that might be based upon part three of the Legislative Guide and on the MLCBI; and the form that the text might take, noting that some of the key elements lent themselves to being developed as a model law, while others were perhaps more in the nature of provisions that might be included in a legislative guide (A/CN.9/WG.V/WP.120, 124 and 128 respectively).

3. At its forty-eighth session (December 2015), the Working Group agreed a set of key principles for a regime to address cross-border insolvency in the context of enterprise groups (A/CN.9/WG.V/WP.133) and considered a number of draft provisions addressing three main areas (A/CN.9/WG.V/WP.134): (a) coordination and cooperation of insolvency proceedings relating to an enterprise group; (b) elements needed for the development and approval of a group insolvency solution involving multiple entities; and (c) the use of so-called "synthetic proceedings" in lieu of commencing non-main proceedings. Two additional supplemental areas were also considered. These might include (d) the use of so-called "synthetic proceedings" in lieu of commencing main proceedings, and (e) approval of a group insolvency solution on a more streamlined basis by reference to the adequate protection of the interests of creditors of affected group members.

[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), subpara. 259 (a); A/CN.9/763, paras. 13–14; *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 326.

4. At its forty-ninth session (May 2016), the Working Group considered a consolidated draft legislative text incorporating the agreed key principles and draft provisions addressing the five areas indicated in paragraph 3 (A/CN.9/WG.V/WP.137 and Add.1). That draft text was further considered at the fiftieth (December 2016) and fifty-first (May 2017) sessions (A/CN.9/WG.V/WP.142 and Add.1 and A/CN.9/WG.V/WP.146 respectively).

5. The draft text below reflects the discussion and decisions taken at the fifty-first session and the revisions the Secretariat was requested to make, together with various suggestions and proposals arising from the Secretariat's work on the draft text.

6. As a general issue applicable to the draft text, the Working Group agreed at its fifty-first session (A/CN.9/903, para. 112) that the distinction between group members "subject to" and "participating in" insolvency proceedings should be carefully considered in the articles in which those phrases were used. The Working Group may wish to review that usage at the fifty-second session.

7. A further issue for consideration concerns the title of the document and the form in which it might be finalized. The title currently refers to "legislative provisions", but several articles (e.g. preamble, articles 1, 2 bis, 2 ter, 2 quater and 19) include references to "this Law", which would be consistent with a model law text. A related question concerns whether the division of the text into parts A and B should be retained, part A being chapters 1–5 and part B being the supplemental provisions. An alternative approach might be to dispense with parts A and B and have 6 chapters, with the supplemental provisions set forth in chapter 6.

II. Draft legislative provisions on facilitating the cross-border insolvency of multinational enterprise groups

[Part A]

Chapter 1. General Provisions

Preamble

The purpose of this Law is to provide effective mechanisms to address cases of cross-border insolvency affecting the members of an enterprise group, in order to promote the objectives of:

(a) Cooperation between courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency affecting members of an enterprise group;

(b) Cooperation between insolvency representatives appointed in this State and foreign States in cases of cross-border insolvency affecting members of an enterprise group;

(c) Development of a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States;

(d) Fair and efficient administration of cross-border insolvencies concerning enterprise group members that protects the interests of all creditors and other interested persons, including the debtors;

(e) Protection and maximization of the overall combined value of the operations and assets of enterprise group members affected by insolvency and of the enterprise group as a whole;

(f) Facilitation of the rescue of financially troubled enterprise groups, thereby protecting investment and preserving employment; and

(g) Adequate protection of the interests of the creditors of each group member participating in a group insolvency solution.

Article 1. Scope

Variant 1

This Law applies to cooperation and the conduct and administration of insolvency proceedings in the context of the cross-border insolvency of multinational enterprise groups.

Variant 2

This Law applies to the insolvency of members of a multinational enterprise group, including the conduct and administration of insolvency proceedings for those enterprise group members and cross-border cooperation between those proceedings.

Notes on article 1

1. Draft article 1 has been revised as in accordance with the report of the fifty-first session (A/CN.9/903, para. 87), with addition of the words "and the conduct and administration of insolvency proceedings" after the word "cooperation".

2. Variant 1 reflects the previous drafting of the article; variant 2 is a proposal by the Secretariat. The drafting of variant 1 is somewhat inaccurate as it limits the scope to the context of cross-border insolvency of enterprise groups. Since chapter 3 concerns insolvency proceedings conducted in the enacting State, the reference to cross-border insolvency is not entirely accurate. The Working Group may wish to consider whether article 1 should reflect both of those elements.

Article 2. Definitions

For the purposes of these provisions:

(a) "Enterprise" means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;

(b) "Enterprise group" means two or more enterprises that are interconnected by control or significant ownership;

(c) "Control" means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;

(d) "Enterprise group member" means an enterprise [referred to] [as defined] in subparagraph (a), which forms part of an enterprise group as defined in subparagraph (b);

(e) "Group representative" means a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding;

Variant 1 of subparagraph (f)

(f) "Group insolvency solution" means a set of proposals developed in a planning proceeding:

(i) For the reorganization, sale, or liquidation of some or all of the operations or assets of one or more enterprise group members;

(ii) With the goal of preserving or enhancing the overall combined value of the enterprise group members involved;

Variant 2 of subparagraph (f)

(f) "Group insolvency solution" means a set of proposals developed in a planning proceeding for the reorganization, sale, or liquidation of some or all of the operations or assets of one or more enterprise group members, with the goal of preserving or enhancing the overall combined value of the group members involved;

(g) "Planning proceeding" means a main proceeding:

(i) Commenced in respect of an enterprise group member, which is a necessary and integral part of a group insolvency solution;

(ii) In which one or more enterprise group members are participating for the purpose of developing and implementing a group insolvency solution; and

(iii) In which a group representative has been appointed.

Notes on article 2

3. Variant 1 of subparagraph (f) (ii) of the definition of "group insolvency solution" has been revised in accordance with the report of the fifty-first session (A/CN.9/903, para. 89), including by deleting what was previously subparagraph (iii) (referring to approval of a group insolvency solution) on the basis that that issue is addressed in article 20.

4. Variant 2 of subparagraph (f) is proposed by the Secretariat on the basis that, with the deletion of what was formerly subparagraph (f)(iii), the remaining elements of the definition might be combined in a single paragraph to simplify the drafting.

Article 2 bis. Jurisdiction of the enacting State

Where the centre of main interests of an enterprise group member is located in this State, nothing in this Law is intended to:

(a) Limit the jurisdiction of the courts of this State with respect to that enterprise group member;

(b) Limit any process or procedure (including any permission, consent or approval) required in this State in respect of that enterprise group member's participation in a group insolvency solution being developed in another State;

(c) Limit the commencement of insolvency proceedings in this State under [*identify laws of the enacting State relating to insolvency*], if required or requested to address the insolvency of that enterprise group member; or

(d) Create an obligation to commence insolvency proceedings in this State when [there is no obligation to commence such proceedings] [no such obligation exists].

Notes on article 2 bis

5. Article 2 bis has been revised in accordance with the report of the fifty-first session (A/CN.9/903, para. 92), in particular revising the second sentence of subparagraph (c) to become new subparagraph (d). The alternative words at the end of subparagraph (d) are proposed in order to simplify the drafting.

Article 2 ter. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

Article 2 quater. Competent court or authority

The functions referred to in this Law relating to the recognition of an insolvency proceeding or a planning proceeding and cooperation with foreign courts shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

Chapter 2. Cooperation and coordination

Article 3. Cooperation and direct communication between a court of this State and foreign courts, foreign representatives and a group representative

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts, foreign representatives and a group representative, where appointed, either directly or through a [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] or other person appointed to act at the direction of the court.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts, foreign representatives or a group representative, where appointed.

Article 4. Cooperation to the maximum extent possible under article 3

For the purposes of article 3, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Communication of information by any means considered appropriate by the court;

(b) Participation in communication with the foreign court, a foreign representative or a group representative, where appointed;

(c) Coordination of the administration and supervision of the affairs of the enterprise group members;

(d) Coordination of concurrent proceedings commenced with respect to enterprise group members;

(e) Appointment of a person or body to act at the direction of the court;

(f) Approval and implementation of agreements concerning the coordination of proceedings relating to two or more enterprise group members located in different States, including where a group insolvency solution is being developed;

(g) Cooperation among courts as to how to allocate and provide for the costs associated with cross-border cooperation and communication;

(h) Use of mediation or, with the consent of the parties, arbitration, to resolve disputes between enterprise group members concerning claims;

(i) Approval of the treatment of claims between enterprise group members;

(j) Recognition of the cross-filing of claims by or on behalf of enterprise group members and their creditors; and

(k) [*The enacting State may wish to list additional forms or examples of cooperation*].

Notes on article 4

6. In accordance with the report of the fifty-first session (A/CN.9/903, para. 95) article 4, the words “For the purposes of article 3” have been moved to the beginning of the chapeau, subparagraph (f) has been deleted on the basis that it could be addressed in chapter 5 and the subparagraphs have been renumbered.

Article 5. Limitation of the effect of communication under article 3

1. With respect to communication under article 3, the court is entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.

2. Participation by a court in communication pursuant to article 3, paragraph 2, does not imply:

(a) A waiver or compromise by the court of any powers, responsibilities or authority;

(b) A substantive determination of any matter before the court;

(c) A waiver by any of the parties of any of their substantive or procedural rights;

(d) A diminution of the effect of any of the orders made by the court;

(e) Submission to the jurisdiction of other courts participating in the communication; or

(f) Any limitation, extension or enlargement of the jurisdiction of the participating courts.

Notes on article 5

7. A cross-reference to article 3 has been added to article 5, paragraph 1 in accordance with the report of the fifty-first session (A/CN.9/903, para. 96).

Article 6. Coordination of hearings

1. The court may conduct a hearing in coordination with a foreign court.

2. The substantive and procedural rights of the parties and the jurisdiction of the court may be safeguarded by the parties reaching agreement on the conditions to govern the coordinated hearing and the court approving that agreement.

3. Notwithstanding the coordination of the hearing, the court remains responsible for reaching its own decision on the matters before it.

Notes on article 6

8. Article 6 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, para. 97), replacing the references to "each court" with the words "the court" in paragraphs 1 and 2 and in paragraph 2, adding the words "the parties" before the words "reaching agreement" and the words "and the court approving that agreement" at the end of the paragraph.

Article 7. Cooperation and direct communication between a group representative, foreign representatives and foreign courts

1. A group representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives of other enterprise group members to facilitate the development and implementation of a group insolvency solution.

2. A group representative is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from foreign courts and foreign representatives of other enterprise group members.

Article 7 bis. Cooperation and direct communication between a [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*]**, foreign courts, foreign representatives and a group representative**

1. A [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts, foreign representatives of other enterprise group members and a group representative, where appointed.

2. A [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from foreign courts, foreign representatives of other enterprise group members and a group representative, where appointed.

Notes on articles 7 and 7 bis

9. The references in paragraph 1 of both articles 7 and 7 bis to article 1 have been deleted in accordance with the report of the fifty-first session (A/CN.9/903, paras. 98 and 99).

Article 8. Cooperation to the maximum extent possible under articles 7 and 7 bis

For the purposes of article 7 and article 7 bis, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning enterprise group members, provided appropriate arrangements are made to protect confidential information;

(b) Negotiation of agreements concerning the coordination of proceedings relating to two or more enterprise group members located in different States, including where a group insolvency solution is being developed;

(c) Allocation of responsibilities between a [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*], a foreign representative and a group representative, where appointed;

(d) Coordination of the administration and supervision of the affairs of the enterprise group members; and

(e) Coordination with respect to the development and implementation of a group insolvency solution, where applicable.

Article 9. Authority to enter into agreements concerning the coordination of proceedings

A [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] may enter into an agreement concerning the coordination of proceedings involving two or more enterprise group members located in different States, including where a group insolvency solution is being developed.

Notes on article 9

10. Draft article 9 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, para. 101) in order to identify the parties that might enter into the types of agreement that are the subject of the draft article.

Article 10. Appointment of a single or the same insolvency representative

1. The court may coordinate with foreign courts with respect to the appointment and recognition of a single or the same insolvency representative to administer and coordinate insolvency proceedings concerning members of the same enterprise group in different States.

2. The appointment of an insolvency representative in this State and in another State under paragraph 1 does not diminish the obligations of the insolvency representative under the law of this State.

Article 11. Participation by enterprise group members in a proceeding under [*identify laws of the enacting State relating to insolvency*]

1. Subject to paragraph 2, if a proceeding under [*identify laws of the enacting State relating to insolvency*] has commenced with respect to an enterprise group member whose centre of main interests is located in this State, any other enterprise group member may participate in that proceeding, including for the purpose of developing and implementing a group insolvency solution.

2. An enterprise group member whose centre of main interests is located in another State may participate in a proceeding referred to in paragraph 1 unless a court in that other State prohibits it from so doing.

3. Participation in a proceeding referred to in paragraph 1 does not subject an enterprise group member to the jurisdiction of the courts of this State. Participation means that the enterprise group member has the right to appear, make written submissions and be heard in that proceeding on matters affecting that enterprise group

member's interests and to take part in the development and implementation of a group insolvency solution.

4. Participation by any other enterprise group member in a proceeding referred to in paragraph 1 is voluntary. An enterprise group member may commence its participation or opt out of participation at any stage of such a proceeding.

5. A participating enterprise group member shall be notified of actions taken with respect to the development of a group insolvency solution.

Notes on article 11

11. In accordance with the report of the fifty-first session, article 11 has been moved from chapter 3 to chapter 2 of the draft text (A/CN.9/903, paras. 104 and 105). The word "including" has been added to paragraph 1; the word "prohibits" has been retained in paragraph 2; and the word "participate" in paragraph 3 has been replaced with the words "take part" (A/CN.9/903, paras. 103 and 105). Since the addition of the word "including" in paragraph 1 indicates that the development of a group insolvency solution is only one possible purpose for participation, paragraphs 3 and 5 might need to be revised to accommodate that change to paragraph 1, particularly in respect of references to a group solution in paragraphs 3 and 5. One solution might be to add to the second sentence of paragraph 3 the words "and, in particular" before the words "to take part in ..." and the words "where applicable" at the end of the provision. The second sentence of paragraph 3 would then read:

> "Participation means that the enterprise group member has the right to appear, make written submissions and be heard in that proceeding on matters affecting that enterprise group member's interests and, in particular, to take part in the development and implementation of a group insolvency solution, where applicable."

The words "where applicable" might also be added at the end of paragraph 5.

Chapter 3. Conduct of a planning proceeding in this State

Article 12. Appointment of a group representative

1. When one or more enterprise group members participate in a proceeding referred to in article 11, and the requirements of article 2, subparagraphs (g)[(i) and (ii)] are otherwise met, the court may appoint a group representative, by which the proceeding becomes a planning proceeding.

2. [*Specify the procedure for appointment of a group representative.*]

3. [A group representative is authorized to seek relief in this State to support the development and implementation of a group insolvency solution.]

4. A group representative is authorized to act in a foreign State on behalf of a planning proceeding [as permitted by the applicable foreign law] and, in particular, to:

(a) Seek recognition of the planning proceeding and relief to support the development and implementation of the group insolvency solution;

(b) Seek to participate in a foreign proceeding relating to an enterprise group member participating in the planning proceeding; and

(c) Seek to participate in a foreign proceeding relating to an enterprise group member not participating in the planning proceeding.

Notes on article 12

12. The chapeau of article 12 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, para. 107), adding a cross-reference to article 2, subparagraph (g) and revising the closing words. The Working Group did not discuss the square brackets around paragraph 3 or included in paragraph 4.

13. The reference to subparagraph (g) may need to be limited to subparagraphs (g)(i) and (g)(ii), as subparagraph (g)(iii) refers to the appointment of the group

representative, which is addressed in the following phrase of paragraph 1. In addition, the definition of "planning proceeding" refers only to the appointment of a group representative without specifying how that appointment is made, while article 12, paragraph 1 refers to appointment by the court. The Working Group may wish to consider whether article 12, paragraph 1 should adopt the same approach as the definition of that term and thus delete the reference to appointment by the court. If the preference is to retain the reference to appointment by the court, paragraph 2 may not be required.

Article 13. Relief available to a planning proceeding

1. To the extent needed to preserve the possibility of developing [or implementing] a group insolvency solution or to protect the assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court, at the request of the group representative, may grant any of the following relief:

(a) Staying execution against the assets of the enterprise group member;

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Staying any insolvency proceedings concerning a participating enterprise group member;

(d) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(e) Entrusting the administration or realization of all or part of the assets of the enterprise group member that are located in this State to the group representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy;

(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

(g) Recognizing arrangements concerning the funding of enterprise group members participating in the planning proceeding where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply; and

(h) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that enterprise group member is not subject to insolvency proceedings [in any jurisdiction].

3. With respect to the assets or operations located in this State of an enterprise group member that has its centre of main interests in another State, relief under this article may only be granted if that relief does not interfere with the [conduct and] administration of insolvency proceedings taking place in that State.

Notes on article 13

14. Article 13 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, paras. 110–112).

Paragraph 1

15. The text formerly in square brackets in paragraph 1 has been retained so that the article applies to enterprise group members both subject to *and* participating in a

planning proceeding. The phrase "solution and to protect" has been amended to "solution or to protect". The Working Group noted that the distinction between enterprise group members "subject to and participating in" a planning proceeding needed to be carefully considered throughout the text. To align articles 13, 15 and 17, the words "or implementing" a group insolvency solution might be added to article 13, paragraph 1.

Subparagraphs 1(c) and (d)

16. The word "temporarily" in reference to the stay in subparagraph (c) has been deleted and the word "insolvency" retained. The references to "the enterprise group member's assets" in subparagraphs (d), (e) and (f) have been changed to refer to "the assets of the enterprise group member" to ensure consistency of usage in the draft text (this drafting has been revised throughout the text).

Subparagraph 1(e)

17. The Working Group may wish to consider whether subparagraph (e) raises the same concerns regarding the powers of the group representative as addressed at the last session (e.g. A/CN.9/903, para. 116) and reflected in amendments made to articles 15, subparagraph 1(e) and 17, subparagraph 1(f) and paragraph 2 (see notes to articles 15 and 17 below).

Subparagraph 1(g)

18. The text formerly in square brackets in subparagraph (g) referring to enterprise group members participating in the planning proceeding has been retained. The relief available under article 13, subparagraph 1(g) appears to be limited to enterprise group members participating in the planning proceeding, whereas the chapeau refers to relief being available under article 13 in respect of group members both subject to and participating in a planning proceeding. The Working Group may wish to consider whether the limitation under subparagraph 1(g) is appropriate and whether the drafting needs to be clarified to ensure that the meaning of the provision is clear.

19. The proviso in article 13, subparagraph (g) "subject to any appropriate safeguards the court may apply" is already contained in article 19, paragraph 2 and thus may not be required in article 13. The guide to enactment of article 13 could draw attention to the relevance of article 19. This observation applies also to the same references in articles 15, subparagraph 1(g) and 17, subparagraph 1(h).

Paragraph 2

20. A new paragraph 2, based upon article 15, paragraph 4, has been added to this article and to article 17 in accordance with the report of the fifty-first session (A/CN.9/903, para. 122) to preclude relief from being granted with respect to the assets of a "solvent" enterprise group member (here described as one not subject to insolvency proceedings) participating in the planning proceeding; square brackets remain around the words "[in any jurisdiction]" in this article, as well as the equivalent paragraphs of articles 15 and 17.

21. The Working Group may wish to consider whether the words "not subject to insolvency proceedings" would inadvertently prevent relief being granted with respect to an insolvent group member for which a court had decided, under articles 21 bis or 22 bis, not to commence an insolvency proceeding as part of the group insolvency solution. To address that concern, additional language might be added to article 13, paragraph 2 (and the equivalent paragraphs of articles 15 and 17) along the lines of "unless not commencing an insolvency proceeding is an element of the proposals being developed in the planning proceeding." The guide to enactment could explain the relevance of articles 21 bis and 22 bis to this provision (and to the equivalent paragraphs of articles 15 and 17).

22. The Working Group may also wish to consider whether adding words to the effect that the group member was not eligible for insolvency proceedings to commence might further clarify the drafting.

Paragraph 3

23. The alternative text in paragraph 3, referring to interference with insolvency proceedings, has been retained in preference to the test of incompatibility with relief granted in insolvency proceedings. The Working Group may wish to consider adding the words "conduct and" before the word "administration" in paragraph 3 to reflect the drafting of article 1.

24. The Working Group may also wish to consider whether, in order to simplify the text, article 13, paragraphs 2 and 3, article 15, paragraphs 4 and 5 and article 17, paragraphs 3 and 4 might be set out in a separate article with appropriate cross-references.

Chapter 4. Recognition of a foreign planning proceeding and relief

Article 14. Application for recognition of a foreign planning proceeding

1. A group representative may apply in this State for recognition of the planning proceeding to which the group representative was appointed.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision appointing the group representative;

(b) A certificate from the foreign court affirming the appointment of the group representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the appointment of the group representative.

3. An application for recognition shall also be accompanied by:

(a) Evidence identifying each enterprise group member participating in the planning proceeding;

(b) A statement identifying all members of the enterprise group and all proceedings commenced in respect of enterprise group members participating in the planning proceeding that are known to the group representative; and

(c) A statement to the effect that the enterprise group member subject to the planning proceeding has its centre of main interests in the jurisdiction where the planning proceeding is taking place and that that proceeding is likely to result in added overall combined value for the enterprise group members involved.

4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Notes on article 14

25. Article 14 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, paras. 113 and 114). The references to evidence relating to the commencement of the proceeding designated as the planning proceeding have been deleted in subparagraphs 2(a), (b) and (c), so that the evidence required is limited to the appointment of the group representative. The second sentence of subparagraph 3(a), which referred to evidence of the approval for a group member to participate in the planning proceeding, has also been deleted. The square brackets have been removed from subparagraph 3(b).

26. The Working Group may wish to consider whether additional paragraphs might be required in draft article 14 to address: (i) the issue of legalization, along the lines of article 16, paragraph 2 of the MLCBI and article 10, paragraph 4 of the draft model law on the recognition and enforcement of insolvency-related judgments (see A/CN.9/WG.V/WP.150); and (ii) the presumption contained in article 16, paragraph 1 of the MLCBI. The requirement for such additions may depend, in part, on the form the draft instrument takes and whether articles of the MLCBI are to be incorporated by reference.

Subparagraphs 3(a) and (b)

27. The current drafting of subparagraphs (a) and (b) may require some further consideration, particularly with respect to the requirements for "evidence" in subparagraph (a) and "a statement" in subparagraph (b). The Working Group may also wish to consider whether the phrase "known to the group representative" applies to both elements of subparagraph (b).

Subparagraph 3(c)

28. The Working Group may wish to consider whether the first part of article 14, subparagraph 3(c) is required, in view of the requirement in article 12 that a proceeding can only become a planning proceeding if it is a proceeding commenced under article 11 at the centre of main interests (COMI) of a group member and that proceeding otherwise meets the requirements of article 2, subparagraph (g) (including that the group member is a necessary and integral part of a group insolvency solution). If the Working Group were to include in article 14 a presumption along the lines mentioned in paragraph 26 above, the court could rely upon the decision of the originating court and presume that the group member subject to the planning proceeding did have its COMI in the jurisdiction in which the planning proceeding was taking place, unless there was reason to seek further evidence on that point. The statement referred to in the first part of article 14, subparagraph 3(c) might then not be required.

29. The Working Group may wish to consider whether the reference in the second part of article 14, subparagraph 3(c) should be to the planning proceeding resulting in additional value or to the group insolvency solution. The definition of a group insolvency solution refers to the notion of preserving or enhancing overall combined value, whereas the definition of a planning proceeding includes no such notion. Moreover, while a group insolvency solution can be developed in a planning proceeding (in accordance with the definition of that term), there is no requirement for a planning proceeding to develop a group insolvency solution. As currently drafted, the reference to added value appears disconnected from the overall purpose of the text of the draft article.

30. The Working Group may wish to consider providing clearer drafting than the reference at the end of subparagraph 3(c) to group members "involved", referring instead, for example, to group members "subject to or participating in" the planning proceeding.

Article 15. [Interim] [Provisional] relief that may be granted upon application for recognition of a foreign planning proceeding

1. From the time of filing an application for recognition until the application is decided upon, where relief is urgently needed to preserve the possibility of developing or implementing a group insolvency solution or to protect the assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court may, at the request of the group representative, grant [appropriate] relief of a provisional nature, including:

(a) Staying execution against the assets of the enterprise group member;

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Staying any insolvency proceedings concerning the enterprise group member;

(d) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(e) In order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the administration or realization of all or part of the

assets of the enterprise group member that are located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member that are located in this State, the group representative or another person designated by the court may be entrusted with that task;

(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

(g) Recognizing arrangements concerning the funding of enterprise group members participating in the planning proceeding where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply; and

(h) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. [*Insert provisions of the enacting State relating to notice*.]

3. Unless extended under article 17, subparagraph 1(a), the relief granted under this article terminates when the application for recognition is decided upon.

4. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that group member is not subject to insolvency proceedings [in any jurisdiction].

5. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place in the centre of main interests of an enterprise group member participating in the planning proceeding.

Notes on article 15

31. Article 15 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, paras. 115–119).

Title of article 15

32. The Working Group may wish to consider whether the title of article 15 should refer to "Provisional relief" rather than to "Interim relief" to provide consistency with the chapeau of paragraph 1 of the article or whether it might refer only to "Relief that may be granted … ". It might be noted that the term "provisional relief" is used in article 11 of the draft model law on the recognition and enforcement of insolvency-related judgments. Article 19 of the MLCBI refers to the relief that may be granted upon application for recognition.

Paragraph 1

33. The chapeau of article 1 has been aligned with the chapeau of article 13, paragraph 1 as noted above. The Working Group may wish to consider whether the word "appropriate" is required; it is not included in article 19 of the MLCBI, which deals with provisional relief, nor is it included in article 11 of the draft model law on recognition and enforcement of insolvency-related judgments, which also addresses provisional relief.

Subparagraph 1(c)

34. The word "temporarily" in reference to the stay has been deleted from subparagraph 1(c) and the word "insolvency" has been retained.

Subparagraph 1(e)

35. To reflect the concerns reported in A/CN.9/903, paragraph 116, subparagraph 1(e) has been replaced with the text proposed. An issue to be considered with respect to subparagraph 1(e) is whether the existing language is sufficient to address the situation where no insolvency representative is appointed in the enacting State (e.g. because article 21 bis or 22 bis is applicable) and whether further language along the lines of "or no insolvency representative has been appointed" might be required, for example, in the second sentence.

Subparagraph 1(g)

36. The proviso in article 15, subparagraph 1(g) is already covered in article 19, paragraph 2 and thus may not need to be repeated in article 15. The guide to enactment of article 15 could ensure the relevance of article 19 is highlighted. As noted above with respect to article 13, this observation applies also to articles 13 and 17.

Paragraph 4

37. As noted above with respect to article 13, paragraph 2 (see para. 19), the square brackets have been removed from around paragraph 4, although they remain around the words "[in any jurisdiction]".

Paragraph 5

38. The reference to a planning proceeding has been deleted after the words "administration of a" and the square brackets around the remainder of the paragraph have been removed.

Article 16. Decision to recognize a foreign planning proceeding

1. Subject to article 2 ter, a planning proceeding shall be recognized if:

(a) The application meets the requirements of article 14, paragraphs 2 and 3;

(b) The proceeding is a planning proceeding within the meaning of article 2, subparagraph (g); and

(c) The application has been submitted to the court referred to in article 2 quater.

2. An application for recognition of a planning proceeding shall be decided upon at the earliest possible time.

3. Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

4. For the purposes of paragraph 3, the group representative shall inform the court of [substantial] [material] changes in the status of the planning proceeding or in the status of its own appointment occurring after the application for recognition is made [and changes that might bear upon the relief granted on the basis of recognition].

Notes on article 16

39. Article 16, paragraph 4 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, para. 120). The Working Group may wish to consider whether a further requirement might be added, that the group representative applying for recognition is a group representative within the meaning of article 2, subparagraph (e), reflecting the drafting of article 17, subparagraph 1(b) of the MLCBI.

40. In paragraph 4, the words "[substantial] [material]" have been placed in square brackets for further consideration, as have the words at the end of the paragraph. The Working Group may wish to note that article 18 of the MLCBI, upon which article 16 is based, uses the word "substantial".

41. The Working Group may wish to consider whether the changes referred to in square brackets at the end of paragraph 4 are additional to the substantial or material

changes referred to at the beginning of paragraph 4. If so, the word “and” might be replaced with the words “as well as” for greater clarity.

Article 17. Relief that may be granted upon recognition of a foreign planning proceeding

1. Upon recognition of a planning proceeding, where necessary to preserve the possibility of developing or implementing a group insolvency solution or to protect the assets of an enterprise group member subject to or participating in the planning proceeding or the interests of the creditors of such an enterprise group member the court, at the request of the group representative, may grant any of the following relief:

(a) Extending any relief granted under article 15, paragraph 1;

(b) Staying execution against the assets of the enterprise group member;

(c) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(d) Staying any insolvency proceedings concerning the enterprise group member;

(e) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(f) In order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the administration or realization of all or part of the assets of the enterprise group member that are located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member that are located in this State, the group representative or another person designated by the court may be entrusted with that task;

(g) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

(h) Recognizing arrangements concerning the funding of enterprise group members participating in the planning proceeding where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply; and

(i) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. In order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the distribution of all or part of the enterprise group member’s assets located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member that are located in this State, the group representative or another person designated by the court may be entrusted with that task.

3. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that enterprise group member is not subject to insolvency proceedings [in any jurisdiction].

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place in the centre of main interests of an enterprise group member participating in the planning proceeding.

Notes on article 17

42. Article 17 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, paras. 121–124). Paragraph 1 has been revised to align it with paragraph 1 of draft articles 13 and 15. The words "or at any time thereafter" have been deleted from paragraph 1, noting that the equivalent article in the MLCBI (article 21) does not include those words and that the words "upon recognition" should be interpreted to refer to any time following recognition. Subparagraph 1(d) has been aligned with articles 13, subparagraph 1(c) and 15, subparagraph 1(c). Subparagraph 1(f), dealing with administration and realization of assets, has been aligned with article 15, subparagraph 1(e). Subparagraph 1(i) has been deleted on the same basis as noted above with respect to article 4, subparagraph 1(f) i.e., that it should be addressed in article 21 (and possibly article 22).

43. Paragraph 2, albeit dealing with distribution of assets, rather than administration and realization of assets, has been aligned with the requirements of subparagraph 1(f). One issue to be considered with respect to both subparagraph 1(f) and paragraph 2 is whether the existing language is sufficient to address the situation where no insolvency representative is appointed in the enacting State (e.g. because article 21 bis or 22 bis are applicable) or whether further language along the lines of "or no insolvency representative has been appointed" might be required, for example, in the second sentence after the word "State". Paragraph 3 has been aligned with articles 13, paragraph 2 and 15, paragraph 4. Paragraph 4 has been added to align article 17 with articles 13, paragraph 3 and 15, paragraph 5.

Article 18. Participation of a group representative in a proceeding under [*identify laws of the enacting State relating to insolvency*]

Upon recognition of a planning proceeding, the group representative may participate in any proceeding under [*identify laws of the enacting State relating to insolvency*] concerning enterprise group members that are participating in the planning proceeding.

Notes on article 18

44. Article 18 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, para. 125), deleting any reference to the group representative having the ability to participate in proceedings concerning group members not participating in the planning proceeding.

Article 19. Protection of creditors and other interested persons

1. In granting, denying, modifying or terminating relief under this Law, the court must be satisfied that the interests of the creditors and other interested persons, including the enterprise group member subject to the relief to be granted, are adequately protected.

2. The court may subject relief granted under this Law to conditions it considers appropriate, including the provision of security.

3. The court may, at the request of the group representative or a person affected by relief granted under this Law, or at its own motion, modify or terminate such relief.

Notes on article 19

45. Article 19 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, para. 126). Cross-references to other articles dealing with relief have been replaced with a general reference to the relief available under "this Law".

Article 20. Approval of local elements of a group insolvency solution

1. Where a group solution affects an enterprise group member participating in a planning proceeding that has its centre of main interests or establishment in this State and a proceeding under [*identify the laws of the enacting State relating to insolvency*]

has commenced [in this State], the group insolvency solution shall be submitted to the court [in this State] for approval.

2. The court shall refer the portion of the group solution affecting the enterprise group member referred to in paragraph 1 for approval in accordance with [*identify the laws of the enacting State relating to insolvency*].

3. If the approval process referred to in paragraph 2 results in approval of the relevant portion of the group insolvency solution, the court shall [confirm and implement that portion relating to assets or operations in this State] [*specify the role to be played by the court in accordance with the law of the enacting State with respect to approval of a reorganization plan*].

[4. Where a group solution affects an enterprise group member participating in the planning proceeding that has its centre of main interests or establishment in this State and no proceeding under [*identify the laws of the enacting State relating to insolvency*] has commenced in this State or article 21 applies, [*specify how, in those situations, the relevant elements of the group insolvency solution may be made binding and effective as required by the law of the enacting State*]. [No such proceeding needs to be commenced if unnecessary to implement the portion of the group insolvency solution affecting the enterprise group member.]]

[4 bis. The group representative may request additional assistance under other laws of this State to implement the portion of the group insolvency solution affecting the enterprise group member.]

5. A group representative is entitled to apply directly to a court in this State to be heard on issues related to approval and implementation of the group insolvency solution.

Notes on article 20

46. Article 20 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, paras. 127–129) with the addition of square brackets to paragraph 4 and the inclusion of an additional sentence in square brackets at the end of that paragraph for further consideration. That sentence is based upon the proposal made at the fifty-first session in A/CN.9/903, paragraph 129. A further paragraph numbered article 4 bis has also been added in square brackets, based upon that same proposal.

47. The Working Group may wish to consider whether the title of the article might be simplified to “Approval of a group insolvency solution”. It might be noted that while article 20 appears in chapter 4 dealing with recognition of a planning proceeding, article 20 itself makes no reference to any requirement for recognition of a planning proceeding as a pre-condition for seeking approval of a group insolvency solution or for the group representative to apply under article 20, paragraph 5 directly to the court to be heard on issues relating to approval and implementation of the solution. The Working Group may wish to consider whether there is a necessary connection between recognition and approval of a group insolvency solution.

48. The Working Group may also wish to consider how article 20, paragraph 5 relates to article 18. In particular, is article 20, paragraph 5 covered by, or additional to, article 18 or is article 20, paragraph 5 broader and applicable irrespective of whether or not there is a proceeding in the enacting State (reflecting paragraphs 4 and 4 bis where no proceeding is required to be commenced).

49. Article 20, paragraph 5 might be moved to article 12, paragraph 4, which identifies the activities the group representative is authorized to conduct. The guide to enactment could provide relevant explanation.

Chapter 5. Treatment of foreign claims

Article 21. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: non-main proceedings

[Treatment of foreign claims in this State in accordance with applicable law: non-main proceedings]

[Commitment on the treatment of foreign claims to minimize commencement of non-main proceedings]

Variant 1

To facilitate the treatment of claims that could otherwise be brought by a creditor in a non-main proceeding for an enterprise group member in another State, an insolvency representative of an enterprise group member appointed in the main proceeding taking place in this State may, jointly with a group representative (if any), where another person has been appointed to that role, commit to, and the court in this State may approve, providing that creditor with the treatment in this State that they would have received in a non-main proceeding in that other State. Such undertaking shall be subject to the formal requirements, if any, of this State and shall be enforceable and binding on the insolvency estate.

Variant 2

1. [To minimize the commencement of non-main proceedings in an enterprise group insolvency], a claim that could be brought by a creditor of an enterprise group member in a non-main proceeding in another State may be treated in a main proceeding commenced in this State in accordance with the treatment it would be accorded in the non-main proceeding, provided:

(a) A commitment to accord such treatment is made by the insolvency representative appointed in the main proceeding in this State. Where a group representative is appointed, the commitment should be made jointly by the insolvency representative and the group representative;

(b) The commitment meets the formal requirements, if any, of this State; and

(c) The court approves the treatment to be accorded in the main proceeding.

2. A commitment made under paragraph 1 shall be enforceable and binding on the insolvency estate.

Notes on article 21

50. Several variations of the heading of article 21 have been proposed by the Secretariat for the consideration of the Working Group.

51. With respect to the draft article, variant 1 reflects the text as proposed at the fifty-first session (A/CN.9/903, para. 133). Variant 2 is proposed pursuant to the request to the Secretariat (A/CN.9/903, para. 135) to provide a revised text for future consideration. Given the number of different elements to be included in the drafting, it is difficult to simplify, but variant 2 seeks to separate the component elements. The chapeau states the general principle that foreign claims that could be brought in non-main proceedings in another State may be treated in main proceedings in the enacting State in accordance with the treatment that would be accorded in the State in which the non-main proceeding could commence, provided the conditions specified in subparagraphs (a)–(c) are met. The commitment should be made by the insolvency representative of the main proceeding; where a group representative has also been appointed, the commitment should be made jointly by those two office holders (the language of A/CN.9/903, paragraph 130 suggests that the commitment "should" rather than "may" be made jointly). The commitment must meet the formal requirements of the enacting State and the court must approve the treatment indicated in the commitment.

52. Variant 1 refers to the insolvency representative committing to accord the claim certain treatment and then describes that commitment as an undertaking. The current

headings of articles 21 bis and 22 use the word "commitment". Variant 2 also refers only to a commitment. The Working Group may wish to consider whether the articles should refer to a "commitment" or to an "undertaking".

53. Paragraph 2 of variant 2 reflects the second part of the final sentence of the text proposed in variant 1.

54. The Working Group may wish to consider whether additional clarifications are required in the drafting. For example, should the provision note that the main and the non-main proceedings must relate to members of the same enterprise group, but that they need not relate to the same group member? It might be recalled that document A/CN.9/903, paragraph 131 states, "it was clarified that the main proceeding and the non-main proceeding referred to in [article 21] were proceedings relating to the same debtor". Further, should the provision explain what is meant by use of the word "treated"? Would it be sufficient to provide a more complete explanation of the provision in a guide to enactment?

Article 21 bis. Powers of the court of this State with respect to a commitment under article 21

Variant 1

[Subject to article 19], a court in this State may stay or decline to commence a non-main proceeding if a foreign representative of an enterprise group member or a group representative from another State in which a main proceeding is pending has made a commitment under article 21 and may approve the treatment in the foreign proceeding of the claims of creditors located in this State.

Variant 2

If a foreign representative of an enterprise group member or a group representative from another State in which a main proceeding is pending has made a commitment in accordance with article 21, a court in this State, [subject to article 19], may:

(a) Approve the treatment to be provided in the foreign main proceeding to the claims of creditors located in this State; and

(b) Stay or decline to commence a non-main proceeding.

Notes on article 21 bis

55. Article 21 bis was formerly paragraph 2 of article 21 and has been separated in accordance with the report of the fifty-first session (A/CN.9/903, para. 134). A new heading has been proposed. The text of variant 1 reflects the previous drafting of the paragraph, with the addition of the words following "commitment under article 21", which were added to reflect the substance of article 17, subparagraph 1(i) (A/CN.9/903, para. 134). Variant 2 seeks to separate the various elements of the draft article.

56. One issue the Working Group may wish to consider is whether the commitment made under article 21 has to be approved by the court in the State in which the treatment is to be accorded before it can be approved by the State that is being asked to stay or decline to commence the non-main proceeding. If that is the case, appropriate wording might need to be reflected in article 21 bis – in variant 2, if that is the preferred text, it could be achieved by adding the words "and that commitment has been approved in the main proceeding" after the words "article 21" in the chapeau. It is somewhat more difficult to add to variant 1 and the drafting of the variant, if that is the preferred text, might need to be reconsidered. The qualification "subject to article 19" remains following the observations in the Working Group (A/CN.9/903, para. 134).

[Part B]

Supplemental provisions

Article 22. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: main proceedings [Treatment of foreign claims in this State in accordance with applicable law: main proceedings] [Commitment on the treatment of foreign claims to minimize commencement of main proceedings]

To facilitate the treatment of claims that would otherwise be brought by a creditor in a proceeding in another State, an insolvency representative of an enterprise group member or a group representative appointed in this State may commit to, and the court in this State may approve, according that [creditor] [claim] with the treatment in this State that [they] [it] would have received in a proceeding in that other State. Such commitment shall be subject to the formal requirements, if any, of this State and shall be enforceable and binding on the insolvency estate.

Notes on article 22

57. The various versions of the heading of draft article 22 reflect the approach proposed above with respect to draft article 21. The square brackets on the second sentence of article 22 have been removed in accordance with the report of the fifty-first session (A/CN.9/903, para. 136). No other revisions, such as aligning the draft article with draft article 21, have been made, in accordance with the report of the fifty-first session (A/CN.9/903, para. 136), however the Working Group may wish to consider the use of the word "accorded" rather than "provided" and changing the reference to the subject of the treatment from the "creditor" to the "claim", to reflect the drafting of article 21. The question raised at the fifty-first session as to which insolvency estate is referred to in the second sentence remains to be further considered.

Article 22 bis. Powers of a court of this State with respect to a commitment under article 22

Variant 1

Subject to article 19, a court in this State may stay or decline to commence a main proceeding if a foreign representative of an enterprise group member or a group representative from another State in which a proceeding is pending has made a commitment under article 22 and may approve the treatment in the foreign proceeding of the claims of creditors located in this State.

Variant 2

If a foreign representative of an enterprise group member or a group representative from another State in which a proceeding is pending has made a commitment under article 22, a court in this State, [subject to article 19], may:

(a) Approve the treatment in the foreign proceeding of the claims of creditors located in this State; and

(b) Stay or decline to commence a main proceeding.

Notes on article 22 bis

58. Article 22 bis was formerly paragraph 2 of article 22 and has been revised as a separate article, in accordance with the report of the fifty-first session (A/CN.9/903, para. 136). The cross-reference to paragraph 1 has been amended to refer to article 22 and the words "and may approve … " have been added (A/CN.9/903, para. 136) to reflect the issue previously addressed in article 17, subparagraph 1(i). Variant 1 reflects the text as previously drafted; variant 2 follows the drafting of article 21 bis.

59. The Working Group may wish to consider whether the words "a proceeding is pending" should be clarified by the addition of the word "main".

Article 23. Additional relief

1. If, upon recognition of a planning proceeding, the court is satisfied that the interests of the creditors of affected enterprise group members would be adequately protected in the planning proceeding, particularly where a commitment under article 21 or 22 has been made, the court, in addition to granting any relief described in article 17, may stay or decline to commence insolvency proceedings in this State relating to any enterprise group member participating in the planning proceeding.

2. Notwithstanding article 20, if, upon submission of a proposed group insolvency solution by the group representative, the court is satisfied that the interests of the creditors of the affected enterprise group member are adequately protected, the court may approve the relevant portion of the group insolvency solution and grant any relief described in article 17 that is necessary for implementation of the group insolvency solution.

Notes on article 23

60. Article 23 has been revised in accordance with the report of the fifty-first session (A/CN.9/903, para. 138). Paragraph 1 refers to the making of a commitment under article 21 or 22 (not to the person making the commitment) and in paragraph 2, the two phrases previously in square brackets have been deleted. These referred to where a commitment had been made under article 21 or 22 and qualified the phrase "adequately protected" with the words "in the group insolvency solution".

E. Note by the Secretariat on insolvency law: directors' obligations in the period approaching insolvency: enterprise groups

(A/CN.9/WG.V/WP.153)

[Original: English]

Contents

Introduction

1. Part three of the UNCITRAL Legislative Guide on Insolvency Law deals with the treatment of enterprise groups in insolvency and provides background on the nature of enterprise groups; reasons for conducting business through enterprise groups; what constitutes an enterprise group by reference to concepts such as ownership and control; and regulation of enterprise groups. Part four of the Legislative Guide addresses the obligations of directors in the period approaching insolvency, discussing issues associated with directors' obligations in that period and, in particular, the rationale for imposing obligations specific to that period by way of the operation of insolvency, rather than corporate, law. Neither part addresses the specific issues that might affect the obligations of directors who perform that function for one or more enterprise group members.

2. At its forty-fourth session (December 2013), the Working Group agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in that area and that solutions would be of great benefit to the operation of efficient insolvency regimes. At the same time, the Working Group noted that possible solutions needed to be considered carefully so that they did not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that an examination of how part four of the Legislative Guide could be applied in the enterprise group context and identification of additional issues (e.g. conflicts between a director's obligations to its own company and the interests of the group) would be helpful.

3. Deliberations on this topic commenced at the Working Group's forty-sixth session (December 2014) on the basis of a draft prepared by the Secretariat following consultation with an informal expert group as requested by the Working Group (A/CN.9/WG.V/WP.125) and continued at its forty-seventh session (May 2015) on the basis of a revised draft (A/CN.9/WG.V/WP.129) and at its forty-ninth session (May 2016) on the basis of further revisions (A/CN.9/WG.V/WP.139).

4. This note has been prepared by the Secretariat on the basis of the deliberations and conclusions of the Working Group at its forty-ninth session (A/CN.9/870, para. 86). Set out below are revisions to draft recommendations 267 to 270 and the accompanying commentary based on the Working Group's decisions. Paragraph 4 of the Introduction refers to the text being developed on the cross-border insolvency of enterprise groups and will need to be completed to reflect the title of that text when it has been finalized and adopted by the Commission.

UNCITRAL Legislative Guide on Insolvency Law, part four: Directors' obligations in the period approaching insolvency – enterprise groups

Introduction and purpose of this section

1. This second section of part four of the UNCITRAL Legislative Guide on Insolvency Law builds upon recommendations 255 to 266 of the first section, which address the obligations of directors of an individual company in the period approaching insolvency. Focusing on the nature of the obligations and the steps that might be taken to discharge those obligations (as established in recommendations 255 and 256), this section proposes how those recommendations could be revised for application to directors[1] in the context of enterprise groups. Recommendations 257 to 266 of the first section of part four continue to apply in the enterprise group context as drafted, however cross-references in those recommendations to recommendations 255 and 256 should be read for the purposes of this additional section as references to recommendations 267 and 268.

2. Additional recommendations (recommendations 269 and 270) have been added to this section to address the situation where a director is appointed to, or holds a managerial or executive position in, more than one group member and conflicts arise in discharging the obligations owed to the different members.

3. This section uses the same terminology as other parts of the Legislative Guide. To provide orientation to the reader, this section should be read in conjunction with part three and the first section of part four.

4. In 201.., UNCITRAL adopted a legislative text, the "…", which seeks to facilitate cross-border insolvency proceedings for multinational enterprise groups. That text and its guide to enactment provides a framework that is intended to streamline the conduct of such proceedings and assist in the development of a group insolvency solution, including by providing a regime for cross-border recognition of group insolvency solutions and the relief that might be needed to support their development. That … and its accompanying Guide to Enactment provides information that will prove useful to the directors and other office holders that are the focus of this Guide.

I. Background

5. The first section of part four of the Legislative Guide considers the obligations of directors of individual companies in the period approaching insolvency, providing information on how those obligations are treated under current laws. While some jurisdictions have developed provisions to impose obligations on directors in the period approaching insolvency, the relative advantages and disadvantages of such regimes remain the subject of debate.[2] The first section of part four underlines the need for early action to be taken when businesses face financial difficulty in order to

[1] The question of who may be considered a director for the purposes of this part is discussed in part four (A) (Director's obligations in the period approaching insolvency), chap. II, paras. 13–16. Although there is no universally accepted definition of the term, this part (B) continues to refer generally to "directors" for ease of reference.

[2] UNCITRAL Legislative Guide on Insolvency Law, part four, paras. 8–10.

avoid rapid decline and to facilitate rescue and reorganization. It also notes that while there has been an appropriate refocusing of insolvency laws in many countries towards increasing the options for that early action to be taken, there has been little corresponding attention paid to creating appropriate incentives for directors to use those options.[3] The first section encourages the development of appropriate incentives by identifying, for incorporation in the law relating to insolvency, the basic obligations a director of an enterprise may have in the period approaching insolvency and the steps that might be taken to discharge those obligations. Those obligations would become enforceable only when insolvency proceedings have commenced.

6. In the enterprise group context, the issue of directors' obligations in the period approaching insolvency does not appear to be clearly or widely addressed by national legislation. While the concept of enterprise groups has been considered and developed in many jurisdictions, the question of the obligations of directors of one or more members of those enterprise groups remains somewhat uncertain.[4]

7. Part three of the Legislative Guide, which addresses the insolvency treatment of enterprise groups, notes that enterprise groups are often characterized by varying degrees of economic integration (from highly centralized to relatively independent) and types of organizational structure (vertical or horizontal) that create complex relationships between group members and may involve different levels of ownership and control. Those factors, together with adherence to the single entity principle and the widespread lack of any explicit acknowledgement of the group reality in the legislation applicable to individual group members, raise a number of issues for directors of enterprise group members. Adherence to the single entity principle typically requires directors to promote the success and pursue the interests of the company they direct, respecting the limited liability of that company and ensuring that its interests are not sacrificed to those of the enterprise group. That is to be achieved irrespective of the interests of the group as a whole, the position of the director's company in the group structure, the degree of independence or integration among group members and the incidence of ownership and control. But where that company's business is part of an enterprise group and reliant, at least to some extent, on other group members for the provision of vital functions (e.g. financing, accounting, legal services, suppliers, markets, management direction and decision-making or intellectual property), addressing the financial difficulties of that company in isolation is likely to be difficult, if not, in some cases, impossible. [Indeed, adhering to a strictly narrow interpretation of the director's obligations may bring about the failure that it is hoped to avoid.] Part three discusses in some detail the current economic reality of enterprise groups and, in the context of insolvency, the impact of treating enterprise group members as unrelated entities on resolving the financial difficulties of some group members or of the group more widely.[5]

8. The requirement to act in the interests of the directed company may be further complicated in the group context when a director of one group member performs that function or holds a managerial or executive position in one or more other group members. In such a situation, it may be difficult for the director to separately identify the interests of each of those group members and treat them in isolation. Moreover, the interests of those group members may be affected by the possibly competing economic goals or needs of other group members and those of the enterprise group collectively. The short and long term implications for the interests of the different group members may need to be assessed, which may involve accepting, even if only in the short term, some detriment to the interests of individual group members in order to achieve a longer term benefit for the enterprise group to which those individual members belong. Where a group insolvency solution is pursued, it is reasonable that some safeguards would apply to protect the interests of creditors of the affected group members and other stakeholders.

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[3] Ibid., para. 6.

[4] A/CN.9/WG.V/WP.115, para. 40 outlines the manner in which a number of different jurisdictions address this issue.

[5] Legislative Guide, part three, chap. I.

9. Some examples of situations in which the interests of individual group members may be affected by those of the group more widely may include where one group member is a key supplier, or provides finance to another group member or acts as a guarantor for finance provided by an external lender to another group member, in an attempt to keep the group as a whole afloat, including its own business; where one group member agrees to transfer its business or assets or surrender a business opportunity to another group member or to contract with that member on terms that could not be considered commercially viable, but where to do so may ultimately benefit the business of the group member agreeing to the transfer; or where a group member enters into cross-guarantees with other group members to assist the group as a whole to use its assets more effectively in financing group operations.

10. Such considerations might be relevant in the period approaching insolvency, when greater control and coordination of the group's activities may be required to maximize efficiency and design solutions to resolve the financial difficulties of the group as a whole or for some of its parts. At that time, there may also be greater opportunity for advantage to be taken of more vulnerable and dependent group members in order to benefit other members, such as through transfers of assets, diversion of business opportunities and use of those group members to conduct more risky transactions or activities or to absorb losses and bad assets.

11. To address the best interests of the directed group member, a director may require a degree of flexibility to weigh the various competing interests and act for the benefit of other group members or the group as a whole where that action coincides with the best interests of the directed member. To the extent that the course of action a director chooses to follow in such circumstances is reasonable and directed to avoiding insolvency or minimizing its impact on the directed group member, that director should not be liable for breach of their obligations. Where having weighed the competing interests of the directed group members, the course of action chosen gives rise to a conflict between the obligations the director owed to those different group members, that conflict should be disclosed to the affected group members. Resolving such a conflict might require mediation or negotiation of the opposing interests.

12. While, as noted above, few laws address directors' obligations in the enterprise group context, courts in different jurisdictions have accorded differing degrees of recognition to the practical reality of the manner in which enterprise groups operate. While the focus is still upon directors exercising their powers for the benefit of their own group member or members, some jurisdictions may permit directors to have regard, for example, to the direct or derivative commercial benefits accruing to that group member from pursuing a particular course of action with other group members and to the extent to which their group member's prosperity or continued existence depends on the well-being of the group as a whole. Typically, however, collective benefit is not a sufficient justification by itself for acts judged to be prejudicial to creditors. Moreover, directors might also be required to take into account any reasonably foreseeable detriments that might flow to their group member as a result of the course of action taken and to consider the position of their group member's unsecured creditors, particularly where that member's solvency might be affected. The latter consideration is of particular importance where the transaction is a guarantee or security granted for a loan to another group member, especially where the survival of that other group member is not critical to the solvency of the group member giving the guarantee or security.

13. Other jurisdictions have allowed directors of group companies to act in the interests of the overall group when certain conditions are met, such as that the group has a structure that affords group members some influence in the overall decisions; that the group member took part in a long-term and coherent group policy; and that the directors in good faith reasonably assumed any detriment suffered by their group member would in due course be offset by other advantages. Another approach permits a director of a group member to act in the interests of the parent provided it does not prejudice the group member's ability to pay its own creditors and the directors are so authorized, either by the constitution of the group member or by shareholders. Under

those laws, for the director to avoid liability, the group member should not be insolvent at the time the director acts, nor should it become insolvent by virtue of that action.

14. This section identifies the extent to which a director of an enterprise group member may take account of considerations beyond the group member they direct in fulfilling their obligations in the period approaching insolvency and the safeguards that should apply. Those considerations will, to a greater or lesser extent, reflect aspects of the economic reality of the enterprise group. This section proposes principles for inclusion in the law concerning the obligations of directors of enterprise group companies in the period approaching insolvency. These principles may serve as a reference point and can be used by policymakers as they examine and develop appropriate legal and regulatory frameworks. While recognizing the desirability of achieving the goals of insolvency law (outlined in part one, chap. I, paras. 1–14 and rec. 1) through early action and appropriate behaviour by directors, it is also acknowledged that there are threats and pitfalls for entrepreneurs that may result from overly draconian rules.

15. This section does not deal with the liability of directors under criminal law, company law or tort law. It focuses only on those obligations that may be included in the law relating to insolvency and become enforceable once insolvency proceedings commence.

II. Elements of the obligations of directors of enterprise group companies in the period approaching insolvency

A. The nature of the obligations

16. The underlying rationale of imposing obligations on directors in the proximity of insolvency is addressed in the first section of part four, paragraphs 1 to 7, and remains equally applicable in the enterprise group context. The obligations of directors of a group member continue to be the same basic obligations as established in recommendation 255, but provision might be made to permit the broader context of the economic reality of the enterprise group to be taken into account in determining the steps that should be taken by a director to avoid liability for breach of those obligations. Relevant factors to be considered might include the position of the enterprise group member in the enterprise group, the degree of integration between enterprise group members (as mentioned in recommendation 217 of part three) and the possibility of maximizing value in the group by designing a solution to the group's financial difficulties that includes the whole group or some of its parts. Such solutions may require a director of a group member in financial difficulty to take steps that may appear, at first glance, to be detrimental to that group member, but that will ultimately achieve a better result for it and ensure the continuation of its business and maximization of its value. Taking those same steps in circumstances where they are not likely to benefit the group member in financial difficulty may expose directors to liability for failure to discharge their obligations reasonably.

17. One consideration for directors evaluating the steps to be taken to address the group member's financial difficulties is the impact of those steps on creditors of that group member, especially when wider group interests are to be accommodated. Recommendation 255 requires directors to have due regard to the interests of creditors, as well as of other stakeholders of the group member. The interests of creditors may be safeguarded by establishing a "no worse off" standard – i.e. that creditors will be no worse off under the steps that are taken than they would have been had those steps not been taken.

18. The first section of part four discusses the types of steps that a director might reasonably be expected to take in order to address financial difficulty, avoid the onset of insolvency and, where it is unavoidable, to minimize its impact (see part four, chap. II, para. 5). Those steps would continue to be relevant in the group context and might be supplemented by additional steps, depending on the factual situation, that might

effectively require some degree of mutual assistance and cooperation with other group members. Those additional steps might be affected by the position of the group member in the enterprise group and require consideration of whether more value might be preserved or created by assisting the implementation of a solution for the enterprise group as a whole or some of its parts, than by taking steps that relate only to the individual group member. Consideration might be given to assessing the directed member's obligations, both financial and legal, to other group members; the transactions that should (or should not) be entered into with other group members; possible sources and availability of finance (both in the period approaching insolvency and once formal proceedings commence), including its provision by the directed group member to other group members; and the impact of possible solutions, whether limited to the directed group member or involving the group more widely, on creditors and other stakeholders of the directed group member. A director might also consider taking steps to organize informal negotiations with creditors, such as voluntary restructuring negotiations, with a view to devising a solution for the enterprise group as a whole or some of its parts where that will benefit the directed group member.

19. Where insolvency is unavoidable and formal proceedings are to be commenced, a director might consider the court in which those proceedings should commence, particularly when there is a possibility of making a joint application with other group members and procedurally coordinating those proceedings, as discussed in part three.[6]

Recommendations 267–268

Purpose of legislative provisions

The purpose of these provisions addressing the obligations of those responsible for making decisions concerning the management of an enterprise group member that arise when insolvency is imminent or unavoidable is:

(a) To protect the legitimate interests of creditors and other stakeholders of the enterprise group member;

(b) To ensure that those responsible for making decisions concerning the management of an enterprise group member are informed of their roles and responsibilities in those circumstances;

(c) To recognize the impact of the enterprise group member's position in the enterprise group upon the manner in which the group member should be managed to address its imminent or unavoidable insolvency and the obligations of those responsible for making decisions concerning the management of that group member, including in situations where they are also responsible for making decisions concerning the management of other group members; and

(d) To permit an enterprise group member to be managed, where appropriate, in a manner that will maximize value in the enterprise group by promoting approaches to resolve insolvency for the enterprise group as a whole or for some of its parts, while taking reasonable steps to ensure that the creditors of that group member and its other stakeholders are no worse off than if that group member had not been managed so as to promote such approaches to resolution.

Paragraphs (a)–(d) should be implemented in a way that does not:

(a) Unnecessarily adversely affect successful business reorganization of the enterprise group member, taking into account the possible benefit of maximizing the value of the enterprise group and promoting an insolvency solution for the enterprise group as a whole or some of its parts; the position of the group member in the enterprise group; and the degree of integration between group members;

(b) Discourage participation in the management of companies, particularly those experiencing financial difficulty; or

[6] Ibid., part three, recs. 202–210.

(c) Prevent the exercise of reasonable business judgment or the taking of reasonable commercial risk.

Contents of legislative provisions

The obligations

267. (a) The law relating to insolvency should specify that the obligations established in recommendation 255 will apply to a person specified in accordance with recommendation 258 with respect to a company that is a member of an enterprise group;

(b) Insofar as not inconsistent with those obligations, the person referred to in subparagraph (a) may take reasonable steps to promote a solution that addresses the insolvency of the enterprise group as a whole or some of its parts. In so doing, the person may take into account the possible benefits of maximizing the value of the enterprise group as a whole, while taking reasonable steps to ensure that the creditors of the group member and its other stakeholders are no worse off than if that group member had not been managed so as to promote such a solution.

Reasonable steps for the purposes of recommendation 267

268. For the purposes of recommendations 255 and 267, and to the extent not inconsistent with the obligations of the person referred to in recommendation 267, subparagraph (a) to the group member to which they were appointed, reasonable steps in the enterprise group context might include, in addition to the steps outlined in recommendation 256:

1. (a) Evaluating the current financial situation of the enterprise group member and of the enterprise group to consider whether more value might be preserved or created by considering a solution for the enterprise group as a whole or some of its parts;

(b) Considering the financial and other obligations of the group member to other enterprise group members, whether transactions should be entered into with other enterprise group members, and possible sources and availability of finance;

(c) Evaluating whether the enterprise group member's creditors and other stakeholders would be better off under an insolvency solution for the enterprise group as a whole or some of its parts;

(d) Assisting the implementation of an insolvency solution for the group as a whole or some of its parts; [and]

(e) Holding and participating in informal negotiations with creditors, such as voluntary restructuring negotiations,[7] where organized for the enterprise group as a whole or some of its parts; [and]

(f) [Considering whether formal insolvency proceedings should be commenced].

2. Where formal insolvency proceedings are to be commenced, considering the court in which they should be commenced, whether a joint application[8] with other relevant enterprise group members is possible or appropriate and whether proceedings should be procedurally coordinated.[9]

B. Identifying the parties who owe the obligations

20. In the enterprise group context, identifying those responsible for management decisions may be more complex than in the case of a single company. Various layers of management and influence can affect the affairs of any single group member and

[7] Ibid., part one, paras. 2–18.
[8] Ibid., part three, recs. 199–201.
[9] Ibid., part three, recs. 202–210.

the manner in which it conducts its business, particularly in the vicinity of insolvency. Such influence may undermine the ability of the directors of a group member to take appropriate steps to address the financial difficulties of the directed member or involve that member in the financial difficulties of other group members, to the detriment of the creditors of the directed group member. This may occur in numerous circumstances, such as where the boards of the two members consist of substantially the same persons; where the majority of the board of one group member is nominated by the other member, which is in a position of control; where one group member controls the management and financial decision-making of the group; or where one group member interferes in a sustained and pervasive manner in the management of another group member, typically in the situation of a parent and controlled group member.

21. There may also be some enterprise groups in which it is difficult to identify the precise boundaries between group members because management responsibilities across different boards are blurred. In addition, relevant executives and decision makers may be employed by group members several steps removed from the group member in question and the separate identity and liability of that group member may be generally disregarded in the daily business of the group. In such situations, serious issues may arise as to the obligations of such persons with respect both to the actual business conducted by the group member in question and to the group member by which they are employed.

22. Persons that might be considered to be a director in the group context could include another group member or the director of another group member, including a shadow director[10] of that other group member. While some laws do not permit a group member to be formally appointed as a director of another group member, such a group member might nevertheless be regarded as a shadow director of that other member when it exercises influence over or directs its activities.

23. Paragraphs 13 to 16 of the first section of part four discuss the parties who owe the obligations discussed above. Recommendation 258 adopts a broad formulation, providing that it should include any person formally appointed as a director or exercising factual control and performing the functions of a director. Paragraph 15 of the commentary notes the types of function that may be expected to be performed by such a person. Those considerations would also be applicable in the enterprise group context discussed in this part.

C. Conflict of obligations

24. It may often be the case in enterprise groups that a director performs that function or holds a management or executive position in more than one group member, whether as a result of the ownership and control structure of the group, the alliances between group members, family ties across the group or some other aspect of the manner in which the business or businesses of the group are organized.[11] Whatever the reason, a director who sits on the boards of, or has managerial responsibility for, a number of different group members may face, in the period approaching insolvency, potential conflicts between the obligations owed to those different group members as they attempt to identify the course of action most likely to preserve value and provide the best solution to the financial difficulties of each group member. The nature and complexity of the conflict may relate to the position of the directed entities in the group hierarchy, the related degree of integration between group members, and the incidence of control and ownership. Where a director sits on the boards of the parent and controlled group members, for example, that director needs to be able to demonstrate that any transaction involving the parent took into account, and was fair and reasonable to, the controlled group member.

25. In addition, the interests of the directed group members may be closely intertwined with the enterprise group more widely, requiring the economic reality of

[10] Ibid., part four, chap. II, footnote 11 to para. 13.

[11] Ibid., part three, chap. I, paras. 6–15.

the group as a whole to be considered. In such circumstances, steps that may be regarded as detrimental to a company operating as a stand-alone entity may be reasonable when considered in that broader context. The business of a subsidiary, for example, may be generally dependent on the business of the group more widely and it may be appropriate for that subsidiary to provide funding in the short term for other members in order to keep that wider business operating and ultimately save the business of the subsidiary itself.

26. Directors facing such a conflict might be expected to act reasonably and take adequate and appropriate steps to address the situation. That might require a director, depending on the factual situation, to identify the nature and extent of the conflict in accordance with applicable law and determine how it might be addressed. It may be sufficient in some circumstances for the director to disclose relevant information regarding the conflict, including its nature and extent, to the affected boards of directors, while in other circumstances wider disclosure to creditors and other stakeholders, including the boards of directors of other group members, may be reasonable. Such disclosure may be sufficient to support the director's continuing integrity and any lack of the impartiality or independence required can be assessed against the circumstances disclosed.

27. It may be appropriate in some circumstances for the director to refrain from participating in any decisions relating to the conflict that are to be taken by the affected boards or attending meetings at which related issues are to be discussed and for this to be recorded as a deliberate approach agreed with fellow directors, as opposed to an act of omission. Appointment of additional or substitute board members may be possible in some cases and, if the conflict cannot be resolved, the director may consider, as a last resort, resigning from one or other of the affected boards. That might potentially include resignation from the board of an insolvent or a solvent group member. While that option of resignation may free the director of the dilemma, it simultaneously neglects the larger problem and may exacerbate the situation, especially in the period approaching insolvency, if it leaves the affected group member or members without the expertise necessary to address their financial difficulties. As noted in the first section of part four, resignation from the board will not render a director immune from liability, as under some laws they may leave themselves open to the suggestion that the resignation was connected to the insolvency or that they had failed to take reasonable steps to minimize losses to creditors in the face of impending insolvency.[12]

28. Good corporate governance that supports analyses of the situations of the respective group members giving rise to the conflict and records the reasons for the action taken may be critical to the director in discharging obligations with respect to the conflict. A policy on corporate governance does not, however, replace or limit obligations owed by directors to the group member or members. It offers indicia as to what steps are considered reasonable to manage the conflict. Different corporate governance policies and standards between the members of an enterprise group can also lead to conflicting solutions and outcomes, which need to be carefully reviewed and assessed by directors.

Recommendations 269–270

Purpose of legislative provisions

The purpose of provisions on conflict of obligations is to address the situation where a director of one enterprise group member holds that position or a management or executive position in another or other enterprise group members, whether the parent or a controlled group member. That situation may give rise, in the period approaching insolvency, to a conflict between the obligations owed to the different

[12] Ibid., part four, para. 27.

group members, which may have an impact upon the steps to be taken to discharge those obligations.

Contents of legislative provisions

Conflict of obligations

269. The law relating to insolvency should address the situation where, from the point of time referred to in recommendation 257, a director of an enterprise group member who holds that position or a management or executive position in another or in other enterprise group members has a conflict between the obligations owed in relation to the creditors and other stakeholders of those different group members.

Reasonable steps for the purposes of recommendation 269

270. The insolvency law may specify that a director faced with such conflicting obligations should take reasonable steps to manage those conflicts. Reasonable steps may include:

(a) Obtaining advice to establish the nature and extent of the different obligations;

(b) Identifying the parties to whom the conflict of obligations must be disclosed and disclosing relevant information, including, in particular, the nature and extent of the conflict;

(c) Identifying when the director should not (i) participate in any decision by the boards of directors of any of the relevant group members on the matters giving rise to such conflicts, or (ii) be present at any board meeting at which such issues are to be considered;

(d) Seeking the appointment of an additional director when the conflicting obligations cannot be reconciled; and

(e) As a last resort, where there is no alternative course of action available, resigning from the relevant board(s) of directors.

F. Note by the Secretariat: proposal for future work submitted by the United States of America

(A/CN.9/WG.V/WP.154)

[Original: English]

The Government of the United States of America has submitted to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) the following proposal for the development of model legislative provisions on civil asset tracing and recovery. The text of the proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat, with formatting changes.

Annex

Proposal by the United States for the development of model legislative provisions on civil asset tracing and recovery

1. In the context of insolvency, the ability to trace and recover assets that have been moved across borders can be vital for enabling insolvency representatives to obtain the maximum possible recovery for creditors. This ability is particularly important when addressing commercial fraud, which is a significant concern both in the context of insolvency and more generally. The UNCITRAL Secretariat has previously identified commercial fraud as a "serious international problem" that causes "direct losses of billions" of dollars per year.[1] As cross-border commerce increases, so does the ability of the perpetrators of fraud to divert funds to multiple jurisdictions in an attempt to conceal the location of the assets.

2. Several past and ongoing UNCITRAL projects are relevant to these issues. The ongoing work on recognition and enforcement of insolvency-related judgments will significantly aid insolvency representatives trying to obtain control of assets in different jurisdictions, if they know where the assets are located. Similarly, UNCITRAL has previously done work on recognizing and preventing commercial fraud (i.e., a list of indicators of commercial fraud). However, UNCITRAL has not yet done any work to directly facilitate the ability of insolvency representatives and others to trace and recover assets that have been moved across borders, whether fraudulently or otherwise.

3. Currently, many jurisdictions lack adequate tools for asset tracing and recovery, and jurisdictions that do have tools in place may not have uniform procedures that can easily be accessed by foreign parties. To facilitate the broader availability of such tools, we propose that Working Group V develop model legislative provisions that could be enacted as domestic law in jurisdictions that have an interest in enhancing cross-border cooperation in this area. Rather than developing a complete model law that would seek to fully harmonize domestic law on these issues, a "toolbox" approach may be appropriate – i.e., providing a set of options from which jurisdictions could choose some or all elements to enact.

4. In developing such a toolbox, Working Group V could draw inspiration from a variety of procedures that are already available in some jurisdictions. Some jurisdictions have tools in place that facilitate parties' efforts to seek information or documents to determine who a wrongdoer is. Other tools facilitate parties' efforts to seek information or documents about the location or nature of an asset. A third group of tools enable the preservation of an asset while its proper destination is determined.

5. As one example, the United States has a measure in place (28 U.S.C. § 1782) that enables courts to provide assistance to foreign tribunals and to litigants before such tribunals. This statute allows parties participating in (or with an interest in) proceedings before a foreign or international tribunal to petition a United States court to compel the production of documents or testimony for use in that foreign or international proceeding.

6. We understand that some other jurisdictions also have a wide variety of tools available that should be considered by the Working Group. For example:

- Norwich Pharmacal orders allow victims of wrongdoing to obtain information or documents from third parties who have become involved in or facilitated the wrongdoing (even innocently) in order to determine what has happened to certain assets. Such orders can be used to determine whether fraud occurred or whether a cause of actions exists, to identify a proper defendant for a claim, and to find information that may need to be preserved. In granting these orders, courts take into account factors such as whether the information sought can be

[1] See, e.g., A/CN.9/540 (2003) at paras. 5–6.

obtained through other means and whether the third party can be indemnified for costs incurred due to the order.

- Bankers Trust orders similarly compel third party banks to disclose information. However, for these orders, the applicant does not have to demonstrate that the bank was involved in wrongdoing. Rather, the applicant must show that it is tracing assets that were taken from it by fraud and that passed through the bank, and that the information might lead to the location and preservation of the assets.
- The Bankers' Book Evidence Act enables courts to order disclosure of information related to a bank account belonging to a defendant in civil or criminal proceedings. The applicant must show that the account likely has entries that are material to the issues in the litigation and that the information sought will be evidence at trial.
- Mareva injunctions are issued to freeze a defendant's assets within a jurisdiction pending determination of a claim, in particular to prevent the defendant from transferring the assets out of the jurisdiction after the claim is filed. The applicant must have a cause of action against the defendant and must show a risk of dissipation of assets. A Mareva injunction does not give the applicant any priority over other claimants or any proprietary interest in the assets, and the applicant may be required to provide security.

7. These tools and others available in various jurisdictions enable the tracing and recovery of assets and thus facilitate their eventual turnover for the benefit of the victims of commercial fraud or other creditors.

8. Given the particular relevance of these tools to the insolvency context – i.e., enabling insolvency representatives to recover diverted assets for the benefit of the insolvency estate – this topic would be an appropriate area for Working Group V to address. The Working Group could develop a set of model legislative provisions containing a menu of options from which states could select and enact tools that would facilitate the tracing and recovery of assets.

9. We therefore suggest that the Working Group request the Commission to grant a mandate to begin preliminary exploration of this topic, so that work could proceed (alongside work on MSME insolvency issues) once the current projects on enterprise groups and insolvency-related judgments have been substantially concluded.

G. Report of the Working Group on Insolvency Law on the work of its fifty-third session (New York, 7–11 May 2018)

(A/CN.9/937)

[Original: English]

Contents

I. Introduction

A. Facilitating the cross-border insolvency of enterprise groups

1. At its forty-fourth session (December 2013), the Working Group agreed to continue its work on cross-border insolvency of multinational enterprise groups[1] by developing provisions on a number of issues, some of which would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (1997)[2] (MLCBI) and part three of the UNCITRAL Legislative Guide on Insolvency Law (2010)[3] and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009).[4] The Working Group discussed this topic at its forty-fifth (April 2014) (A/CN.9/803), forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864), forty-ninth (May 2016) (A/CN.9/870), fiftieth (December 2016) (A/CN.9/898), fifty-first (May 2017) (A/CN.9/903) and fifty-second (December 2017) (A/CN.9/931) sessions and continued its deliberations at the fifty-third session.

B. Recognition and enforcement of insolvency-related judgments

2. At its forty-seventh session (2014), the Commission approved a mandate for Working Group V to develop a model law or model legislative provisions providing for the recognition and enforcement of insolvency-related judgments.[5] The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864), forty-ninth

[1] A/CN.9/763, paras. 13–14; A/CN.9/798, para. 16; see the mandate given by the Commission at its forty-third session (2010): *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259(a).
[2] General Assembly resolution 52/158, annex.
[3] Available from http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html.
[4] United Nations publication, Sales No. E.10.V.6.
[5] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

(May 2016) (A/CN.9/870), fiftieth (December 2016) (A/CN.9/898), fifty-first (May 2017) (A/CN.9/903) and fifty-second (December 2017) (A/CN.9/931) sessions and continued its deliberations at the fifty-third session.

C. Insolvency of micro, small and medium-sized enterprises (MSMEs)

3. At its forty-sixth session (2013), the Commission requested Working Group V to conduct a preliminary examination of issues relevant to the insolvency of MSMEs.[6] At its forty-seventh session (2014), the Commission gave Working Group V a mandate to undertake work on the insolvency of MSMEs as a next priority, following completion of the work on facilitating the cross-border insolvency of multinational enterprise groups and recognition and enforcement of insolvency-related judgments.[7] At its forty-ninth session (2016), the Commission clarified the mandate of Working Group V with respect to the insolvency of MSMEs as follows: "Working Group V is mandated to develop appropriate mechanisms and solutions, focusing on both natural and legal persons engaged in commercial activity, to resolve the insolvency of MSMEs. While the key insolvency principles and the guidance provided by the UNCITRAL Legislative Guide on Insolvency Law should be the starting point for discussions, the Working Group should aim to tailor the mechanisms already provided in the Legislative Guide to specifically address MSMEs and develop new and simplified mechanisms as required, taking into account the need for those mechanisms to be equitable, fast, flexible and cost efficient. The form the work might take should be decided at a later time based on the nature of the various solutions that were being developed."[8] The Working Group held a preliminary discussion of the topic at its forty-fifth (April 2014) (A/CN.9/803), forty-ninth (May 2016) (A/CN.9/870) and fifty-first (May 2017) (A/CN.9/903) sessions and continued its deliberations at the fifty-third session.

II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its fifty-third session in New York from 7 to 11 May 2018. The session was attended by representatives of the following States Members of the Working Group: Argentina, Austria, Brazil, Bulgaria, Canada, Chile, China, Czechia, Denmark, Ecuador, El Salvador, France, Germany, Greece, Honduras, India, Indonesia, Israel, Italy, Japan, Kenya, Kuwait, Libya, Mexico, Nigeria, Pakistan, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Bahrain, Cyprus, Dominican Republic, Iraq, Malta, Nepal, Netherlands, Paraguay, Qatar, Senegal, Saudi Arabia, Sudan and Uzbekistan.

6. The session was also attended by observers from Holy See and the European Union.

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

(a) *Organizations of the United Nations system*: International Monetary Fund and the World Bank Group (WB);

(b) *Invited international non-governmental organizations*: American Bar Association (ABA), Commercial Finance Association (CFA), European Law Students' Association (ELSA), Fondation pour le Droit Continental, Groupe de réflexion sur

[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 326.
[7] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 156.
[8] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 246.

l'insolvabilité et sa prévention (GRIP 21), INSOL Europe, INSOL International, Instituto Iberoamericano de Derecho Concursal (IIDC), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), Inter-Pacific Bar Association (IPBA), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association (MAA), National Law Center for Inter-American Free Trade (NLCIFT) and New York City Bar (NYCBAR).

8. The Working Group elected the following officers:

Chairman: Wisit WISITSORA-AT (Thailand)

Rapporteur: María Amparo LÓPEZ SENOVILLA (Spain)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.155);

(b) A note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft model law (A/CN.9/WG.V/WP.156);

(c) A note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law (A/CN.9/WG.V/WP.157);

(d) A note by the Secretariat on facilitating the cross-border insolvency of enterprise groups: draft legislative provisions (A/CN.9/WG.V/WP.158);

(e) Note by the Secretariat on insolvency of micro, small and medium-sized enterprises (A/CN.9/WG.V/WP.159); and

(f) Proposal by the Government of the United States of America for the development of model legislative provisions on civil asset tracing and recovery (A/CN.9/WG.V/WP.154).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of: (a) recognition and enforcement of insolvency-related judgments; (b) facilitating the cross-border insolvency of enterprise groups; (c) insolvency of micro, small and medium-sized enterprises; and (d) proposal for the development of model legislative provisions on civil asset tracing and recovery.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group commenced its work with the discussion of the recognition and enforcement of insolvency-related judgments on the basis of documents A/CN.9/931 (annex), A/CN.9/WG.V/WP.156 and A/CN.9/WG.V/WP.157. The Working Group approved the text of the draft model law on recognition and enforcement of insolvency-related judgments annexed to this report and transmitted it for finalization and adoption by the Commission at its fifty-first session, in 2018. The Working Group requested the Secretariat to transmit to the Commission for consideration and adoption the draft guide to enactment contained in document A/CN.9/WG.V/WP.157, together with the revisions agreed to be made to that draft at the current session (see section IV.B of this report).

12. The Working Group also discussed cross-border insolvency of enterprise groups on the basis of document A/CN.9/WG.V/WP.158, insolvency of micro, small and medium-sized enterprises on the basis of document A/CN.9/WG.V/WP.159, and the

proposal by the Government of the United States of America for the development of model legislative provisions on civil asset tracing and recovery (A/CN.9/WG.V/WP.154). The deliberations and decisions of the Working Group related to those topics are reflected in chapters V, VI and VII of this report.

IV. Recognition and enforcement of insolvency-related judgments: draft model law and draft guide to enactment

A. Consideration of the draft model law

13. The Working Group commenced its discussions on the topic by reviewing the text of the draft model law contained in the annex to the report of its fifty-second session (A/CN.9/931) and drafting suggestions by the Secretariat to that draft contained in document A/CN.9/WG.V/WP.156.

Title

14. The Working Group agreed to delete the words "cross-border" from the title of the draft model law so that the title would read "Draft model law on recognition and enforcement of insolvency-related judgments" (MLIJ).

Preamble

15. The Working Group agreed to remove the words "for parties" and "their" in paragraph 1 (a) and to add the word "insolvency" before the word "proceedings" in paragraph 1 (b).

16. With those amendments, the Working Group approved the substance of the preamble.

Article 1. Scope of application

17. The Working Group approved the substance of the draft article.

Article 2. Definitions

18. With reference to the drafting suggestions in paragraphs 1 and 2 of document A/CN.9/WG.V/WP.156, the Working Group considered whether a definition of the term "court" should be included in article 2 to clarify that the term encompassed a competent administrative authority. A question arose whether that definition would refer to courts and administrative authorities of the originating State or also of the receiving State. The concern was expressed that, if the definition was meant to cover both, it could interfere with draft article 4 that already sufficiently clarified that the model law intended to cover both courts and competent administrative authorities of the receiving State.

19. The Working Group agreed not to add a definition of "court" or "foreign court" in article 2 and to add the phrase "or other competent authority" in subparagraph (a) after the word "court" and in all other cases where such addition would be necessary to clarify that references to courts of the originating State encompassed also reference to other competent authorities of that State. The understanding was that the guide to enactment of the MLIJ would include an explanation of the references to courts, of both the originating and receiving State. The Working Group agreed to delete the words "by the court" in the end of the second sentence of subparagraph (c).

20. With those amendments, the Working Group approved the substance of the draft article.

Article 3. International obligations of this State

21. The Working Group approved the substance of the draft article.

Article 4. Competent court or authority

22. The Working Group approved the substance of the draft article with the deletion of the phrase "in the course of proceedings" at the end of the draft article.

Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State; Article 6. Additional assistance under other laws; and Article 7. Public policy exception

23. The Working Group approved the substance of the draft articles.

Article 8. Interpretation

24. A suggestion to replace the word "uniformity" with the word "consistency" did not receive support. The Working Group approved the substance of the draft article.

Article 9. Effect and enforceability of an insolvency-related judgment; and Article 9 bis. Effect of review in the originating State on recognition and enforcement

25. The Working Group approved the substance of the draft articles.

Article 10. Procedure for seeking recognition and enforcement of an insolvency-related judgment

26. The suggestion to redraft paragraph 1 of the draft article to make it broader by according the right of standing also to various affected stakeholders did not gain support. The Working Group approved the substance of the draft article with the deletion of the words "in the course of proceedings" in paragraph 1 and with paragraph 5 redrafted as follows: "Any party against whom recognition and enforcement is sought has the right to be heard."

Article 11. Provisional relief

27. The Working Group approved the substance of the draft article.

Article 12. Decision to recognize and enforce an insolvency-related judgment

28. With reference to the drafting suggestion in paragraph 3 of document A/CN.9/WG.V/WP.156, the Working Group agreed to delete the words "paragraph 1" in subparagraph (a).

29. With that amendment, the Working Group approved the substance of the draft article.

Article 13. Grounds to refuse recognition and enforcement of an insolvency-related judgment

30. A proposal was made to add in draft article 13 the following wording: "where the effect of recognition would be (i) to restrict, suspend or interfere with or prejudice in any way insolvency proceedings in the State in which recognition is sought; or (ii) to prejudice the right of creditors in the State in which the judgment is sought to be enforced." That proposal did not receive support. It was explained that subparagraphs (a), (e) and (f) of the draft article already addressed some situations intended to be covered by the proposal. Concern was expressed that such terms as "interfere with" and "prejudice" used in the proposal were prone to a broad interpretation.

31. Doubts were expressed about the need for subparagraph (h) in the light of the broad scope of the draft model law and the difficulty of finding examples that would be covered by that subparagraph. The alternative view was that the provision should be retained as drafted. The Working Group recalled its deliberations on the same issue at past sessions.

32. The Working Group approved the substance of the draft article.

Article 14. Equivalent effect

33. The need for paragraph 1 was questioned. The prevailing view was that it should be retained.

34. Different views were expressed as to whether the first or second alternative texts in square brackets, or both, should be kept. Recalling that the Working Group had already considered the matter, the view that the draft article should be approved as drafted with the two alternative texts separated by the conjunction "or" and accompanied by a footnote as suggested in paragraph 4 of document A/CN.9/WG.V/WP.156 prevailed.

35. Suggestions to replace in paragraph 2 the word "relief" with the word "remedy" and the word "equivalent" with the words "available in this State" did not receive support.

Article 15. Severability

36. The Working Group approved the substance of draft article 15 with the replacement of the phrase "only part" with the words "only that part".

Article X. Recognition of an insolvency-related judgment under [*insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency*]

37. With reference to the drafting suggestion in paragraph 5 of document A/CN.9/WG.V/WP.156, the Working Group agreed to replace the words "the Model Law" at the end of the first sentence in the text in italics preceding article X with the words "that Model Law" to clarify that the reference was to the MLCBI.

38. With that amendment, the Working Group approved the substance of the draft article.

B. Consideration of the draft guide to enactment (A/CN.9/WG.V/WP.157)

39. The Working Group requested the Secretariat to reflect in the draft guide the revisions agreed to be made in the draft model law at the current session, in particular by adding in chapter III.B of the draft guide a section explaining that references to courts in the text of the model law encompassed competent administrative authorities (see para. 19 above).

40. A question was raised whether the title of the draft guide to enactment should be the Guide to Enactment and Interpretation similar to the title of the revised guide to enactment of the MLCBI. The Working Group recalled that the title of the guide to the MLCBI was amended after its content was expanded to reflect the case law on the MLCBI. The Working Group agreed to keep the title as contained in document A/CN.9/WG.V/WP.157. It was noted that consequential changes would need to be made to paragraph 13 of the draft guide by deleting the words "and its interpretation and application".

41. A suggestion was made to redraft paragraph 18 by softening the advice given to enacting States by using words such as "enacting States may wish to", by explaining benefits of enacting the MLIJ and by deleting the last sentence. It was pointed out that such benefits might include: fostering insolvency cooperation; consistent treatment of insolvency judgments; fairness; and reduction of costs of insolvency proceedings. The Working Group requested the Secretariat to revise paragraph 18 on the basis of those suggestions.

42. Queries were raised regarding the clarity of the drafting of paragraph 37, in particular whether the paragraph should address judgments arising from non-insolvency proceedings or only judgments originating from insolvency

proceedings that would not be recognized under the MLCBI. The Secretariat was requested to consider redrafting that paragraph to provide more clarity on that aspect.

43. A question was also raised as to whether draft article 13, subparagraph (h) addressed the situation where the underlying insolvency proceeding was manifestly contrary to public policy. In response, it was suggested that public policy exemptions were sufficiently addressed in draft article 7.

44. The Working Group further agreed to amend the draft guide as follows:

(a) To add a cross-reference to paragraph 57 in paragraph 30;

(b) To replace in the third sentence of paragraph 37 the words "is an exception" with the words "also provides an exception";

(c) To delete paragraph 41;

(d) To delete the phrase starting with the words "as that judgment" from the last sentence of paragraph 44;

(e) To include in paragraph 46 reference to additional possible exemptions from the scope of the MLIJ that the State might consider under paragraph 2 of article 1, such as judgments relating to entities excluded from the MLIJ, e.g. banks and insurance companies;

(f) To reflect, in conjunction with paragraph 49, that the "insolvency representative," although defined in the MLIJ, might be referred to by different names in various jurisdictions (e.g. along the lines of the Legislative Guide on Insolvency Law, part two, chapter III, para. 35);

(g) To redraft paragraph 55 by replacing the phrase "without more" with the phrase "without additional court orders";

(h) To redraft paragraph 57 by removing the reference to first day orders;

(i) To redraft paragraph 59(d) in more neutral terms to reflect that some States might consider that a judgment would fall into the category described in that paragraph when the cause of action arose after the commencement of insolvency proceedings, while other States might include judgments relating to a cause of action arising before the commencement of insolvency proceedings. It was suggested that the paragraph could be redrafted along the following lines: "Judgments determining whether the debtor owes or is owed a sum or any other performance not covered by subparagraph (a) or (b). The enacting State will need to determine whether this category should extend to all such judgments regardless of when the cause of action arose. While it might be considered that a cause of action that arose prior to the commencement of the insolvency proceedings was sufficiently linked to the insolvency proceeding, as it was being pursued in the context of, and could have an impact on, that proceeding, it might also be considered that a judgment on such a cause of action could have been obtained by or against the debtor prior to the commencement of the insolvency proceeding and, thus, lacked a sufficiently material association with the insolvency proceedings.";

(j) To add in the last sentence of paragraph 63 the word "could" before the word "apply";

(k) To delete paragraph 73 in the light of the clear explanation already contained in paragraph 72 in preference to the alternative suggestion to replace it with the following wording: "Judicial cooperation among insolvency courts, including through the recognition and enforcement of foreign judgments, should not be unduly hampered by an expansive interpretation of public policy";

(l) To delete the part of paragraph 78 starting with the word "Thus" until the words "a decision";

(m) To redraft the last part of the first sentence of paragraph 80 by replacing the phrase "review by an appellate court" with the phrase "review by way of an appeal to an appellate court";

(n) To replace in paragraph 83 the phrase “entitlement to apply” with “the conditions for applying” and the word “defines” with the word “sets”;

(o) To add the word “solely” before the words “on a ground” in the first sentence of paragraph 110;

(p) To add at the end of paragraph 111 the following sentences: “The originating court does not need to have explicitly relied on or made findings regarding the relevant basis for jurisdiction, so long as that basis for jurisdiction existed at the relevant time. The originating court’s reliance on additional or different jurisdictional grounds does not prevent one of the ‘safe harbours’ from applying.”;

(q) In paragraph 113, to delete the fourth sentence and the first part of the last sentence until the words “it does not prevent”;

(r) To delete the phrase “and relating only to assets” in the heading of the section on article 13, subparagraph (h);

(s) To move paragraph 118 before paragraph 117;

(t) To delete the last sentence in paragraph 121;

(u) To replace references to “relief” with references to “a form of relief” in paragraph 121 and the second sentence of paragraph 122;

(v) To add at the end of paragraph 126 the following sentence: “The enactment of this provision is not necessary in jurisdictions where the Model Law on Cross-Border Insolvency is interpreted as covering the recognition and enforcement of insolvency-related judgments”. Queries were raised whether reference to “judgment” instead of “insolvency-related judgment” might be more appropriate in the context of article X and whether the enactment of article X should be encouraged regardless of interpretation of the MLCBI, which might change over time.

45. The suggestion to replace the phrase “‘extraordinary’ reviews” with the phrase “‘extraordinary’ judicial reviews” in the last sentence of paragraph 80 did not gain support.

46. The suggestion was made that the last sentence of paragraph 83 should be deleted or replaced with the following phrase: “This basic structure would be complemented by existing procedural requirements of the enacting State and accordingly the enacting State should ensure that article 10 interacts appropriately with the domestic procedural law.” That suggestion did not gain support. Concern was expressed that by adding the suggested wording, a message could inadvertently be conveyed to enacting States that the MLIJ was more permissive than intended as regards grounds for refusing the recognition and enforcement of insolvency-related judgments. Noting that the last sentence of paragraph 83 as drafted was taken from the Guide to Enactment and Interpretation of the MLCBI, the Working Group agreed to retain that sentence with a cross-reference to article 10, paragraph 2.

47. With those amendments, the Working Group approved the substance of the draft guide.

V. Facilitating the cross-border insolvency of enterprise groups

A. Form of the document

48. The prevailing view was that the text should be prepared as a stand-alone model law, in the light of its distinct scope. That approach, it was noted, would accord more prominence to the text and facilitate its promotion, as well as highlight its importance for cross-border inter-State cooperation and coordination in insolvency-related matters.

49. A suggestion was made that the title of that model law should avoid terms that might create confusion with other UNCITRAL insolvency-related model laws. For that reason, it was suggested, such terms as “cross-border” should not be included in

its title. A provisional title of "model law on enterprise group insolvency" (the MLEGI) was suggested.

50. Concern was expressed that enacting States might face difficulties with enacting the MLEGI, in particular because of its interaction with two other insolvency-related model laws of UNCITRAL (the MLCBI and the MLIJ). To address that concern, it was agreed that issues of enactment and implementation of the MLEGI, including its interaction with other two model laws, should be discussed in a guide to enactment of the MLEGI. The understanding was that it would be for enacting States to decide how to integrate the MLEGI into their legal framework, either as part of insolvency law or otherwise.

B. Consideration of the draft legislative provisions (A/CN.9/WG.V/WP.158)

[Part A]

Chapter 1. General provisions

Preamble

51. A suggestion to add the phrase "Initiation of the planning proceedings" in the beginning of subparagraph (c) did not receive support.

52. With reference to the drafting suggestion in paragraph 1 of document A/CN.9/WG.V/WP.158, different views were expressed as regards the need for ensuring consistency throughout the text in references to the overall combined value of the group members and of the enterprise group as a whole. The need for reference to the enterprise group as a whole in subparagraph (e) was questioned. The prevailing view was that the preamble should be kept unchanged to provide a general statement of the goals of the MLEGI.

Article 1. Scope

53. With reference to the drafting suggestion in paragraph 2 of document A/CN.9/WG.V/WP.158, the Working Group agreed to replace the word "including" with the words "and addresses", to delete the words "for those enterprise group members" and add a new paragraph that would envisage exclusions from the scope of the MLEGI, along the lines of article 1, paragraph 2 of the MLCBI.

Article 2. Definitions

54. In response to a suggestion to replace the word "involved" in subparagraph (f) with a reference to "those" group members whose assets and operations were the subject of the proposals contained in the group solution, the question was raised as to whether the definition should be broader and include reference to: (a) those group members participating in a planning proceeding; and (b) those group members that, while not directly covered by the proposals in the group solution, might nevertheless be affected by those proposals. Related questions concerned the relevance or feasibility of determining the value of both of those sets of group members or the value of the group as whole, if that concept were to be added to the definition. After discussion, the Working Group agreed to retain the subparagraph with deletion of the word "involved" and replacement of the word "the group members" with "those group members".

55. The Working Group agreed to consider including additional definitions in the MLEGI at a later stage. In a later discussion, the Working Group heard suggestions for inclusion of such additional definitions as main and non-main proceedings, foreign proceeding, insolvency proceeding and concurrent proceedings. The understanding was that the Secretariat should have discretion to consider the need for those and additional definitions when revising the draft text.

Article 2 bis. Jurisdiction of the enacting State

56. With reference to the drafting suggestion in paragraph 7 of document A/CN.9/WG.V/WP.158, the Working Group agreed to add the words "in respect of that enterprise group member" after the words "insolvency proceedings" in subparagraph (d).

Article 2 ter. Public policy exception; and Article 2 quater. Competent court or authority

57. The Working Group approved the substance of the draft articles.

Additional articles in chapter 1

58. The Secretariat was requested to add articles similar to articles 3 and 8 of the MLIJ addressing international obligations and uniform interpretation, respectively.

Chapter 2. Cooperation and coordination

Article 3. Cooperation and direct communication between a court of this State and foreign courts, foreign representatives and a group representative; Article 4. Cooperation to the maximum extent possible under article 3; Article 6. Coordination of hearings

59. In response to a query on practical aspects of holding joint hearings as envisaged in article 6, paragraph 1, attention was drawn to part three of the Legislative Guide on Insolvency Law (chapter III, paras. 38–40) and other UNCITRAL texts discussing that point, as well as to relevant judicial practice.

Article 5. Limitation of the effect of communication under article 3

60. A suggestion was made to delete paragraph 1 since it represented a fundamental principle relating to independence of courts applicable more broadly and not only to article 3 and that for that reason, it could be discussed in the guide to enactment as applicable to the MLEGI as a whole. Another suggestion was that paragraph 1 could be moved to draft article 3. An additional point made was that paragraph 1 might overlap with paragraph 2(a). An alternative view was that paragraph 1 should remain in the draft article.

61. After discussion, the Working Group agreed to retain paragraph 1 in draft article 5.

Article 7. Cooperation and direct communication between a group representative, foreign representatives and foreign courts; Article 7 bis. Cooperation and direct communication between a [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*]**, foreign courts, foreign representatives and a group representative; and Article 8. Cooperation to the maximum extent possible under articles 7 and 7 bis**

62. The Working Group approved the substance of the draft articles.

Article 9. Authority to enter into agreements concerning the coordination of proceedings

63. In response to the question raised in paragraph 9(b) of document A/CN.9/WG.V/WP.158, there was agreement that a group representative, if appointed, should be authorized to enter into the agreements envisaged in draft article 9. Although there were different views as to whether a clarification needed to be included in article 9 or discussed in the guide to enactment of the MLEGI, the prevailing view was to include relevant drafting in the article.

Article 10. Appointment of a single or the same insolvency representative

64. A query was raised about the use of the phrase "a single or the same" in paragraph 1 and in the title of the draft article. The Working Group was referred to part three of the Legislative Guide on Insolvency Law (chapter II, paras. 142–144), where reasons for using that phrase were explained. The Secretariat was requested to include that explanation in the guide to enactment of the MLEGI. Suggestions to replace that phrase did not receive sufficient support.

65. A point was made that nothing in the draft model law could be understood as limiting obligations or duties, whether legislative or not, that existed in relation to insolvency representatives under domestic law. The Working Group agreed to delete paragraph 2 and reflect its content in the guide to enactment of the MLEGI.

Article 11. Participation by enterprise group members in a proceeding under [*identify laws of the enacting State relating to insolvency*]

66. The Working Group agreed: (a) to delete the words "chapter 2 of" in paragraph 1; (b) to replace the words "any other enterprise group" with the words "an enterprise group" in paragraph 4 and to move that paragraph before paragraph 3; and (c) to merge paragraphs 3 and 3 bis as follows: "An enterprise group member participating in a proceeding referred to in paragraph 1 has the right to appear, make written submissions and be heard in that proceeding on matters affecting that enterprise group member's interests and to take part in the development and implementation of a group insolvency solution. The sole fact that an enterprise group member participates in such a proceeding does not subject it to the jurisdiction of the courts of this State for any purpose other than that participation."

67. Proposals to delete paragraph 4 as being redundant in the light of paragraphs 1 and 2 of the draft article and to add provisions addressing possible exclusion from participation in the planning proceeding did not receive support.

Chapter 3. Conduct of a planning proceeding in this State

Article 12. Appointment of a group representative

68. With reference to the drafting suggestions in paragraph 12 of document A/CN.9/WG.V/WP.158, the Working Group agreed to delete the word "otherwise" in paragraph 1 of the draft article and to retain the words "a foreign proceeding" in subparagraphs 3(b) and (c) with an explanation in the guide that a foreign proceeding might cover proceedings other than insolvency proceedings. The Working Group agreed to add the phrase "pursuant to article 13" after the phrase "to seek relief" in paragraph 2 and to include an explanation in the guide to enactment of the MLEGI.

69. Support was expressed for a suggestion in paragraph 47 of document A/CN.9/WG.V/WP.158 to move paragraph 5 of draft article 20 to draft article 12. However, the Working Group deferred the consideration of article 20 to a later stage (see paras. 85–91 below).

Article 13. Relief available to a planning proceeding

70. The Working Group agreed to revise the draft article to reflect the drafting suggestions in paragraphs 14, 15 and 17 of document A/CN.9/WG.V/WP.158 (concerning the placement of paras. 1(c) and (g), the drafting of para. 1(g) in the singular form and the wording of para. 3). It also agreed to delete the phrase "where the funding entity is located in this State" in paragraph 1(g) (and in the corresponding provisions of arts. 15 and 17).

71. No support was expressed for closer aligning of the drafting of paragraph 3 with the wording contained in draft articles 15 and 17.

72. Various proposals were made with respect to paragraph 2 and the language in square brackets, including retaining the words in square brackets as drafted, deleting that text and deleting the whole paragraph. One difficulty highlighted with respect to

the existing language in square brackets was that it referred to article 22, which is a supplemental article, and including a reference to that article in article 13, paragraph 2 would only be applicable to States that had decided to enact the supplemental provisions. Further, for States that chose to enact the supplemental provisions, the text could be extended to also refer to article 23. Where those supplemental provisions were not enacted, it was noted, the only relevant reference was to article 21.

73. A proposal, using less specific language, was to replace the bracketed text with the words "unless a decision to stay or decline to commence an insolvency proceeding was made by a court where the enterprise group member has its centre of main interest (COMI)". While that proposal received some support on the basis that it was the COMI court that could most appropriately make the decision not to commence an insolvency proceeding, it was pointed out that that language did not address the situation in articles 21 and 21 bis, where the decision would not be made by the COMI court.

74. Further suggestions were to add the words "or as a consequence of a decision under article 21 bis, subparagraph (b)" after the word "COMI" in the proposal above or to refer to a decision of a court "of an appropriate jurisdiction". In support of deleting the text in square brackets, it was suggested that the guide to enactment could explain (for arts. 13, 15 and 17) the situations that might be covered by the reference to "not subject to insolvency proceedings" and that since the relief being discussed was not automatic, the court would have the discretion to take account of relevant considerations. Moreover, it was emphasized that the provisions on relief could not possibly concern group members that were not subject to insolvency proceedings. In support of the approach of dealing with the issue in the guide to enactment and avoiding complicated drafting to reconcile the core and supplemental provisions, it was recalled that the goal of the provision was to address very limited circumstances that would rarely occur i.e. those in which, notwithstanding that an insolvency proceeding had not commenced for a particular group member, there may nevertheless be a need to enable relief to be granted with respect to its assets and operations.

75. A different concern expressed was that the text should not impose on States that did not enact the supplemental articles 22 or 23 any obligation to recognize requests from States that had enacted those articles, although they may have the discretion to do so.

76. After further discussion, a proposal was made to replace the existing text in square brackets with the words "unless insolvency proceedings were not commenced for the purpose of minimizing the commencement of proceedings in accordance with this Law". Support was expressed for that proposal as a workable solution. A suggestion was made that the purpose of minimizing the commencement of proceedings should also be reflected in draft articles 21 and 22 or in the guide to enactment.

77. A suggestion was made to add another phrase to the proposed wording to read: "unless insolvency proceedings were not commenced for the purpose of minimizing the commencement of proceedings or facilitating the treatment of claims in an enterprise group insolvency in accordance with this Law." No support was expressed for the revised wording.

Chapter 4. Recognition of a foreign planning proceeding and relief

Article 14. Application for recognition of a foreign planning proceeding

78. The Working Group agreed to revise the draft article to: (a) amend the part of paragraph 2(c) after the comma to read "any other evidence concerning the appointment of the group representative that is acceptable to the court"; (b) add the word "insolvency" before the first reference to "proceedings" in paragraph 3(b); (c) delete the phrase "that are known to the group representative" at the end of paragraph 3(b); and (d) add the phrase "that are known to the group representative that have been" before the word "commenced" in paragraph 3(b).

Article 15. Provisional relief that may be granted upon application for recognition of a foreign planning proceeding

79. The Working Group agreed to revise the draft article to reflect the drafting suggestions in paragraphs 28 and 31 of document A/CN.9/WG.V/WP.158 (concerning the addition of wording to para. 1 and deletion of the proviso in para. 1(g)). It was agreed that the issue raised in paragraph 29 of document A/CN.9/WG.V/WP.158 (concerning para. 1(e)) should be discussed in the guide.

Article 16. Decision to recognize a foreign planning proceeding

80. It was agreed that there was no need to add to paragraph 1 the language suggested in paragraph 32 of document A/CN.9/WG.V/WP.158. Different views were expressed on the need for the phrase "Subject to article 2 ter," at the beginning of paragraph 1. It was noted that the MLCBI used a similar opening phrase in article 17 and for that reason it should be retained in the MLEGI. A different view was that a deviation from the MLCBI in that respect could be justified in the light of the drafting history of the MLCBI and the automatic consequences of recognition in that text. The Working Group agreed to delete the phrase and explain in the guide to enactment the overarching nature of public policy provisions contained in article 2 ter of the MLEGI.

Article 17. Relief that may be granted upon recognition of a foreign planning proceeding

81. A question was raised as to whether the language of paragraphs 1(d) and 1(e) should be consistent – referring to "commencement and continuation" of proceedings. There was no support for revising the existing drafting.

82. The Working Group agreed to replace the word "recognizing" with the word "approving" in paragraph 1(h) and in other provisions where that phrase was used (arts. 13 and 15); and to delete the word "entrusting" and add the words "may be entrusted" before the phrase "to an insolvency representative appointed", in paragraph 2.

Article 18. Participation of a group representative in a proceeding under [*identify laws of the enacting State relating to insolvency*]

83. Concern was expressed that, by addressing the proceedings involving participating members only, draft article 18 was narrower than other provisions of the draft model law (e.g. draft article 12). It was agreed that a provision addressing authorization by the court for participation by a group representative in proceedings relating to non-participating members would be added at the end of article 18.

Article 19. Protection of creditors and other interested persons

84. With reference to the drafting suggestions in paragraphs 38 to 40 of document A/CN.9/WG.V/WP.158, the Working Group agreed to add the phrase "of each participating enterprise group member" after the word "creditors" in paragraph 1.

Article 20. Approval of [local elements of] a group insolvency solution

85. With reference to the drafting suggestion in paragraph 42 of document A/CN.9/WG.V/WP.158, the Working Group agreed to revise the title of the article to read "Approval of a group insolvency solution".

86. Preference was expressed for variant 2 of both paragraphs 1 and 4. It was suggested that the phrase "in accordance with the law of this State" could be added at the end of variant 2 of paragraph 1. It was further suggested that the word "refer" in paragraph 2 could be replaced with the words "[approve or] direct that" with the consequential change of the words "for approval" in the same paragraph with the words "be approved". An alternative suggestion was to redraft paragraph 2 as follows: "The portion of the group solution affecting the enterprise group member referred to in paragraph 1 shall be approved by the court in accordance with the local law."

87. Views differed as regards suggestions to delete paragraph 3, to move article 23, paragraph 2, to article 20, and to merge paragraphs 4 and 4 bis.

88. Several drafting suggestions were made in an attempt to address different requirements found in various jurisdictions as regards the approval or confirmation of the group solution by a court. A general understanding was that some type of approval or confirmation would be needed under the local law for the group solution to have effect in the enacting State but those requirements would vary from jurisdiction to jurisdiction and would not necessarily involve a court. It was therefore suggested that the MLEGI should leave it to enacting States to specify their approval or confirmation requirements in their enactments of the MLEGI.

89. A query was raised about the need for paragraph 4. Concern was expressed in particular as regards the words "if unnecessary" found in that paragraph which would be inappropriate to suggest for enacting by States.

90. After detailed discussion, the Working Group agreed to replace paragraphs 1 to 4 bis with the following sentence: "Where a group insolvency solution affects an enterprise group member participating in a planning proceeding that has its COMI or establishment in this State, the portion of the group solution affecting that enterprise group member shall have effect in this State if it has received all approvals and confirmations required in accordance with the laws of this State." It was suggested that reference to approvals and confirmation in that proposed wording should be placed in square brackets to enable enacting States to specify applicable local requirements. The understanding was that the issues raised by that provision would be discussed in the guide to enactment of the MLEGI.

91. In response to concerns about the wording of draft article 4 ter, the Working Group agreed to revise it along the lines of article 7 of the MLCBI.

Chapter 5. Treatment of foreign claims

Article 21. Undertaking on the treatment of foreign claims: non-main proceedings

92. As regards the chapeau provisions of paragraph 1, a suggestion to move the opening two phrases to the guide did not receive support.

93. As regards paragraph 1(a), different views were expressed on whether the words "should be given" in the second sentence of that paragraph should be changed to "can be given" and whether that sentence should be moved to the guide.

94. It was suggested that the words "accorded" and "accord" where appearing in article 21 be replaced with the word "granted" or "grant" as appropriate.

95. As regards the article as a whole, views differed on whether it should be limited to synthetic proceedings related to the same debtor. Preference was expressed for keeping the scope of the article broader. The view was expressed that an article on international obligations agreed to be included in the draft model law (see para. 58 above) would sufficiently accommodate an approach to synthetic procedures taken in one region. In response, it was argued that provisions on international obligations alone would not be sufficient and the article itself should be limited to proceedings related to the same debtor, while other situations should be covered in supplemental provisions. For that reason, it was proposed to add the phrase "of that enterprise group member" in the chapeau provisions of paragraph 1 and in paragraph 1(a), in both cases after the words "main proceeding". That proposal did not receive support.

96. After discussion, except for replacing the conjunction "and" with "or" in opening phrases of the chapeau, the prevailing view was to retain the draft article unchanged and include in the guide the following explanation: "Article 21 was conceived to apply to a single debtor. The wording of the article, however, does not exclude the possibility for the enacting State to permit claims that could be made in a non-main proceeding for one group member to be addressed in the main proceeding of another group member."

Article 21 bis. Powers of the court of this State with respect to an undertaking under article 21

97. The Working Group approved the substance of the draft article.

[Part B]

Supplemental provisions

Article 22. Undertaking on the treatment of foreign claims: main proceedings

98. The Working Group agreed to include the text in square brackets without square brackets. Views differed as regards other drafting suggestions in paragraphs 51 and 52 of document A/CN.9/WG.V/WP.158. The Working Group agreed not to incorporate them.

Article 22 bis. Powers of a court of this State with respect to an undertaking under article 22

99. With reference to the drafting suggestion in paragraph 53 document A/CN.9/WG.V/WP.158, the Working Group agreed to retain the text in square brackets in the chapeau without the brackets.

Article 23. Additional relief

100. With reference to the drafting suggestions in paragraph 54 of document A/CN.9/WG.V/WP.158, the Working Group agreed to delete the text in the first set of square brackets in paragraph 1 and retain the word "that" without the brackets. No support was expressed for a suggestion to delete the word "particularly".

101. The Working Group agreed to retain the text in both sets of square brackets in paragraph 2 without the brackets. No support was expressed for moving paragraph 2 to article 20.

102. No support was expressed for a suggestion to add a new paragraph after paragraph 2 that would read as follows: "The portion of the group insolvency solution approved by the court pursuant to paragraph 1 of this article shall be given the same effect as it would have had if it had been prepared pursuant to insolvency law of this State."

103. A suggestion to add a reference to implementation of the plan in draft article 20 did not receive support.

C. Decision of the Working Group

104. The Working Group requested the Secretariat to revise document A/CN.9/WG.V/WP.158 to reflect the deliberations at the session. The understanding was that at the next session the Working Group might have for its consideration a draft of the guide to enactment of the MLEGI.

VI. Insolvency of micro, small and medium-sized enterprises

A. General statements

105. Appreciation was expressed to the Secretariat for preparing document A/CN.9/WG.V/WP.159, which would serve an excellent basis for further work of the Working Group on the topic.

106. General support was expressed for the work by UNCITRAL on the topic as being both timely and important, considering that MSMEs were the backbone of economies of all countries, not only developing ones, and recognizing the role of MSMEs for achieving sustainable development goals (SDGs). Difficulties currently faced by some developing countries in building local capacity to deal with MSME's insolvency were mentioned.

107. Some delegates pointed out that, in the light of the debtors intended to be covered, the work on the topic might raise some issues that were not previously considered by the Working Group in detail, such as out-of-court proceedings and other non-legislative measures to support MSMEs, such as counselling and advisory services.

108. National and regional experience with providing special treatment for insolvency of MSMEs and individual entrepreneurs was shared. The work of other international institutions on the same topic was also recalled. While acknowledging the importance of the work of those other institutions, the Working Group was of the view that the work by UNCITRAL would not duplicate but rather complement their work. In addition, it was noted, that in the light of its coordination mandate, UNCITRAL would be expected to coordinate the work of other international organizations on issues of MSMEs insolvency.

B. Form of the document

109. Different views were expressed on the form of document to be prepared, in particular whether it would be a supplement to the Legislative Guide on Insolvency Law or a stand-alone set of recommendations. The understanding was that the answer to that question would emerge as the work progressed. Support was expressed for preparing a toolbox of solutions to common problems faced by MSMEs in insolvency.

C. Consideration of core provisions relating to MSME insolvency

1. Scope of work

110. Views differed on whether the formulation of a definition of enterprises to be covered by an intended simplified regime would be needed. Difficulties with defining MSMEs were acknowledged in the light of varying and evolving concepts, thresholds and standards used in jurisdictions for such purpose. The alternative view was that the accounting standards or a global survey of national approaches to defining MSMEs might assist in formulating a generally acceptable definition of MSMEs.

111. Although various suggestions were made as to what should be the focus of the work i.e. micro enterprises, micro and small enterprises or micro, small and medium enterprises, differentiating between categories of MSMEs was thought to be too difficult; instead the focus should be on criteria that an enterprise would need to meet in order to be eligible for access to simplified insolvency procedures (e.g. a simple debt structure).

112. The general understanding was that the policy decision as to the persons that would be able to benefit from a simplified regime as envisaged would need to be left to each State.

2. Policy objectives

113. The following objectives of the work by the Working Group on the topic were mentioned: (a) formulating provisions for speedy, simple and low cost procedures; (b) emphasizing in that context the importance of out-of-court and hybrid procedures, conciliation and enforcement of concluded settlement agreements; (c) facilitating and incentivizing early access to insolvency proceedings; (d) achieving the right balance between the competing needs and interests of creditors and MSME debtors; (e) ensuring equity and fairness; and (f) building safeguards against abuse of a simplified insolvency regime.

D. Comments on document A/CN.9/WG.V/WP.159

1. Liquidation

Access by MSME debtors

114. The following points were made about access by MSME debtors:

(a) As to the relevance of good faith to commencement of liquidation proceedings, it should not be a condition of access to a proceeding, but was relevant to the progress of the proceeding and, in particular, to the availability of discharge and the conditions upon which it might be provided. Otherwise, administrative efficiency would not be achieved. There should be no presumption of bad faith based only upon the fact of financial difficulty or bad record keeping;

(b) On the test that might be available for commencement of a liquidation, cessation of payments was regarded as being easier to prove for small debtors. At the same time, balance sheet records were considered important for distribution of assets or, in no-asset cases, for discharge;

(c) With respect to the costs of liquidation, mechanisms should be found to ensure that debtors that did not have sufficient assets to fund a liquidation could nevertheless enter a proceeding or process to address their financial difficulties and obtain a discharge; the level of assets available might be relevant to determining the type of process available, and States might give consideration to the use of other sources of funding, such as public monies;

(d) A debtor seeking to access liquidation should be required, as a minimum, to provide a statement of what assets they owned, without having to provide details such as the value of those assets, as well as information relating to any transfers they might have made to related persons such as relatives. Such a requirement would assist in determining the appropriate process for the debtor and be relevant to considerations of good faith;

(e) Notification of creditors and the existence of a debtor's restructuring plan might also be considered as relevant factors in determining good faith;

(f) Ways of providing relevant information to MSME debtors to create incentives for early access to insolvency proceedings and to avoid any delay in commencement of proceedings (in particular through electronic communications and standard documentation) might be considered; at the same time it was recognized that those issues could be outside the scope of the insolvency law;

(g) Parallel proceedings for personal bankruptcy and linked insolvency of MSMEs should be discussed, as well as the possibility of nominating a joint liquidator or insolvency representative.

Assets constituting the insolvency estate

115. Although provisions for exemption of assets would be needed, safeguards against abuse would have to be also considered, in particular by specifying assets subject to exemption in legislation.

No-asset cases

116. Concerns were expressed that the advantages of mechanisms described in paragraphs 23 to 25 for no-asset MSMEs may be abused and therefore safeguards, for example verification procedures, should be put in place.

2. Reorganization

117. With respect to reorganization, a number of points were made, including the following:

(a) The issue of viability, as reflected in paragraph 32, was an important one and viability needed to be assessed, although it may be difficult in practice to do so.

Any test adopted should not be costly or detrimental to the assets of the debtor. One means suggested might be to focus on various ratios e.g. debt to capital;

(b) Simplified procedures needed to ensure an appropriate balance was achieved between the rights of the debtor and creditors. Unlike the general approach of the Legislative Guide, for MSMEs there should not be a focus on reorganization, and to the extent that it was discussed it should avoid reference to complex issues such as different categories of creditors. Consideration might be given to exploring reorganization of only some categories of debt. In addition, the question of hold outs where there was, for example, a single creditor in a position of influence (such as creditor secured by the residential property of the debtor) and the problems arising from intermingling of business and personal assets needed to be considered;

(c) As in the case of liquidation, incentives to encourage early access to reorganization processes should be considered, particularly with respect to equity holders and debtors providing personal guarantees for MSME debt; and

(d) Creditor passivity was not a problem peculiar to MSME insolvency, so that simplification might be justified not by reference to that issue, but rather to the number of creditors.

3. Discharge

118. As regards that section, the following suggestions were made: (a) to place that section after the section on liquidation; (b) to stipulate a short discharge period, which would be important for a fresh start as explained in paragraph 68; (c) not to condition the discharge on the availability of funds, which would however be an important factor in determining the length of the discharge period and categories of debts that could be discharged; (d) to note that in some jurisdictions provisions on discharge could be found not in insolvency but in consumer protection law; and (e) to prefer the second option for disqualification described in paragraph 75.

4. Related persons and third party guarantors

119. The importance of elaborating on the notions of related persons and third party guarantees referred to in paragraph 79 was emphasized. A suggestion was made to redraft paragraphs 80 and 81 to balance interests of debtors and creditors considering that if the enforcement was stayed, the interests of creditors might be jeopardized.

E. Decision of the Working Group

120. The Working Group requested the Secretariat to revise document A/CN.9/WG.V/WP.159 to reflect the deliberations at the session.

VII. Proposal by the Government of the United States of America for the development of model legislative provisions on civil asset tracing and recovery

121. The Working Group heard further information with respect to the proposal that had been submitted to the Working Group at the previous session (A/CN.9/931, para. 95). The intention, it was emphasized, was not to embark upon any consideration of criminal law or cross-border issues. It was pointed out that close coordination with international organizations that might be affected by any work on the topic that might be taken up by UNCITRAL, including the Hague Conference on Private International Law and the United Nations Office on Drugs and Crime (UNODC), was to be ensured. It was further explained that, while the proposal raised issues not necessarily limited to insolvency law, a toolbox of options might be developed that could be of particular utility in the context of insolvency.

122. There was support in the Working Group for suggesting to the Commission that it might wish to consider that topic for possible future work. The understanding was

that, if the Commission were to find the proposal interesting, it might wish to request the Secretariat to research the topic and prepare a study for future consideration.

Annex

Draft model law on recognition and enforcement of insolvency-related judgments

Preamble

1. The purpose of this Law is:

(a) To create greater certainty in regard to rights and remedies for recognition and enforcement of insolvency-related judgments;

(b) To avoid the duplication of insolvency proceedings;

(c) To ensure timely and cost-effective recognition and enforcement of insolvency-related judgments;

(d) To promote comity and cooperation between jurisdictions regarding insolvency-related judgments;

(e) To protect and maximize the value of insolvency estates; and

(f) Where legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has been enacted, to complement that legislation.

2. This Law is not intended:

(a) To restrict provisions of the law of this State that would permit the recognition and enforcement of an insolvency-related judgment;

(b) To replace legislation enacting the UNCITRAL Model Law on Cross-Border Insolvency or limit the application of that legislation;

(c) To apply to the recognition and enforcement in the enacting State of an insolvency-related judgment issued in the enacting State; or

(d) To apply to the judgment commencing the insolvency proceeding.

Article 1. Scope of application

1. This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a State that is different to the State in which recognition and enforcement are sought.

2. This Law does not apply to [...].

Article 2. Definitions

For the purposes of this Law:

(a) “Insolvency proceeding” means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(b) “Insolvency representative” means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the insolvency proceeding;

(c) “Judgment” means any decision, whatever it may be called, issued by a court or administrative authority, provided an administrative decision has the same effect as a court decision. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses. An interim measure of protection is not to be considered a judgment for the purposes of this Law;

(d) “Insolvency-related judgment”:

(i) Means a judgment that:

a. Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and

b. Was issued on or after the commencement of that insolvency proceeding; and

(ii) Does not include a judgment commencing an insolvency proceeding;

Article 3. International obligations of this State

1. To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

2. This Law shall not apply to a judgment where there is a treaty in force concerning the recognition or enforcement of civil and commercial judgments, and that treaty applies to the judgment.

Article 4. Competent court or authority

The functions referred to in this Law relating to recognition and enforcement of an insolvency-related judgment shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*] and by any other court before which the issue of recognition is raised as a defence or as an incidental question.

Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to act in another State with respect to an insolvency-related judgment issued in this State, as permitted by the applicable foreign law.

Article 6. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance under other laws of this State.

Article 7. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State.

Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

Article 9. Effect and enforceability of an insolvency-related judgment

An insolvency-related judgment shall be recognized only if it has effect in the originating State and shall be enforced only if it is enforceable in the originating State.

Article 9 bis. Effect of review in the originating State on recognition and enforcement

1. Recognition or enforcement of an insolvency-related judgment may be postponed or refused if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired. In such cases, the court may also make recognition or enforcement conditional on the provision of such security as it shall determine.

2. A refusal under paragraph 1 does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 10. Procedure for seeking recognition and enforcement of an insolvency-related judgment

1. An insolvency representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment may seek recognition and enforcement of that judgment in this State. The issue of recognition may also be raised as a defence or as an incidental question.

2. When recognition and enforcement of an insolvency-related judgment is sought under paragraph 1, the following shall be submitted to the court:

(a) A certified copy of the insolvency-related judgment; and

(b) Any documents necessary to establish that the insolvency-related judgment has effect and, where applicable, is enforceable in the originating State, including information on any pending review of the judgment; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence on those matters acceptable to the court.

3. The court may require translation of documents submitted pursuant to paragraph 2 into an official language of this State.

4. The court is entitled to presume that documents submitted pursuant to paragraph 2 are authentic, whether or not they have been legalized.

5. Any party against whom recognition and enforcement is sought has the right to be heard.

Article 11. Provisional relief

1. From the time recognition and enforcement of an insolvency-related judgment is sought until a decision is made, where relief is urgently needed to preserve the possibility of recognizing and enforcing an insolvency-related judgment, the court may, at the request of an insolvency representative or other person entitled to seek recognition and enforcement under article 10, paragraph 1, grant relief of a provisional nature, including:

(a) Staying the disposition of any assets of any party or parties against whom the insolvency-related judgment has been issued; or

(b) Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related judgment.

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice, including whether notice would be required under this article*.]

3. Unless extended by the court, relief granted under this article terminates when a decision on recognition and enforcement of the insolvency-related judgment is made.

Article 12. Decision to recognize and enforce an insolvency-related judgment

Subject to articles 7 and 13, an insolvency-related judgment shall be recognized and enforced provided:

(a) The requirements of article 9 with respect to effectiveness and enforceability are met;

(b) The person seeking recognition and enforcement of the insolvency-related judgment is an insolvency representative within the meaning of article 2, subparagraph (b), or another person entitled to seek recognition and enforcement of the judgment under article 10, paragraph 1;

(c) The application meets the requirements of article 10, paragraph 2; and

(d) Recognition and enforcement is sought from a court referred to in article 4, or the question of recognition arises by way of defence or as an incidental question before such a court.

Article 13. Grounds to refuse recognition and enforcement of an insolvency-related judgment

In addition to the ground set forth in article 7, recognition and enforcement of an insolvency-related judgment may be refused if:

(a) The party against whom the proceeding giving rise to the judgment was instituted:

(i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or

(ii) Was notified of the institution of that proceeding in a manner that is incompatible with fundamental principles of this State concerning service of documents;

(b) The judgment was obtained by fraud;

(c) The judgment is inconsistent with a judgment issued in this State in a dispute involving the same parties;

(d) The judgment is inconsistent with an earlier judgment issued in another State in a dispute involving the same parties on the same subject matter, provided the earlier judgment fulfils the conditions necessary for its recognition and enforcement in this State;

(e) Recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings, including by conflicting with a stay or other order that could be recognized or enforced in this State;

(f) The judgment:

(i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and

(ii) The interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

(g) The originating court did not satisfy one of the following conditions:

(i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;

(ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that the defendant argued on the merits before the court without objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that such an objection to jurisdiction would not have succeeded under that law;

(iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or

(iv) The court exercised jurisdiction on a basis that was not incompatible with the law of this State;

States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency might wish to enact subparagraph (h)

(h) The judgment originates from a State whose insolvency proceeding is not or would not be recognizable under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*], unless:

(i) The insolvency representative of a proceeding that is or could have been recognized under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*] participated in the proceeding in the originating State to the extent of engaging in the substantive merits of the cause of action to which that proceeding related; and

(ii) The judgment relates solely to assets that were located in the originating State at the time the proceeding in the originating State commenced.

Article 14. Equivalent effect

1. An insolvency-related judgment recognized or enforceable under this Law shall be given the same effect it [has in the originating State] or [would have had if it had been issued by a court of this State].*

2. If the insolvency-related judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

Article 15. Severability

Recognition and enforcement of a severable part of an insolvency-related judgment shall be granted where recognition and enforcement of that part is sought, or where only that part of the judgment is capable of being recognized and enforced under this Law.

States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency will be aware of judgments that may have cast doubt on whether judgments can be recognized and enforced under article 21 of that Model Law. States may therefore wish to consider enacting the following provision:

Article X. Recognition of an insolvency-related judgment under *[insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency]*

Notwithstanding any prior interpretation to the contrary, the relief available under [*insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment.

* The enacting State may wish to note that it should choose between the two alternatives provided in square brackets. An explanation of this provision is provided in the Guide to Enactment in the notes to article 14.

H. Note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft model law

(A/CN.9/WG.V/WP.156)

[Original: English]

Contents

I. Introduction

1. At its forty-seventh session (2014), the Commission approved a mandate for Working Group V to develop a model law or model legislative provisions providing for the recognition and enforcement of insolvency-related judgments.[1] The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864), forty-ninth (May 2016) (A/CN.9/870), fiftieth (December 2016) (A/CN.9/898), fifty-first (May 2017) (A/CN.9/903) and fifty-second (December 2017) (A/CN.9/931) sessions.

2. Following the fifty-second session, the draft model law was circulated to governments for comment. While those comments will be provided to the fifty-first session of the Commission (25 June–13 July 2018), any issues requiring further consideration of the draft text by the Working Group will be raised orally at the fifty-third session.

3. The notes below outline a few drafting suggestions by the Secretariat. It should be noted that the articles will not be renumbered until after finalization and adoption by the Commission.

II. Drafting proposals

Article 4. Competent court or authority

The functions referred to in this Law relating to recognition and enforcement of an insolvency-related judgment shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*] and by any other court [or authority] before which the issue of recognition is raised as a defence or as an incidental question in the course of proceedings.

Note on article 4

1. Since article 4 addresses both courts and other authorities competent to recognize and enforce a judgment, the words “or authority” might be added as indicated and also to the end of draft article 12 (d) after the word “court”.

2. Alternatively, since nearly all articles in the draft model law refer to “the court” (e.g. 6, 9, 10, 11, 12, 13, 14) it may be appropriate to add the words “or authority” throughout the text or to add to the text a definition of “court” that reflects the wording in the definition of “judgment”, along the lines of “a judicial or administrative authority, provided the administrative authority can issue decisions which have the same effect as a decision of a judicial authority”. An alternative approach may be to include an explanation of the term “court” in the guide to enactment (e.g. in section III.C Use of terminology).

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

Article 12. Decision to recognize and enforce an insolvency-related judgment

Subject to articles 7 and 13, an insolvency-related judgment shall be recognized and enforced provided:

(a) The requirements of article 9 [, paragraph 1] with respect to effectiveness and enforceability are met;

(b) …;

(c) …; and

(d) … .

Note on article 12

3. Since the revised version of article 9 contains only one paragraph, the words "paragraph 1" in subparagraph (a) of article 12 should be deleted.

Article 14. Equivalent effect

1. An insolvency-related judgment recognized or enforceable under this Law shall be given the same effect it [has in the originating State] *or* [would have had if it had been issued by a court of this State].[*]

2. If the insolvency-related judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

[[*] *The enacting State may wish to note that it should choose between the two alternatives provided in square brackets. An explanation of this provision is provided in the Guide to Enactment in the notes to article 14.*]

Note on article 14

4. To clarify that the two sets of text included in square brackets in article 14 are intended to be alternatives for States to choose between, the word "*or*" might be added, together with the footnote (indicated with an [*]) as suggested. The alternative nature of the drafting is explained in the draft guide to enactment.

States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency will be aware of judgments that may have cast doubt on whether judgments can be recognized and enforced under article 21 of [the] [that] Model Law. States may therefore wish to consider enacting the following provision.

Article X. Recognition of an insolvency-related judgment under [*insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*]

….

Note on article X

5. In the words in italics preceding article X, the words "the Model Law" at the end of the first sentence might be replaced with "that Model Law" to clarify that the reference is to MLCBI.

I. Note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law

(A/CN.9/WG.V/WP.157)

[Original: English]

Contents

I. Introduction

1. The draft text set out below provides guidance on application and interpretation of the draft model law on recognition and enforcement of insolvency-related judgments, which is set out in in the annex to document A/CN.9/931. It follows the same format as the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI), and draws upon that Guide as applicable; a number of the articles of the draft model law are the same as, or similar to, articles of MLCBI and the relevant explanations for those articles set out below are therefore based upon the explanations contained in the MLCBI Guide.

2. It is intended that the text of the articles of the model law will be included in the final version of the guide to enactment once the drafting of those articles is finalized. This document should thus be read together with the annex to document A/CN.9/931, which contains the current draft of the articles. The draft guide is based upon that text, which was revised during the fifty-second session of Working Group V (December 2017).

II. DRAFT Guide to Enactment of the UNCITRAL Model Law on recognition and enforcement of insolvency-related judgments

I. Purpose and origin of the Model Law

A. Purpose of the Model Law

1. The UNCITRAL Model Law on recognition and enforcement of insolvency-related judgments, adopted in 2018 is designed to assist States to equip their laws with a framework of provisions for recognizing and enforcing insolvency-related judgments that will facilitate the conduct of cross-border insolvency proceedings and complement the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI).

B. Origin of the Model Law

2. The work on this topic had its origin, in part, in certain judicial decisions[1] that led to uncertainty concerning the ability of some courts, in the context of recognition proceedings under MLCBI, to recognize and enforce judgments given in the course of foreign insolvency proceedings, such as judgments issued in avoidance proceedings, on the basis that neither article 7 nor 21 of MLCBI explicitly provided the necessary authority. Moreover, there was a concern that decisions by foreign courts determining the lack of such explicit authority in MLCBI for recognition and enforcement of insolvency-related judgments might have been regarded as persuasive authority in those States with legislation based upon article 8 of MLCBI, which relates to international effect.

3. Those concerns about the application and interpretation of MLCBI together with the general absence of an applicable international convention or other regime to address the recognition and enforcement of insolvency-related judgments[2] and the exclusion of judgments relating to insolvency matters from the instruments that do exist,[3] led to the proposal to UNCITRAL in 2014 to develop a model law or model legislative provisions on the recognition and enforcement of insolvency-related judgments.

4. The law of recognition and enforcement of judgments is arguably becoming more and more important in a world in which movement across borders, of both persons and assets, is increasingly easy. Although there is a general tendency towards more liberal recognition of foreign judgments, it is reflected in treaties requiring such recognition in specific subject areas (e.g. conventions relating to family matters, transportation and nuclear accidents) and in a narrower interpretation of the exceptions to recognition in treaties and domestic laws. Under applicable national regimes, some States will only enforce foreign judgments pursuant to a treaty regime, while others will enforce foreign judgments more or less to the same extent as local judgments. Between those two positions there are many different national approaches.

5. With respect to an international regime dealing more generally with recognition and enforcement of judgments, in 1992, the Hague Conference on Private International Law commenced work on two key aspects of private international law in cross-border litigation in civil and commercial matters: the international jurisdiction of courts and the recognition and enforcement of judgments abroad (the Judgments Project). The focus of that work was to replace the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. It led to the Convention of 30 June 2005 on Choice of Court Agreements (2005 Choice of Court Convention), which entered into force on 1 October 2015. Further work to develop a global judgments convention commenced in 2015.[4]

6. Insolvency decisions are typically excluded from the Hague Conference instruments, on the grounds, for example, that those matters may be seen as very specialized and best dealt with by specific international arrangements, or as closely intertwined with issues of public law. Article 1, subparagraph 5, of the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, for example, provides that the convention does not apply to "questions of bankruptcy, composition or analogous proceedings, including decisions which may result therefrom and which relate to the validity of the acts of the debtor." Article 2, subparagraph 2 (e), of the 2005 Choice of Court Convention provides that it does not apply to "insolvency, composition and analogous matters". That approach

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[1] For example, Rubin v. Eurofinance SA, [2012] UKSC 46 (on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 971); CLOUT case No. 1270. See also decision of the Supreme Court of Korea of 25 March 2010 (case No.: 2009Ma1600).

[2] Existing regimes are largely regional in focus e.g. Latin America, the European Union and the Middle East, UNCITRAL document A/CN.9/WG.V/WP.126, para. 6.

[3] The 1971 Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters and the Convention of 30 June 2005 on Choice of Court Agreements, both of which were developed by the Hague Conference on private international law.

[4] Information on the work of the Hague Conference can be found at: www.hcch.net.

is followed in the work to develop a global judgments convention, with the additional exclusion of "resolution of financial institutions".[5]

7. In the context of the Hague Conference texts,[6] the term "insolvency" is intended to cover both the bankruptcy of individual persons and the winding up or liquidation of corporate entities which are insolvent. It does not cover the winding up or liquidation of corporations for reasons other than insolvency, which is addressed in other provisions. It does not matter whether the process is initiated or carried out by creditors or by the insolvent person or entity itself with or without the involvement of a court. The term "composition" refers to procedures in which the debtor may enter into agreements with creditors in respect of a moratorium on the payment of debts or on the discharge of those debts. The term "analogous proceedings" covers a broad range of other methods in which insolvent persons or entities can be assisted to regain solvency while continuing to trade.[7]

8. Very few States have recognition and enforcement regimes that specifically address insolvency-related judgments. Even in States that do have such regimes, they may not cover all orders that might broadly be considered to relate to insolvency proceedings.[8] In one State, for example, judgments against a creditor or third party determining rights to property claimed by the insolvency estate, awarding damages against a third party, or avoiding a transfer of property can be considered insolvency-related judgments as they are the result of an adversarial process and have required service of the documents originating the action. In that same State, orders confirming a plan of reorganization, granting a bankruptcy discharge or allowing or rejecting a claim against the insolvency estate are not considered insolvency-related judgments, even if those orders may have some of the attributes of a judgment.

9. One regional regime provides for the recognition and enforcement of judgments that "derive directly from and are closely linked to the insolvency proceedings". Judgments held to fall into that category have included those concerning:[9] avoidance actions, insolvency law-related lawsuits on the personal liability of directors and officers; lawsuits concerning the priority of a claim; disputes between an insolvency representative and debtor on inclusion of an asset in the insolvency estate; approval of a reorganization plan; discharge of residual debt; actions on the insolvency representative's liability for damages, if exclusively based on the carrying out of the insolvency proceedings; action by a creditor aiming at the nullification of an insolvency representative's decision to recognize another creditor's claim; and claims by an insolvency representative based on specific insolvency law privilege. Judgments held not to fall into that category have included:[10] actions by and against an insolvency representative which would also have been possible without the insolvency proceedings; criminal proceedings in connection with insolvency; an action to recover property in the possession of the debtor; an action to determine the legal validity or amount of a claim pursuant to general laws; claims by creditors with a right for segregation of assets; claims by creditors with a right for separate satisfaction (secured creditors); and an avoidance action filed not by an insolvency representative but by a legal successor or assignee.

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[5] See November 2017 draft convention, art. 2, subpara. 1(e). This additional exclusion refers to the new legal framework enacted in various jurisdictions under the auspices of the Financial Stability Board to prevent the failure of financial institutions.

[6] Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report by Trevor Hartley and Masato Dogauchi, [56]. There is an identical provision in art. 1(2)(e) of the preliminary draft Convention of 1999, and its scope is further examined at paras. 38 to 39 of the report by Peter Nygh and Fausto Pocar, Report of the Special Commission, appended to the Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters (2000).

[7] For example, chapter 11 of the United States Federal Bankruptcy Code and Part II of the United Kingdom Insolvency Act 1986.

[8] See UNCITRAL document A/CN.9/WG.V/WP.126, paras. 16–22.

[9] These judgments relate to decisions under the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings. See UNCITRAL document A/CN.9/WG.V/WP.126, para. 21 for case citations.

[10] A/CN.9/WG.V/WP.126, para. 22.

10. Examples of judgments to be covered by the Model Law are discussed further below in the notes on article 2.

C. Preparatory work and adoption

11. In 2014, the Commission gave Working Group V (Insolvency Law) a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgments.[11] The Model Law was negotiated between December 2014 and May 2018, the Working Group having devoted part of 8 sessions (forty-sixth to fifty-third) to work on the project.

12. The final negotiations on the draft text took place during the fifty-first session of UNCITRAL, held in Vienna from 25 June to 13 July 2018. UNCITRAL adopted the Model Law by consensus on ... July. In addition to the 60 States members of UNCITRAL, representatives of … observer States and … international organizations participated in the deliberations of the Commission and the Working Group. Subsequently, the General Assembly adopted resolution …/… of … (see annex), in which it expressed its appreciation for UNCITRAL completing and adopting the Model Law.

II. Purpose of the Guide to Enactment

13. The Guide to Enactment is designed to provide background and explanatory information on the Model Law and its interpretation and application. That information is primarily directed to executive branches of Government and legislators preparing the necessary legislative revisions, but may also provide useful insight to those charged with interpretation and application of the Model Law, such as judges, and other users of the text, such as practitioners and academics. That information might also assist States in considering which, if any, of the provisions might need to be adapted to address particular national circumstances.

14. The present Guide was considered by Working Group V at its fifty-second (December 2017) and fifty-third (May 2018) sessions. It is based on the deliberations and decisions of the Working Group in negotiating the text of the Model Law and those of the Commission in finalizing and adopting the Model Law at its fifty-first session.

III. A model law as a vehicle for the harmonization of laws

15. A model law is a legislative text recommended to States for incorporation into their national law. Unlike an international convention, a model law does not require the State enacting it to notify the United Nations or other States that may have also enacted it. However, the General Assembly resolution endorsing the Model Law invites States that have used the Model Law to advise the Commission accordingly (see annex).

A. Fitting the Model Law into existing national law

16. With its scope limited to recognition and enforcement of insolvency-related judgments, the Model Law is intended to operate as an integral part of the existing law of the enacting State.

17. In incorporating the text of a model law into its legal system, a State may modify or elect not to incorporate some of its provisions. In the case of a convention, the possibility of changes being made to the uniform text by the States parties (normally referred to as “reservations”) is much more restricted; in particular, trade law conventions usually either totally prohibit reservations or allow only specified ones. The flexibility inherent in a model law, on the other hand, is particularly desirable in those cases when it is likely that the State would wish to make various modifications

[11] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

to the uniform text before it would be ready to enact it as a national law. Some modifications may be expected, in particular, when the uniform text is closely related to the national court and procedural system.

18. The flexibility that enables the Model Law to be adapted to the legal system of the enacting State should be utilized with due consideration for the need for uniformity in its interpretation (see notes on article 8 below) and for the benefits to the enacting State of adopting modern, generally acceptable international practices in insolvency-related matters. Modification means that the degree of, and certainty about, harmonization achieved through a model law may be lower than in the case of a convention. Therefore, in order to achieve a satisfactory degree of harmonization and certainty, it is recommended that States make as few changes as possible when incorporating the Model Law into their legal systems. This will assist in making the national law as transparent and predictable as possible for foreign users. The advantage of uniformity and transparency is that it will make it easier for enacting States to demonstrate the basis of their national law on recognition and enforcement of insolvency-related judgments.

19. While the Model Law indicates specific grounds upon which a judgment may be refused recognition and enforcement, it also preserves the possibility of excluding or limiting any action that may be taken under the Model Law on the basis of overriding public policy considerations, although it is expected that the public policy exception will be rarely used (article 7).

B. Use of terminology

20. Rather than using terminology familiar to only some jurisdictions and legal traditions and thus to avoid confusion, the Model Law follows the approach of other UNCITRAL texts of developing new terms with defined meanings. Accordingly, the Model Law introduces the term “insolvency-related judgment” and relies upon other terms, such as “insolvency representative” and “insolvency proceeding” that were developed in other UNCITRAL insolvency texts. Where the expression used is likely to vary from country to country, the Model Law, instead of using a particular term, indicates the meaning of the term in italics within square brackets and calls upon the drafters of the national law to use the appropriate term.

21. The use of the term “insolvency-related judgment” is intended to avoid confusion as to the application to the Model Law of jurisprudence that may relate to particular terms or phrases used in specific States or regions. The phrase “arises as a consequence of or is materially associated with” is used to describe the connection between the judgment and an insolvency proceeding, rather than the phrase referred to in paragraph 9 above, which is key terminology in a particular regional law and has been given a specific interpretation by relevant courts.

“Insolvency”

22. Acknowledging that different jurisdictions might have different notions of what falls within the term “insolvency proceedings”, the Model Law does not define the term “insolvency”. However, as used in the Model Law, “insolvency proceeding” refers to various types of collective proceedings commenced with respect to a debtor that is in severe financial distress or insolvent, with the goal of liquidating or reorganizing that debtor as a commercial entity. A judicial or administrative proceeding to wind up a solvent entity where the goal is to dissolve the entity and other foreign proceedings not falling within article 2, subparagraph (a) are not insolvency proceedings within the scope of the Model Law. Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2, subparagraph (a) of the Model Law only if the debtor is insolvent or in severe financial distress. The use of the term “insolvency” in the Model Law is

consistent with its use in other UNCITRAL insolvency texts, specifically MLCBI and the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide).[12]

23. It should be noted that in some jurisdictions the expression "insolvency proceedings" has a narrow technical meaning in that it may refer, for example, only to collective proceedings involving a company or a similar legal person or only to collective proceedings against a natural person. No such distinction is intended to be drawn by the use of the term "insolvency" in the Model Law, since the Model Law is designed to be applicable to foreign judgments related to proceedings addressing the insolvency of both natural and legal persons as the debtor. If, in the enacting State, the word "insolvency" may be misunderstood as referring to one particular type of collective proceeding, another term should be used to refer to the proceedings covered by the Law.

"State"/"originating State"

24. The words "this State" are used throughout the Model Law to refer to the entity that enacts the Model Law (i.e. the enacting State). The term should be understood as referring to a State in the international sense and not, for example, to a territorial unit in a State with a federal system. The words "originating State" are also used throughout the Model Law to refer to the State in which the insolvency-related judgment was issued.

"Recognition and enforcement"[13]

25. The Model Law generally refers to "recognition and enforcement" of an insolvency-related judgment as a single concept, although there are some articles where a distinction is made between recognition on the one hand and enforcement on the other. Use of the phrase "recognition and enforcement" should not be regarded as requiring enforcement of all recognized judgments where it is not required.

26. Under some national laws, recognition and enforcement are two separate processes and may be covered by different laws. In some federal jurisdictions, for example, recognition may be subject to national law, while enforcement is subject to the law of a territorial or sub-federal unit. Recognition may have the effect of making the foreign judgment a local judgment that can then be enforced under local law. Thus while enforcement may presuppose recognition of a foreign judgment, it goes beyond recognition. Confusion may be caused in some States as to whether both can be achieved through a single application or whether two separate applications are required. The Model Law does not specifically address that procedural requirement, but provisions that might be of specific relevance to the issue of enforcement should be noted, for example, article 9bis which refers to conditional recognition or enforcement.

27. In the case of some judgments, recognition might be sufficient and enforcement may not be needed, for example, for declarations of rights or some non-monetary judgments, such as the discharge of a debtor or a judgment determining that the defendant did not owe any money to the plaintiff. The receiving court may simply recognize that finding and if the plaintiff were to sue the defendant again on the same claim before that court, the recognition already accorded would be enough to dispose of the case. Thus, while enforcement must be preceded by recognition, recognition need not always be accompanied or followed by enforcement.

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[12] MLCBI, Guide to Enactment and Interpretation, paras. 48–49; Legislative Guide, Introd., glossary, para. 12(s): "'Insolvency': when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets."

[13] See paras. … below for further explanation of the meaning of the term "recognition and enforcement".

Documents referred to in this Guide

28. (a) "MLCBI": UNCITRAL Model Law on Cross-Border Insolvency (1997);

(b) "Guide to Enactment and Interpretation": Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, as revised and adopted by the Commission on 18 July 2013;

(c) "Practice Guide": UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009);

(d) "Legislative Guide": UNCITRAL Legislative Guide on Insolvency Law (2004), including part three: treatment of enterprise groups in insolvency (2010) and part four: obligations of directors in the period approaching insolvency (2013);

(e) "Judicial Perspective": UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (updated 2013);

(f) 2005 Choice of Court Convention: Hague Conference on Private International Law Convention of 30 June 2005 on Choice of Court Agreements; and

(g) Hartley/Dogauchi report: Explanatory Report on the 2005 Choice of Court Convention by Trevor Hartley and Masato Dogauchi.

IV. Main features of the Model Law

A. Scope of application

29. The Model Law applies to an insolvency-related judgment that was issued in a proceeding taking place in a State other than the enacting State in which recognition and enforcement is sought. That scope would include the situation where both the proceeding giving rise to the judgment and the insolvency proceeding to which it relates are taking place in another State. It would also include the situation in which the judgment was issued in another State, but the insolvency proceeding to which the judgment relates is taking place in the enacting State in which recognition and enforcement are sought. In other words, while the judgment must be issued in a State other than the enacting State, the location of the insolvency proceeding to which the judgment relates is not material, and it can be either a foreign proceeding or a local proceeding taking place in the enacting State.

B. Types of judgment covered

30. To fall within the scope of the Model Law a foreign judgment needs to possess certain attributes. These are, firstly, that it arises as a consequence of or is materially associated with an insolvency proceeding (as defined in art. 2, subpara. (a)) and, second, that it was issued on or after the commencement of that insolvency proceeding (art. 2, subpara. (d)). The definition does not include the judgment commencing an insolvency proceeding, as noted in the preamble, subparagraph 2(d) and in article 2, subparagraph (d)(ii). An interim measure of protection is not to be considered a judgment for the purposes of the Model Law (see paras. 53–54 below).

31. The cause of action giving rise to an "insolvency-related judgment" may have been pursued by various parties, including a creditor with approval of the court, based upon the insolvency representative's decision not to pursue that cause of action or, if the cause of action was assigned by the insolvency representative in accordance with the applicable law, by the party to whom it was assigned. In both instances, the judgment must be otherwise enforceable under the Model Law.

32. For the information of enacting States, a number of examples of the types of judgment that might fall within the definition of "insolvency-related judgment" are provided below; the list is not intended to be exhaustive (see para. 59 below).

C. Relationship between the Model Law and MLCBI

33. The subject matter of the Model Law is related to that of MLCBI. Both texts use similar terminology and definitions (e.g. the definition of "insolvency proceeding"

draws upon the definition of "foreign proceeding" in MLCBI); a number of the general articles of MLCBI are repeated in the Model Law;[14] and the Preamble[15] refers specifically to the relationship between the Model Law and MLCBI. The Preamble, as noted below (para. 44), clarifies that the Model Law is not intended to replace legislation enacting MLCBI. States that have enacted or are considering enacting MLCBI may wish to note the following guidance on the complementary nature of the two texts.

34. MLCBI applies to the recognition of specified foreign insolvency proceedings (that is, those that are a type of proceeding covered by the definition of "foreign proceeding" and can be considered to be either a foreign main or a foreign non-main proceeding under article 2). Other types of insolvency proceeding, such as those commenced on the basis of presence of assets or those that are not a collective proceeding (as explained in paras. 69–72 of the Guide to Enactment and Interpretation of MLCBI) do not fall within the types of proceeding eligible for recognition under MLCBI.

35. The Model Law, in comparison, has a narrower scope, addressing the recognition and enforcement of insolvency-related judgments, that is, judgments that bear the necessary relationship (as defined in art. 2, subpara. (d)), to an insolvency proceeding (as defined in art. 2, subpara. (a)). If the insolvency proceeding to which the specific judgment relates does not satisfy that definition, the judgment would not be an insolvency-related judgment capable of recognition and enforcement under the Model Law. The decision commencing the insolvency proceeding, which is the subject of MLCBI's recognition regime, is specifically excluded from the definition of "insolvency-related judgment" for the purposes of the Model Law[16] However, it should be noted that, in view of the severability provision in article 15, there may be other orders included in a judgment commencing an insolvency proceeding that could be subject to recognition and enforcement under the Model Law (see paras. 57 and 124–125 below).

36. Like MLCBI, the Model Law establishes a framework for seeking cross-border recognition, but in this case of an insolvency-related judgment. That framework seeks to establish a clear, simple procedure that avoids unnecessary complexity, such as requirements for legalization.[17] Like the analogous article in MLCBI (art. 19), the Model Law also permits orders for provisional relief to preserve the possibility of recognizing and enforcing an insolvency-related judgment between the time recognition and enforcement are sought and the time the court issues its decision. Like MLCBI, the Model Law also seeks to establish certainty with respect to the outcome of the recognition and enforcement procedure, so that if the relevant documents are provided, the judgment satisfies the definitional requirements and those for effectiveness and enforceability in the originating State, the person seeking recognition and enforcement is the appropriate person and there are insufficient or no grounds for refusing recognition and enforcement, the judgment should be recognized and enforced.

37. As discussed in more detail in the article-by-article remarks below, the Model Law includes an optional provision that permits recognition of an insolvency-related judgment to be refused when the judgment originates from a State whose insolvency proceeding is not susceptible of recognition under MLCBI; this may be because, as noted above, the insolvency proceeding is not one that falls within the definition in article 2, subparagraph (a) of the Model Law, or because that State is neither the location of the insolvency debtor's centre of main interests (COMI) nor of an establishment of the debtor. That principle is contained in article 13, subparagraph (h) of the Model Law, which is an optional provision for consideration by States that have enacted (or are considering enactment of) MLCBI. The substance of subparagraph (h) is an exception to that general principle, which permits recognition of a judgment

[14] MLCBI, article. 3, para. 1 to article 8.

[15] Preamble, subpara. 2(b)), as well as article 13, subparagraph (h) and article X (which is discussed below, see para. …).

[16] Preamble, subpara. 2(d) and art. 2, para. (d)(ii) (see paras. .. and .. below).

[17] See the discussion on legalization in the notes for article 10 below.

issued in a State that is neither the location of COMI nor of an establishment of the debtor, provided (i) the judgment relates only to assets that were located in the originating State and (ii) certain conditions are met. The exception could facilitate the recovery of additional assets for the insolvency estate, as well as the resolution of disputes relating to those assets. Such an exception with respect to the recognition of insolvency proceedings is not available in the MLCBI.

38. A requirement for protection of the interests of creditors and other interested persons, including the debtor, is included in both the Model Law and MLCBI, but in different situations. MLCBI requires the recognizing court to ensure that those interests are considered when granting, modifying or terminating provisional or discretionary relief under MLCBI (art. 22). As the Guide to Enactment and Interpretation of MLCBI explains, the idea underlying that requirement is that there should be a balance between relief that might be granted to the foreign representative and the interests of the persons that may be affected by that relief.[18] The Model Law is more narrowly focused; the issue of such protection is relevant only in so far as article 13, subparagraph (f) gives rise to a ground for refusing recognition and enforcement where those interests were not adequately protected in the proceeding giving rise to certain types of judgment. Those include, for example, a judgment confirming a plan of reorganization. As discussed further below (see paras. 108–109), the rationale is that the types of judgment specified in article 13, subparagraph (f) directly affect the rights of creditors and other stakeholders collectively. Although other types of insolvency-related judgment resolving bilateral disputes between parties may also affect creditors and other stakeholders, those effects are typically indirect (e.g., via the judgment's effect on the size of the insolvency estate). In those circumstances, a separate analysis of the adequate protection of third-party interests is not considered to be necessary and could lead to unnecessary litigation and delay.

39. Another element of the relationship between the Model Law and MLCBI concerns article X, which addresses the interpretation of article 21 of MLCBI. Article X is a further optional provision that States that have enacted (or are considering enacting) MLCBI may wish to consider. Pursuant to the clarification provided by article X, the discretionary relief available under article 21 of MLCBI to support a recognized foreign proceeding (covering both main and non-main proceedings) should be interpreted as including the recognition and enforcement of a judgment, notwithstanding any interpretation to the contrary.

V. Article-by-article remarks

Title

"Model Law"

40. If the enacting State decides to incorporate the provisions of the Model Law into an existing national statute, the title of the enacted provisions would have to be adjusted accordingly, and the word "Law", which appears in various articles, would have to be replaced by the appropriate phrase.

41. In enacting the Model Law, it is advisable to adhere as much as possible to the uniform text in order to make the national law as transparent as possible for foreign users of the national law (see also section III above).

Preamble

42. Paragraph 1 of the Preamble is drafted to provide a succinct statement of the basic policy objectives of the Model Law. It is not intended to create substantive rights, but rather to provide a general orientation for users of the Model Law and to assist with its interpretation.

43. In States where it is not customary to include in legislation an introductory statement of the policy on which the legislation is based, consideration might

[18] See Guide to Enactment and Interpretation, paras. 196–199.

nevertheless be given to including a statement of the objectives contained in the Preamble to the Model Law either in the body of the statute or in a separate document, in order to provide a useful reference for interpretation of the law.

44. Paragraph 2 of the Preamble is intended to clarify certain issues concerning the relationship of the Model Law to other national legislation dealing with the recognition of insolvency proceedings that might also address the recognition of insolvency-related judgments, including, for example, MLCBI where it has been enacted (see also art. 13, subpara. (h) and article X). Subparagraph 1(f) of the Preamble emphasizes that the Model Law is intended to complement MLCBI, while subparagraph 2(a) builds upon that complementarity, confirming that nothing in the Model Law is intended to restrict the application of those other laws and subparagraph 2(b) clarifies that the Model Law is not intended to replace legislation enacting MLCBI or to limit the application of that legislation. Subparagraph 2(c) relates to article 1 of the Model Law and clarifies that the text does not cover recognition and enforcement of an insolvency-related judgment issued in the enacting State. Subparagraph 2(d) of the Preamble confirms that the Model Law is not intended to apply to a judgment commencing an insolvency proceeding, as that judgment is the subject of recognition under MLCBI (this is also made clear in the definition of "insolvency-related judgment" in article 2, subparagraph (d)(ii)).

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 48
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 16, 58, 76
A/CN.9/WG.V/WP.150
A/CN.9/931, paras. 14–15

Article 1. Scope of application

Paragraph 1

45. Article 1, paragraph 1, confirms that the Model Law is intended to address the recognition and enforcement in one State (i.e. the State enacting the Model Law) of an insolvency-related judgment issued in a different State i.e. in a cross-border context. While the judgment to which the Model Law applies must be issued in a State other than the State in which recognition and enforcement are sought, it should be noted that the insolvency proceeding to which that judgment is related could be taking place in the State in which recognition and enforcement are sought; there is no requirement that that proceeding be taking place in another State. The judgment could also be related to a number of insolvency proceedings concerning the same debtor that are taking place in more than one State concurrently.

Paragraph 2

46. Article 1, paragraph 2, indicates that the enacting State might decide to exclude certain types of judgment, such as those raising public policy considerations or where other specifically designated legal regimes are applicable. These might include, for example, judgments concerning foreign revenue claims, extradition for insolvency-related matters or family law matters. With a view to making the national law based on this Model Law more transparent for the benefit of foreign users, exclusions from the scope of the law might usefully be mentioned in paragraph 2.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 49–53
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 55–60
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 32

A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [1]
A/CN.9/898, para. 11
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 16, 59–63
A/CN.9/WG.V/WP.150
A/CN.9/931, para. 16

Article 2. Definitions

Subparagraph (a) "Insolvency proceeding"

47. This definition draws upon on the definition of "foreign proceeding" in MLCBI.[19] A judgment will fall within the scope of the Model Law if it is related to an insolvency proceeding that meets the definition in article 2, subparagraph (a). The attributes required for that proceeding to fall within the definition include the following: judicial or administrative proceeding of a collective nature; basis in insolvency-related law of the originating State; opportunity for involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding. For a proceeding to be considered an "insolvency proceeding" it must possess all of these elements. The definition refers to assets that "are or were subject to control" to address situations such as where the insolvency proceeding has closed at the time recognition of the insolvency-related judgment is sought or where all assets were transferred at the start of a proceeding pursuant to a pre-packaged reorganization plan and while the assets are no longer subject to control, the proceeding remains open (see also notes with respect to the definition of "insolvency-related judgment" below).

48. A detailed explanation of the elements required for a proceeding to be considered an "insolvency proceeding" is provided in the Guide to Enactment and Interpretation of the MLCBI.[20]

Subparagraph (b) "Insolvency representative"

49. This definition draws upon the definition of "foreign representative" in MLCBI[21] and "insolvency representative" in the Legislative Guide.[22] Article 2, subparagraph (b) recognizes that the insolvency representative may be a person authorized in insolvency proceedings to administer those proceedings and, in the case of proceedings taking place in a State other than the enacting State, the "insolvency representative" may also include a person authorized specifically for the purposes of representing those proceedings.

50. The Model Law does not specify that the insolvency representative must be authorized by a court and the definition is thus sufficiently broad to include appointments that might be made by a special agency other than the court. It also includes appointments made on an interim basis. Such appointments are included to reflect the practice in many countries of often, or even usually, commencing insolvency proceedings on an "interim" or "provisional" basis. Except for being labelled as interim, those proceedings meet all the other requisites of the definition of "insolvency proceeding" in article 2, subparagraph (a). Such proceedings are often

[19] MLCBI, art. 2(a): (a) "'Foreign proceeding' means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."

[20] Guide to Enactment and Interpretation, paras. 69–80.

[21] MLCBI, art. 2(d): "'Foreign representative' means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."

[22] Legislative Guide, Introd., subpara. 12(v): "'Insolvency representative': a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate."

conducted for weeks or months as "interim" proceedings under the administration of persons appointed on an "interim" basis, and only at some later time would the court issue an order confirming the continuation of the proceedings on a non-interim basis. The definition in subparagraph (b) is sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings.

Subparagraph (c) "Judgment"

51. The Model Law adopts a broad definition of what constitutes a judgment, explaining what the term might include in the second sentence of article 2, subparagraph (c). The focus is upon judgments issued by a court, which might generally be described as an authority exercising judicial functions or by an administrative authority, provided a decision of the latter has the same effect as a court decision. Administrative authorities are included in the Model Law, as they are in MLCBI, on the basis that some insolvency regimes are administered by specialized authorities and decisions issued by those authorities in the course of insolvency proceedings merit recognition on the same basis as judicial decisions. The Model Law does not require an insolvency-related judgment to have been issued by a specialized court with insolvency jurisdiction, since not all States have such specialized courts and there are many instances in which a judgment covered by the Model Law could be issued by a court that did not have such competence. This is also supported by the focus upon "insolvency-related" judgments. For those reasons, the use of the word "court" is intentionally broader than the use of that word in both MLCBI and the Legislative Guide.[23]

52. The reference to costs and expenses of the court has been added to restrict the enforcement of costs orders to those given in relation to judgments that can be recognized and enforced under the Model Law.

53. Interim measures of protection should not be considered to be judgments for the purposes of the Law. The Model Law does not define what is intended by the term "interim measures". In the international context, few definitions of what constitute interim, provisional, protective or precautionary measures exist and legal systems differ on how those measures should be characterized.

54. Interim measures may serve two principal purposes: to maintain the status quo pending determination of the issues at trial and to provide a preliminary means of securing assets out of which an ultimate judgment may be satisfied. In addition, they may share certain characteristics; for example, they are temporary in nature, they may be sought on an urgent basis, or they may be issued on an ex parte basis. However, if an order for such measures is confirmed after the respondent has been served with the order and had the opportunity to appear and seek the discharge of the order, it may cease to be regarded as a provisional or interim measure.

55. Legal effects that might apply by operation of law, such as a stay applicable automatically on commencement of insolvency proceedings pursuant to the relevant law relating to insolvency, may not, without more, be considered a judgment for the purposes of the Model Law.

Subparagraph (d) "Insolvency-related judgment"

56. The types of judgment to be covered by the Model Law are those that can be considered to arise as a consequence of or that are materially associated with an insolvency proceeding (as defined in art. 2, subpara. (a)) and that are issued by a court or relevant administrative authority on or after the commencement of that insolvency proceeding. An insolvency-related judgment would include any equitable relief,

[23] Ibid., Introd., para. 8: For purposes of simplicity, the Legislative Guide uses the word "court" in the same way as art. 2, subpara. (e), of MLCBI to refer to "a judicial or other authority competent to control or supervise" insolvency proceedings. An authority which supports or has specified roles in insolvency proceedings, but which does not have adjudicative functions with respect to those proceedings, would not be regarded as within the meaning of the term "court" as that term is used in the Guide. MLCBI, art. 2 subpara. (e), provides: (e) "'Foreign court' means a judicial or other authority competent to control or supervise a foreign proceeding."

including the establishment of a constructive trust, provided in that judgment or required for its enforcement, but would not include any element of a judgment imposing a criminal penalty (although article 15 may enable the criminal penalty to be severed from other elements of the judgment).

57. The decision commencing an insolvency proceeding is specifically the subject of recognition under MLCBI and is not covered by this Model Law, as confirmed by subparagraph (d)(ii) of the definition. It might be noted that should recognition of the commencement decision be required, it is most likely to be in circumstances where the relief available under MLCBI is also required. The Model Law does, however, cover judgments issued at the time of commencement of insolvency proceedings, such as appointment of an insolvency representative and other judgments that might in some jurisdictions be described as first day orders. These could include judgments or orders addressing payment of employee claims and continuation of employee entitlements, retention and payment of professionals, acceptance or rejection of executory contracts, and use of cash collateral and post-commencement finance. They would be considered insolvency-related judgments on the basis that they arise as a consequence of the commencement of the insolvency proceedings and are judgments that fall within the definition of that term.

58. The words at the end of the definition of "insolvency-related judgment" in article 2, subparagraph (d)(i) a, "whether or not that insolvency proceeding has closed", clarify that an insolvency-related judgment issued after the proceeding to which it relates has closed, can still be considered an insolvency-related judgment for the purposes of the Model Law. In some jurisdictions, for example, actions for avoidance may be pursued after a reorganization plan has been approved and confirmed by the court, where that confirmation is considered to be the conclusion of the proceedings (see also para. 47 above). Insolvency laws take different approaches to conclusion of insolvency proceedings, as discussed in the Legislative Guide, part two, chapter VI, paragraphs 16–19.

59. The following list, which is not intended to be exhaustive, provides some examples of the types of judgment that might be considered insolvency-related judgments:

(a) A judgment dealing with constitution and disposal of assets of the insolvency estate, such as whether an asset is part of, should be turned over to, or was properly (or improperly) disposed of by the insolvency estate;

(b) A judgment determining whether a transaction involving the debtor or assets of its insolvency estate should be avoided because it upset the principle of equitable treatment of creditors (preferential transactions) or improperly reduced the value of the estate (transactions at an undervalue);

(c) A judgment determining that a representative or director of the debtor is liable for action taken when the debtor was insolvent or in the period approaching insolvency, and the cause of action relating to that liability was one that could be pursued by or on behalf of the debtor's insolvency estate under the law relating to insolvency, in line with part four of the Legislative Guide;

(d) A judgment determining that sums not covered by (a) or (b) above are owed to or by the debtor or its insolvency estate; some States may consider that a judgment would fall into this category only where the cause of action relating to the recovery or payment of those sums arose after the commencement of insolvency proceedings in respect of the debtor;

(e) A judgment (i) confirming or varying a plan of reorganization or liquidation, (ii) granting a discharge of the debtor or of a debt, or (iii) approving a voluntary or out-of-court restructuring agreement. The types of agreement referred to in subparagraph (iii) are typically not regulated by the insolvency law and may be reached through informal negotiation to address a consensual modification of the claims of all participating creditors. In the Model Law, the reference is to such

agreements that are ultimately referred to the court for approval in formal proceedings, such as an expedited proceeding of the type addressed in the Legislative Guide;[24] and

(f) A judgment for the examination of a director of the debtor, where that director is located in a third jurisdiction.

60. The cause of action leading to the judgment need not necessarily be pursued by the debtor or its insolvency representative. "Cause of action" should be interpreted broadly to refer to the subject matter of the litigation. The insolvency representative may have decided not to pursue the action, but rather to assign it to a third party or to permit it to be pursued by creditors with the approval of the court. The fact that the cause of action was pursued by another party will not affect the recognizability or enforceability of any resulting judgment, provided it is of a type otherwise enforceable under the Model Law.

61. Subparagraph (d)(ii), as noted above (paras. 57), confirms that the definition does not include the decision commencing an insolvency proceeding on the basis that it is the subject of a recognition regime under MLCBI. However, other decisions made at the time of commencement of an insolvency proceeding, as noted above (para. 57), such as the decision appointing the insolvency representative, are not excluded from the Model Law. Recognition of that appointment, for example, is often a critical factor in demonstrating that the insolvency representative has standing to apply for recognition and enforcement of the judgment (art. 10) or for relief associated with such recognition and enforcement (art. 11).

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 54–60
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 61–70
A/CN.9/WG.V/WP.138
A/CN.9/WG.V/WP.140, paras. 3–5
A/CN.9/870, paras. 53–60
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [2]–[13]
A/CN.9/898, paras. 48–60
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 16, 64–73, 77 (para. 68 is relevant to the history and evolution of the definition of the term "insolvency-related judgment")
A/CN.9/WG.V/WP.150
A/CN.9/931, paras. 17–18

Article 3. International obligations of this State

62. Article 3, paragraph 1, expressing the principle of supremacy of international obligations of the enacting State over internal law, has been modelled on similar provisions in other model laws prepared by UNCITRAL, including MLCBI.[25]

63. Article 3, paragraph 2, provides that where there is a treaty in force for the enacting State and that treaty applies to the recognition and enforcement of civil and commercial judgments, if the judgment in question falls within the terms of the treaty then the treaty should cover its recognition and enforcement, rather than the Model Law. The article confirms that the treaty will prevail only when it has entered into force for the enacting State and applies to the judgment in question. Binding legal obligations issued by regional economic integration organizations that are applicable to members of that organization might be treated as obligations arising from an international treaty. This provision can also be adapted in national law to refer to binding international instruments with non-state entities, where such instruments apply to the recognition and enforcement of insolvency-related judgments.

[24] Legislative Guide, chap. IV, section B.
[25] See for example, Guide to Enactment and Interpretation, paras. 91–93.

64. In some States binding international treaties are self-executing. In other States, however, those treaties, with certain exceptions, are not self-executing as they require internal legislation in order to become enforceable law. In view of the normal practice of the latter group of States with respect to international treaties and agreements, it might be inappropriate or unnecessary to enact article 3 or it might be appropriate to enact it in a modified form.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 61–63
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [14]–[15]
A/CN.9/898, paras. 13–17
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 17–20, 78
A/CN.9/WG.V/WP.150
A/CN.9/931, para. 19

Article 4. Competent court or authority

65. The competence for the judicial functions dealt with in the Model Law may lie with different courts and authorities in the enacting State and the enacting State would tailor the text of the article to its own system of such competence. The value of article 4, as enacted in a given State, would be to increase the transparency and ease of use of the legislation for the benefit of, in particular, foreign insolvency representatives and others authorized under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment. If, in the enacting State, any of the functions relating to recognition and enforcement of an insolvency-related judgment are performed by an authority other than a court, the State would insert in article 4, and in other appropriate places in the enacting legislation, the name of the competent authority.

66. In defining jurisdiction in matters mentioned in article 4, the implementing legislation should not unnecessarily limit the jurisdiction of other courts in the enacting State. In particular, as the article makes clear, the issue of recognition may be raised by way of defence or as an incidental question in a proceeding in which the main issue for determination is not that of recognition and enforcement of such a judgment. In those cases, that issue may be raised in a court or authority other than the body specified in accordance with the first part of article 4.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 64
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [16]–[17]
A/CN.9/898, paras. 18–20
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 21
A/CN.9/WG.V/WP.150
A/CN.9/931, para. 20

Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State

67. The intent of article 5 is to ensure insolvency representatives or other authorities appointed in insolvency proceedings commenced in the enacting State are authorized to act abroad with respect to an insolvency-related judgment. An enacting State in which insolvency representatives are already equipped to act in that regard may decide to forgo inclusion of article 5, although retaining that article would provide clear statutory evidence of that authority and assist foreign courts and other users of the law.

68. Article 5 is formulated to make it clear that the scope of the power exercised abroad by the insolvency representative would depend upon the foreign law and courts. Action that the insolvency representative appointed in the enacting State may wish to take in a foreign State will be action of the type dealt with in the Model Law, such as seeking recognition or enforcement of an insolvency-related judgment or associated relief. The authority to act in that foreign State will not depend on whether it has enacted legislation based on the Model Law.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 65
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [16]
A/CN.9/898, para. 21
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 22
A/CN.9/WG.V/WP.150
A/CN.9/931, para. 20

Article 6. Additional assistance under other laws

69. The purpose of the Model Law is to increase and harmonize the cross-border assistance available in the enacting State with respect to the recognition and enforcement of an insolvency-related judgment. However, since the law of the enacting State may, at the time of enacting the Law, already have in place various provisions under which a foreign insolvency representative could obtain that assistance and since it is not the purpose of the Law to replace or displace those provisions to the extent they provide assistance that is additional to or different from the type of assistance dealt with in the Model Law, the enacting State may consider whether article 6 is needed to make that point clear. Article X is also relevant in this regard in so far as it provides clarification as to the scope of article 21 of MLCBI and the relief that should be available under that article. As article 6 does not specify to whom the relief is available, it follows from article 10 that any person entitled to apply for recognition and enforcement of an insolvency-related judgment could also seek additional assistance under article 6.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 66
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [16]
A/CN.9/898, para. 21

A/CN.9/WG.V/WP.145
A/CN.9/903, para. 23
A/CN.9/WG.V/WP.150
A/CN.9/931, para. 21

Article 7. Public policy exception

70. As the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted in article 7.

71. In some States, the expression "public policy" may be given a broad meaning in that it might relate in principle to any mandatory rule of national law. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees; in those States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when to do so would contravene those fundamental principles.[26]

72. The purpose of the expression "manifestly", which is also used in many other international legal texts as a qualifier of the expression "public policy" (including MLCBI), is to emphasize that the public policy exception should be interpreted restrictively and that article 7 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State. In some States, that may include situations where the security or sovereignty of the State has been infringed.

73. For the applicability of the public policy exception in the context of the Model Law it is important to note that a growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs, as well as the notion of public policy as it is used in matters of international cooperation and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public policy. This dichotomy reflects the realization that international cooperation would be unduly hampered if "public policy" were to be understood in an expansive manner.

74. The second part of the provision referring to procedural fairness is intended to focus attention on serious procedural failings. It was drafted to accommodate those States with a relatively narrow concept of public policy (and which treat procedural fairness and natural justice as being distinct from public policy) that may wish to include language about procedural fairness in legislation enacting the Model Law.[27] The addition of this language is not intended to suggest that the approach to public policy in the Model Law differs in any way from that of MLCBI or that the idea of procedural fairness would not be included under the public policy exception in article 6 of MLCBI.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.138
A/CN.9/870, para. 67
A/CN.9/WG.V/WP.143
A/CN.9/898, para. 21
A/CN.9/WG.V/WP.143/Add.1, notes [18]–[19]
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 24
A/CN.9/WG.V/WP.150
A/CN.9/931, para. 22

[26] For relevant cases under MLCBI see, for example, the Judicial Perspective, section III.B.5 "The 'public policy' exception".
[27] Cf. article 9 (e) of the 2005 Choice of Court Convention; Hartley/Dogauchi report, paras. 189–190.

Article 8. Interpretation

75. A provision similar to the one contained in article 8 appears in a number of private law treaties (e.g. art. 7, para. 1, of the United Nations Convention on Contracts for the International Sale of Goods). It has been recognized that such a provision would also be useful in a non-treaty text, such as a model law, on the basis that a State enacting a model law would have an interest in its harmonized interpretation. Article 8 is modelled on the corresponding article of MLCBI.

76. Harmonized interpretation of the Model Law is facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system, under which the UNCITRAL secretariat publishes abstracts of judicial decisions (and, where applicable, arbitral awards) that interpret conventions and model laws emanating from UNCITRAL (for further information about the system, see para. 129 below).

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 68
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [16]
A/CN.9/898, para. 22
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 25
A/CN.9/WG.V/WP.150
A/CN.9/931, para. 23

Article 9. Effect and enforceability of an insolvency-related judgment

77. Article 9 provides that a judgment will only be recognized if it has effect in the originating State, and will only be enforced if it is enforceable in the originating State.[28] Having effect generally means that the judgment is legally valid and operative. If it does not have effect, it will not constitute a valid determination of the parties' rights and obligations. It is possible that a judgment is effective in the originating State without being enforceable because, for example, it has been suspended pending the outcome of an appeal (this is addressed in article 9bis). If a judgment does not have effect or is not enforceable in the originating State or if it ceases to have effect or be enforceable in the originating State, it should not be recognized or enforced (or continue to be recognized or enforced) in another State under the Model Law. The question of effect and enforceability must thus be determined by reference to the law of the originating State, recognizing that different States have different rules on finality and conclusiveness of judgments.

78. This discussion raises the distinction between recognition of a judgment and its enforcement.[29] As noted above (see paras. 25–27), recognition means that the receiving court will give effect to the originating court's determination of legal rights and obligations reflected in the judgment. For example, if the originating court held that the plaintiff had, or did not have, a certain right, the receiving court would accept and recognize that determination. Enforcement, on the other hand, means the application of the legal procedures of the receiving court to ensure compliance with the judgment issued by the originating court. Thus, if the originating court ruled that the defendant must pay the plaintiff a certain sum of money, the receiving court would ensure that the money was paid to the plaintiff. Since that would be legally indefensible if the defendant did not owe that sum of money to the plaintiff, a decision

[28] Cf. article 8 (3) of the 2005 Choice of Court Convention; Hartley/Dogauchi report, para. 171.
[29] Ibid., para. 170.

to enforce the judgment must, for the purposes of the Model Law, be preceded or accompanied by recognition of the judgment.

79. In contrast, recognition need not be accompanied or followed by enforcement. For example, if the originating court held that one party had an obligation to pay money to another party or that one party had a certain right, the receiving court may simply recognize that finding of fact, without any issue of enforcement arising. If the cause of action giving rise to that judgment was pursued again in the receiving State, recognition of the foreign judgment would be sufficient to dispose of the application.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 69, 72
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [20]–[21]
A/CN.9/898, paras. 23–24
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 26–27
A/CN.9/WG.V/WP.150
A/CN.9/931, paras. 24–26

Article 9bis. Effect of review in the originating State on recognition and enforcement

80. The use of the word "review" in article 9bis might have different meanings depending on national law; in some jurisdictions, it might initially include both the possibility of a review by the issuing court, as well as review by an appellate court. For example, an originating court may have a short period before an appeal is made to a higher court in which to review its own judgment; once the appeal is made, the originating court no longer has that ability. Both situations would be covered by the use of the word "review". "Ordinary review" describes, in some legal systems, a review that is subject to a time limit and conceived as an appeal with a full review (of facts and law). It differentiates those cases from "extraordinary" reviews, such as an appeal to a court of human rights or internal appeals for violation of fundamental rights.

81. Article 9bis, paragraph 1, provides that if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review has not expired, the receiving court has the discretion to adopt various approaches to the judgment. For example, it can refuse to recognize the judgment; postpone recognition and enforcement until it is clear whether the judgment is to be affirmed, set aside or amended in the originating State; proceed to recognize the judgment, but postpone enforcement; or recognize and enforce the judgment. This flexibility allows the court to deal with a variety of different situations, including, for example, where the judgment debtor pursues an appeal in order to delay enforcement, where the appeal may otherwise be considered frivolous or the judgment may be provisionally enforced in the originating State. If the court decides to recognize and enforce the judgment notwithstanding the review or to recognize the judgment but postpone enforcement, the court can require the provision of some form of security to ensure that the relevant party is not prejudiced pending the outcome of the review. If the judgment is subsequently set aside or amended or ceases to become effective or enforceable in the originating State, the receiving State should rescind or amend any recognition or enforcement granted in accordance with relevant procedures established under domestic law.

82. If the court decided to refuse recognition and enforcement because of the pending review, that decision should not prevent a new request for recognition and enforcement once that review had been determined. Refusal in that situation would mean dismissal without prejudice. This is addressed by article 9bis, paragraph 2.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 69, 72
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [20]–[21]
A/CN.9/898, paras. 23–24
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 2627
A/CN.9/WG.V/WP.150
A/CN.9/931, paras. 24–26

Article 10. Procedure for seeking recognition and enforcement of an insolvency-related judgment

83. Article 10 establishes the entitlement to apply for recognition and enforcement of an insolvency-related judgment in the enacting State and defines the core procedural requirements. Article 10 provides a simple, expeditious structure to be used for obtaining recognition and enforcement. Accordingly, in incorporating the provision into national law, it is desirable that the process not be encumbered with requirements additional to those already included.

Paragraph 1

84. Recognition and enforcement of an insolvency-related judgment can be sought by either an insolvency representative or a person authorized to act on behalf of an insolvency proceeding within the meaning of article 2, subparagraph (b). It may also be sought by any person entitled under the law of the originating State to seek such recognition and enforcement. Such a person might include a creditor whose interests are affected by the judgment. The second sentence of paragraph 1 repeats article 4, noting that the question of recognition may also be raised by way of defence or as an incidental question in the course of a proceeding. In such cases, enforcement may not be required. Where the issue arises in those circumstances, the requirements of article 10 should be met in order to obtain recognition of the judgment. Moreover, the person raising the question in that manner should be a person referred to in the first sentence of article 10, paragraph 1.

Paragraph 2

85. Article 10, paragraph 2, lists the documents or evidence that must be produced by the party seeking recognition and enforcement of an insolvency-related judgment. Subparagraph 2(a) requires the production of a certified copy of the judgment. What constitutes a "certified copy" should be determined by reference to the law of the State in which the judgment was issued. Subparagraph 2(b) requires the provision of any documents necessary to satisfy the condition that the judgment is effective and enforceable in the originating State, including information as to any pending review of the judgment (see notes on art. 9bis, para. 1), which could include information concerning the time limits for review. While the Model Law does not provide for recognition of the decision commencing the insolvency proceeding to which the judgment is related, it is desirable that a copy of that judgment be provided to the recognizing court as evidence of the existence of the insolvency proceeding to which the judgment is related. It is not intended, however, that where a copy of that judgment is provided in support of the application for recognition and enforcement, a receiving court should evaluate the merits of the foreign court's decision commencing that proceeding.

86. In order to avoid refusal of recognition because of non-compliance with a mere technicality (e.g. where the applicant is unable to submit documents that in all details meet the requirements of art. 10, subparas. 2(a) and (b)), subparagraph (c) allows evidence other than that specified in subparagraphs 2(a) and (b) to be taken into account. That provision, however, does not compromise the court's power to insist on the presentation of evidence acceptable to it. It is advisable to maintain that flexibility in enacting the Model Law.

Paragraph 3

87. Paragraph 3 entitles, but does not compel, the court to require a translation of some or all of the documents submitted under paragraph 2. If that discretion is compatible with the procedures of the court, it may facilitate a decision being made on the application at the earliest possible time if the court is in a position to consider the request without the need for translation of the documents.

Paragraph 4

88. The Model Law presumes that documents submitted in support of recognition and enforcement need not be authenticated in any special way, in particular by legalization: according to article 10, paragraph 4, the court is entitled to presume that those documents are authentic whether or not they have been legalized. "Legalization" is a term often used for the formality by which a diplomatic or consular agent of the State in which the document is to be produced certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp on the document.

89. It follows from article 10, paragraph 4, (according to which the court "is entitled to presume" the authenticity of documents submitted pursuant to paragraph 2) that the court retains discretion to decline to rely on the presumption of authenticity in the event of any doubt arising as to that authenticity or to conclude that evidence to the contrary prevails. This flexible solution takes into account the fact that the court may be able to assure itself that a particular document originates from a particular court even without it being legalized, but that in other cases the court may be unwilling to act on the basis of a foreign document that has not been legalized, in particular when documents emanate from a jurisdiction with which it is not familiar. The presumption is useful because legalization procedures may be cumbersome and time-consuming (e.g. because in some States they involve various authorities at different levels). Nevertheless, a State requiring legalization of documents such as those provided under article 10 is not prevented by the terms of the article from extending that requirement to the Model Law.

90. In respect of the provision relaxing any requirement of legalization, the question may arise whether it is in conflict with the international obligations of the enacting State. Several States are parties to bilateral or multilateral treaties on mutual recognition and legalization of documents, such as the Convention Abolishing the Requirement of Legalisation for Foreign Documents of 1961 [United Nations, Treaty Series, vol. 527, No. 7625] adopted under the auspices of the Hague Conference on Private International Law and providing specific, simplified procedures for the legalization of documents originating from signatory States. In many instances, however, the treaties on legalization of documents, like letters rogatory and similar formalities, leave in effect laws and regulations that have abolished or simplified legalization procedures; therefore, a conflict is unlikely to arise. For example, as stated in article 3, paragraph 2, of the above-mentioned convention:

> "However, [legalisation] cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more Contracting States have abolished or simplified it, or exempt the document itself from legalisation."

91. According to article 3, paragraph 1, of the Model Law, if there is still a conflict between the Model Law and a treaty or other formal, binding agreement, the treaty or other agreement will prevail.

Paragraph 5

92. Article 10, paragraph 5, establishes the right of the party against whom the relief provided in the judgment is sought to be heard on the application for recognition and enforcement. To ensure that the right is meaningful and can be enforced, the party against whom that relief is sought will require notice of the application for recognition and enforcement and of the details of the hearing. The Model Law leaves it up to the law of the enacting State to determine how that notice should be provided.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 62–63
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 72–75
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 70–71
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [22]–[25]
A/CN.9/898, paras. 25–26
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 28–32
A/CN.9/WG.V/WP.150
A/CN.9/931, paras. 27–29

Article 11. Provisional relief

93. Article 11 deals with "urgently needed" relief that may be ordered at the discretion of the court and is available from the moment recognition is sought, until a decision on recognition and, if appropriate, enforcement is made. The rationale for making such relief available is to preserve the possibility that if the judgment is recognized and enforced, assets will be available to satisfy it, whether they are assets of the debtor in the insolvency proceeding to which the judgment relates or of the judgment debtor. The urgency of the measures is alluded to in the opening words of paragraph 1. Subparagraph 1(a) restricts the stay to the disposition of assets of any party against whom the judgment was issued. Subparagraph 1(b) provides for other relief, both legal and equitable, to be granted provided it is within the scope of the judgment for which recognition is sought. As drafted, paragraph 1 should be flexible enough to encompass an ex parte application for relief, where the law of the enacting State permits a request to be made on that basis. This deferral to the law of the enacting State is also reflected in the notice provisions contained in paragraph 2.

Paragraph 2

94. The laws of many States contain requirements for notice to be given (either by the insolvency representative upon the order of the court or by the court itself) when relief of the type mentioned in article 11 is granted, except where it is sought on an ex parte basis (if that is permitted in the enacting State). Paragraph 2 is the appropriate place for the enacting State to make provision for such notice where it is required.

Paragraph 3

95. Relief available under article 11 is provisional in that, as provided in paragraph 3, it terminates when the issue of recognition and, where appropriate enforcement, is decided, unless extended by the court. The court might wish to do so, for example, to avoid a hiatus between any provisional measure issued before recognition and any measure that might be issued on or after recognition.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 82–83
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [40]
A/CN.9/898, para. 45
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 52–53
A/CN.9/WG.V/WP.150
A/CN.9/931, para. 30

Article 12. Decision to recognize and enforce an insolvency-related judgment

96. The purpose of article 12 is to establish clear and predictable criteria for recognition and enforcement of an insolvency-related judgment. If (a) the judgment is an "insolvency-related judgment" (as defined in art. 2, subpara. (d)); (b) the requirements for recognition and enforcement have been met (i.e. the judgment is effective and enforceable in the originating State under art. 9); (c) recognition is sought by a person referred to in article 10, paragraph 1, from a court or authority referred to article 4 or the question of recognition arises by way of defence or as an incidental question before such a court or authority; (d) the documents or evidence required under article 10, paragraph 2, have been provided; (e) recognition is not contrary to public policy (art. 7); and (f) the judgment is not subject to any of the grounds for refusal (art. 13), recognition should be granted.

97. In deciding whether an insolvency-related judgment should be recognized and enforced, the receiving court is limited to the preconditions set out in the Model Law. No provision is made for the receiving court to embark on a consideration of the merits of the foreign court's decision to issue the insolvency-related judgment or issues related to the commencement of the insolvency proceeding to which the judgment is related. Nevertheless, in reaching its decision on recognition, the receiving court may have due regard to any decisions and orders made by the originating court and to any information that may have been presented to the originating court. Those orders or decisions are not binding on the receiving court in the enacting State, which is only required to satisfy itself independently that the insolvency-related judgment meets the requirements of article 2. Nevertheless, the court is entitled to rely, pursuant to the presumption in article 10, paragraph 4, on the information in the certificates and documents provided in support of the request for recognition. In appropriate circumstances that information would assist the receiving court in its deliberations.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 64
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 76–77
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 73
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [26]–[27]
A/CN.9/898, paras. 27–29
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 33
A/CN.9/WG.V/WP.150
A/CN.9/931, para. 31

Article 13. Grounds to refuse recognition and enforcement of an insolvency-related judgment

98. Article 13 sets out the specific grounds, in addition to the public policy ground under article 7, on which recognition and enforcement of an insolvency-related judgment might be refused. The list of grounds is intended to be exhaustive, so that grounds not mentioned would not apply. As noted above, provided the judgment meets the conditions of article 12, recognition is not prohibited under article 7, and the grounds set forth in article 13 do not apply, recognition of the judgment should follow. By indicating that recognition and enforcement "may" be refused, article 13 makes it clear that, even if one of the provisions of article 13 is applicable, the court is not obliged to refuse recognition and enforcement. However, it might be noted that in some legal traditions, once one of the grounds enumerated in article 13 is found to exist, the court would not have that discretion and would have to refuse recognition and enforcement of the judgment. In principle, the onus of establishing one or more

of the grounds set out under article 13 rests upon the party opposing recognition or enforcement of the judgment.

Subparagraph (a) – notification of proceedings giving rise to the insolvency-related judgment

99. Article 13, subparagraph (a) permits the court to refuse recognition and enforcement if the defendant in the proceeding giving rise to the insolvency-related judgment was not properly notified of that proceeding. Two rules are involved: the first, in subparagraph (a)(i), is concerned with the interests of the defendant; the second, in subparagraph (a)(ii), is concerned with the interests of the receiving State.[30]

100. Subparagraph (a)(i) addresses failure to notify the defendant in sufficient time and in such a manner as to enable a defence to be arranged. This provision encompasses notification not only of the fact of the institution of the proceedings, but also of the essential elements of the claims made against the defendant in order to enable them to arrange their defence. The use of the word "notified" has no technical legal meaning, and simply requires the defendant to be placed in a position to inform her or himself of the claim and the content of the documentation relating to the institution of the proceedings. The test of whether notification has been given in sufficient time is purely a question of fact which depends on the circumstances of each case. The procedural rules of the originating court may afford guidance as to what might be required to satisfy the requirement, but would not be conclusive. Unfamiliarity with the local law and language and problems in finding a suitable lawyer may require a longer period than is prescribed under the law and practice of the originating court. The notification should also be effected "in such a manner" as to enable the defendant to arrange a defence, which may require documents written in a language that the defendant is unlikely to understand to be accompanied by an accurate translation. The defendant would have to show not merely that notice was insufficient, but that the fact of insufficiency deprived them of a substantial defence or evidence which, as a matter of certainty and not merely of speculation, would have made a material difference to the outcome of the originating litigation. If that is not the case, it cannot be argued that the defendant was not enabled to arrange a defence.

101. The rule in subparagraph (a)(i) does not apply if the defendant entered an appearance and presented their case without contesting notification, even if they had insufficient time to prepare their case properly. The purpose of this rule is to prevent the defendant raising issues at the enforcement stage that they could have raised in the original proceeding. In such a situation, the obvious remedy would have been for the defendant to seek an adjournment of that proceeding. If they failed to do that, they should not be entitled to put forward the lack of proper notification as a ground for non-recognition of the ensuing judgment. This rule does not apply if it was not possible to contest notification in the court of origin.

102. Subparagraph (a)(ii) addresses notification given in a manner that was incompatible with fundamental principles of the receiving State concerning service of documents, but only applies where the receiving State is the State in which that notification was given. Many States have no objection to the service of a foreign writ on their territory without any participation by their authorities, as it is seen as a matter of conveying information. A foreign person can serve a writ in those jurisdictions simply by going there and handing it to the relevant person. Other States, however, take a different view, considering that the service of a writ is a sovereign or official act and thus service on their territory without permission is an infringement of sovereignty. Permission would normally be given through an international agreement laying down the procedure to be followed. Such States would be unwilling to recognize a foreign judgment if the writ was served in a way that was regarded as an infringement of their sovereignty. Subparagraph (a)(ii) takes account of this point of view by providing that the court addressed may refuse to recognize and enforce the

[30] Cf. art. 9, subparas. (c)(i) to (ii) of the 2005 Choice of Court Convention; this explanation is based on the Hartley/Dogauchi report, paras. 185–187.

judgment if the writ was notified to the defendant in the receiving State in a manner that was incompatible with fundamental principles of that State concerning service of documents. Procedural irregularities that are capable of being cured retrospectively by the court in the receiving State would not be sufficient to justify refusal under this ground.

Subparagraph (b) – fraud

103. Article 13, subparagraph (b), sets out the ground of refusal that the judgment was obtained by fraud, which refers to a fraud committed in the course of the proceedings giving rise to the judgment.[31] It can be a fraud, which is sometimes collusive, as to the jurisdiction of the court. More often, it is a fraud practised by one party to the proceedings on the court or on the other party by producing false evidence or deliberately suppressing material evidence. Fraud involves a deliberate act; mere negligence does not suffice. Examples might include where the plaintiff deliberately served the writ, or caused it to be served, on the wrong address; where the requesting party (typically the plaintiff) deliberately gave the party to be notified (typically the defendant) incorrect information as to the time and place of the hearing; or where either party sought to corrupt or mislead a judge, juror or witness, or deliberately conceal key evidence. While in some legal systems fraud may be considered as falling within the scope of the public policy provision, this is not true for all legal systems. Accordingly, this provision is included as a form of clarification.

Subparagraphs (c)–(d) – inconsistency with another judgment

104. Article 13, subparagraphs (c) and (d), concern the situation in which there is a conflict between the judgment for which recognition and enforcement is sought and another judgment given in a dispute between the same parties.[32] Both subparagraphs are satisfied where the two judgments are inconsistent, but they operate in different ways.

105. Article 13, subparagraph (c), is concerned with the case where the foreign judgment is inconsistent with a judgment issued by a court in the receiving State. In such a situation, the receiving court is permitted to give preference to a judgment issued in its own State, even if that judgment was issued after the issue of the inconsistent judgment in the originating court. For this provision to be satisfied, the parties must be the same, but it is not necessary for the cause of action or subject matter to be the same; the subparagraph is therefore broader than subparagraph (d). The requirement that the parties must be the same will be satisfied if the parties bound by the judgments are the same, even if the parties to the proceedings giving rise to the judgment are different, for example, where one judgment is against a particular person and the other judgment is against the successor to that person.[33] Inconsistency between the judgments arises under subparagraph (c) when findings of fact or conclusions of law, which are based on the same issues, are mutually exclusive.

106. Article 13, subparagraph (d), concerns foreign judgments, where the judgment for which recognition and enforcement is sought is inconsistent with an earlier judgment. In that situation, a judgment may be refused recognition and enforcement only if: (a) it was issued after the conflicting judgment, so that priority in time is a relevant consideration; (b) the parties to the dispute are the same; (c) the subject matter is the same, so that the inconsistency goes to the central issue of the cause of action; and (d) the earlier conflicting judgment fulfils the conditions necessary for recognition in the enacting State, whether under this Law, other national law or a convention regime.

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[31] Cf. article 9, para. (d) of the 2005 Choice of Court Convention; Hartley/Dogauchi report, para. 188.

[32] Cf. article 9, paras. (f) and (g) of the 2005 Choice of Court Convention; the explanation of these grounds is based on the Hartley/Dogauchi report, paras. 191–193.

[33] Ibid., footnote 231.

Subparagraph (e) – interference with insolvency proceedings

107. Subparagraph (e) addresses the desirability of avoiding interference with the conduct and administration of the debtor's insolvency proceedings. Those proceedings could be the proceeding to which the judgment is related or other insolvency proceedings (i.e. concurrent proceedings) concerning the same insolvency debtor. While the concept of interference is somewhat broad, the provision gives examples of what might constitute such interference. Inconsistency with a stay, for example, would typically arise where the stay permitted the commencement or continuation of individual actions to the extent necessary to preserve a claim, but did not permit subsequent recognition and enforcement of any ensuing judgment. It could also arise where the stay did not permit the commencement or continuation of such individual actions and the proceeding giving rise to the judgment was commenced after the issue of the stay (and was thus potentially in violation of the stay). Interference may also cover instances where recognition of the insolvency-related judgment could upset cooperation between multiple insolvency proceedings or result in giving effect to a judgment on a matter or cause of action that should have been pursued in the jurisdiction of the insolvency proceeding (e.g. because the insolvency proceeding is the main proceeding or is taking place in the State in which the assets that are the subject of the judgment are located). However, this ground of interference should not be used as a basis for selective recognition of foreign judgments. It would not be justified as the sole reason for denying recognition and enforcement on the basis that, for example, it would deplete the value of the insolvency estate.

Subparagraph (f) – judgments implicating the interests of creditors and other stakeholders

108. Subparagraph (f) would only apply to judgments that materially affect the rights of creditors and other stakeholders, in the manner referred to in the subparagraph. The provision allows the receiving court to refuse recognition of such judgments where the interests of those parties were not taken into account and adequately protected in the proceeding giving rise to the judgment. The creditors and other stakeholders referred to would only be those whose interests might be affected by the foreign judgment. A creditor whose interests remain unaffected by, for example, a plan of reorganization or a voluntary restructuring agreement (e.g., because their claims are to be paid in full) would not have a right to oppose recognition and enforcement of a judgment under the provision.

109. Subparagraph (f) does not apply more generally to other types of insolvency-related judgment that resolve bilateral disputes between two parties. Even though such judgments may also affect creditors and other stakeholders, those effects are only indirect (e.g., via the judgment's effect on the size of the insolvency estate). In those instances, permitting a judgment debtor to resist recognition and enforcement by citing third-party interests could unnecessarily generate opportunities for wasteful relitigation of the cause of action giving rise to the judgment. For example, if a court in State A determined that the debtor owned a particular asset and issued a judgment against a local creditor resolving that ownership dispute, and the insolvency representative then sought to enforce that judgment in State B, the creditor should not be able to resist enforcement in B by raising arguments about the interests of other creditors and stakeholders that are not relevant to that dispute.

Subparagraph (g) – basis of jurisdiction of the originating court

110. Article 13, subparagraph (g), permits refusal of recognition and enforcement if the originating court did not satisfy one of the conditions listed in subparagraphs (i) to (iv); in other words, if the originating court exercised jurisdiction on a ground ***other*** than the ones listed, recognition and enforcement may be refused. As such, subparagraph (g) works differently to the other subparagraphs of article 13, each of which create a freestanding discretionary ground on which the court may refuse recognition and enforcement of a judgment; under subparagraph (g), one of the grounds ***must*** be met or recognition and enforcement of the judgment can be refused.

111. Subparagraph (g) can thus be seen as a broad exception, permitting refusal on grounds of inadequate jurisdiction in the originating court (as determined by the receiving court) with "safe harbours" that render the provision inapplicable if the originating court satisfies any one of them.

112. Subparagraph (g)(i) provides that the originating court's exercise of jurisdiction must be seen as adequate if the judgment debtor explicitly consented to that exercise of jurisdiction, whether orally or in writing. The consent could be addressed to the court (e.g., the judgment debtor informed the court that no objections to jurisdiction would be raised) or to the other party (e.g. the judgment debtor agreed with the other party that the proceeding should be brought in the originating court). The existence of explicit consent is a question of fact to be determined by the receiving court.

113. Subparagraph (g)(ii) provides that the originating court's exercise of jurisdiction must be seen as adequate if the judgment debtor submitted to the jurisdiction of the originating court by presenting their case without objecting to jurisdiction or the exercise of jurisdiction within any time frame applicable to such an objection, unless it was evident that such an objection would not have succeeded under the law of the originating State. In the above circumstances, the judgment debtor cannot resist recognition and enforcement by claiming that the originating court did not have jurisdiction. The method of raising the objection to jurisdiction is a matter for the law of the originating State. The decision by the defendant not to contest the jurisdiction must be made freely and on an informed basis. While the receiving court may not be under any obligation to satisfy itself independently that this was the case, it does not prevent a receiving court, in an appropriate case, from making inquiries where matters giving rise to concern become apparent.

114. Subparagraph (g)(iii) provides that the originating court's exercise of jurisdiction must be seen as adequate if exercised on a basis on which the receiving court could have exercised jurisdiction if an analogous dispute had taken place in the receiving State. If the law of the receiving State would have permitted a court to exercise jurisdiction in parallel circumstances, the receiving court cannot refuse recognition and enforcement on the basis that the originating court did not properly exercise jurisdiction.

115. Subparagraph (g)(iv) is similar to subparagraph (g)(iii), but broader. While subparagraph (g)(iii) is limited to jurisdictional grounds explicitly permitted under the law of the receiving State, subparagraph (g)(iv) applies to any additional jurisdictional grounds which, while not explicitly grounds upon which the receiving court could have exercised jurisdiction, are nevertheless not incompatible with the law of the receiving State. The purpose of subparagraph (g)(iv) is to discourage courts from refusing recognition and enforcement of a judgment in cases in which the originating court's exercise of jurisdiction was not unreasonable, even if the precise basis of jurisdiction would not be available in the receiving State, provided that exercise was not incompatible with the central tenets of procedural fairness in the receiving State.

Subparagraph (h) – judgments originating in certain States and relating only to assets

116. This subparagraph is an optional provision. States that have or are considering enacting the MLCBI might wish to consider adopting this provision, although there is nothing in the provision that would prevent a State that has not enacted (and does not plan to enact) the MLCBI from adopting the approach of this subparagraph.

117. Subparagraph (h) relies upon the MLCBI framework of recognition of specific types of foreign proceedings (i.e. main or non-main proceedings) and addresses the situation of a judgment issued in a State that is not the location of either the COMI or an establishment of the insolvency debtor, where the judgment relates only to assets that were located in that State at the time the proceeding giving rise to the judgment commenced. In those circumstances, it may be useful for that judgment to be recognized because, for example, it resolves issues of ownership that are relevant to the insolvency estate and that could only be resolved in that jurisdiction, rather than

in the jurisdiction of the debtor's COMI or establishment. By facilitating the recognition and enforcement of such judgments, the Model Law could assist the recovery of additional assets for the insolvency estate, as well as the resolution of disputes relating to those assets. The provision is nevertheless designed to help ensure that the Model Law framework is not undermined by the recognition and enforcement of judgments resolving issues that should have been resolved in the State where the debtor has or had its COMI or an establishment.

118. The chapeau of article 13, subparagraph (h), establishes the key principle that recognition of an insolvency-related judgment can be refused when the judgment originates from a State (the originating State) whose insolvency proceeding is not or would not be susceptible of recognition under MLCBI (e.g., because that State is neither the location of the insolvency debtor's COMI nor of an establishment). The language of the chapeau does not require an insolvency proceeding to have actually commenced in the originating State, only that, were such a proceeding to commence in that State, recognition and enforcement could be refused if the proceeding would not be susceptible of recognition. For example, an insolvency debtor has its COMI in State A and an establishment in State B, but only a main proceeding in A has commenced and no non-main insolvency proceeding has yet commenced in B. Some other litigation in B results in an insolvency-related judgment that is relevant to the insolvency estate. The insolvency representative from A wants to seek recognition or enforcement of the insolvency-related judgment from B in State C, which has enacted the Model Law and MLCBI. The court in C would see that the judgment comes from a State whose insolvency proceeding would be recognizable under MLCBI (i.e. the debtor has an establishment in B and a non-main proceeding could thus be commenced), even though no such recognizable proceeding has yet commenced in B. The receiving court thus cannot refuse recognition on the basis of article 13, subparagraph (h).

119. Subparagraphs (h)(i) and (ii) outline two conditions that must be met in order to establish an exception to the general principle of non-recognition. Subparagraph (h)(i) requires the insolvency representative of an insolvency proceeding that is or could have been recognized under the law giving effect to MLCBI in the enacting State (i.e. the insolvency representative of a main or non-main proceeding) to have participated in the proceeding giving rise to the judgment, where that participation involved engaging with the substantive merits of the cause of action being pursued. For the purposes of this subparagraph, participation would mean that the insolvency representative was a party to the proceedings as a representative of the debtor's insolvency estate or had standing to intervene in those proceedings by appearing in court and making representations on the substantive merits of the case. The proceedings might have been instituted by the insolvency debtor against a third party or have been instituted against the debtor. Many national procedural laws contemplate cases where a party who demonstrates a legal interest in the outcome of a dispute between two other parties may be permitted by the court to be heard in the proceedings.

120. Subparagraph (h)(ii), which adds to the requirement in subparagraph (h)(i), requires the judgment in question to have related solely to assets that were located in the originating State at the time of commencement of the proceeding giving rise to the judgment. With regard to the reference to "assets", the broad definition of "assets of the debtor" (meaning the insolvency debtor) in the Legislative Guide[34] might be noted, even though it may not be applicable to all circumstances arising under the current text. It may be sufficiently broad to cover, for example, intellectual property registered in the originating State where it is neither the debtor's COMI nor a State in which the debtor has an establishment.

[34] Legislative Guide, Introd., para. 12(b): "'Assets of the debtor': property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor's interests in encumbered assets or in third party-owned assets."

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 65–69
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 76–77
A/CN.9/WG.V/WP.138
A/CN.9/WG.V/WP.140, paras. 6–9
A/CN.9/870, paras. 73, 76, 79
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [28]–[37]
A/CN.9/898, paras. 27–29
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 34–48, 79–82
A/CN.9/WG.V/WP.150
A/CN.9/931, paras. 32–36

Article 14. Equivalent effect

121. Article 14, paragraph 1, provides that an insolvency-related judgment recognized and enforceable under the Model Law can be given one of two different effects in the enacting State. Since States adopt different approaches to this question, the Model Law provides that the enacting State can choose between giving the judgment the same effect in the receiving State as it had in the originating State (i.e. the effect in the originating State is exported to the receiving State) or the same effect as it would have had if it been issued in the receiving State (i.e. the effect would be equivalent to that of such a judgment issued in the receiving State). The rationale of the first choice, that the effect in the originating State is extended to the receiving State, ensures that the judgment has, in principle, the same effects in all States; the effect does not differ depending on the receiving State. That effect is modified to some extent by paragraph 2, which does not oblige the receiving State to provide relief that is not available under its own law. The rationale of the second choice is based upon maintaining equality, fairness and certainty as between domestic and foreign judgments, as well as the practical difficulties that a court in the enacting State may have in determining the precise "effects" (such as claim or issue preclusion) of a judgment under the law of the originating State. Moreover, in some jurisdictions, the court may have limited ability to recognize and enforce types of judgment that could not be issued domestically.

122. Paragraph 2 provides that where the insolvency-related judgment provides for relief that is not available or not known in the receiving State, the court should provide relief that has equivalent effects (as opposed to relief that is merely "formally" equivalent), and give effect to the judgment to the extent permissible under its national law. The receiving court is not required to provide relief that is not available under its national law, but is authorized, as far as is possible, to adapt the relief granted by the originating court to a measure known in the receiving court, but not exceeding the effects the relief granted in the judgment would have under the law of the originating State. This provision enhances the practical effectiveness of judgments and aims at ensuring the successful party receives meaningful relief.

123. Two types of situations can trigger this provision: first, where the receiving State does not know the relief granted in the originating State; and secondly, where the receiving State knows a type of relief that is "formally", but not "substantively" equivalent. Although provisional measures are not to be considered insolvency-related judgments for the purposes of the Model Law, a stay preventing a defendant from disposing of his or her assets may provide an illustration of how this article operates, as such a stay can have *in personam* or *in rem* effects, depending on the jurisdiction. Where recognition of a stay issued by a State that characterizes stays as having *in rem* effects is sought in a State that only grants such orders *in personam* effects, article 14 would be satisfied by the receiving court enforcing the stay with *in personam* effects. If the originating court issued a stay with only *in personam* effects and recognition was sought in a State whose national law granted such a stay *in rem*

effects, the receiving court would not comply with article 14 if it enforced the stay with *in rem* effects in accordance with national law, since that would go beyond the effects granted under the law of the originating State.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.138
A/CN.9/870, para. 78
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [38]
A/CN.9/898, para. 43
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 49, 83
A/CN.9/WG.V/WP.150
A/CN.9/931, paras. 37–38

Article 15. Severability

124. Article 15 aims to increase the predictability of the Model Law and encourages reliance on the judgment in cases where recognition or enforcement of the judgment as a whole might not be possible.[35] In those circumstances, the receiving court should not be able to refuse recognition and enforcement of one part of the judgment on the basis that another part is not recognizable and enforceable; the severable part of the judgment should be treated in the same manner as a judgment that is wholly recognizable and enforceable.

125. Recognition and enforcement of the judgment as a whole might not be possible where some of the orders included in the judgment fall outside the scope of the Model Law, are contrary to the public policy of the receiving State or, because they are interim orders, are not yet enforceable in the originating State. It may also be the case that only some parts of the judgment are relevant to the receiving State (see para. 56 above). In such cases, the severable part of a judgment could be recognized and enforced, provided that part is capable of standing alone. That would usually depend on whether recognizing and enforcing only that part of the judgment would significantly change the obligations of the parties. Where that question raises issues of law, they would be determined by the law of the receiving State.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 80–81
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [39]
A/CN.9/898, para. 44
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 50–51
A/CN.9/WG.V/WP.150
A/CN.9/931, para. 39

Article X. Recognition of an insolvency-related judgment under [*insert a cross reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*]

126. As noted above (para. 2), an issue has arisen as to whether the relief available under MLCBI includes the recognition and enforcement of an insolvency-related judgment. The MLCBI provisions on relief (principally art. 21) make no specific reference to recognition and enforcement of such a judgment. The purpose of article X is to make it clear to States enacting (or considering enactment of) MLCBI that the relief available under article 21 of MLCBI includes recognition and

[35] See art. 15, 2005 Choice of Court Convention; Hartley/Dogauchi report, para. 217.

enforcement of an insolvency-related judgment and that such relief may therefore be sought under article 21. States enacting (or considering enactment of) MLCBI may thus rely upon article X to achieve that purpose, irrespective of any prior interpretations of article 21 to the contrary.

127. Since article X relates to interpretation of MLCBI, it is not intended that it be included in legislation enacting this Model Law. To do so might lead to it being overlooked by parties seeking to make use of MLCBI or by courts interpreting MLCBI as enacted. States wishing to enact this article should determine the appropriate location. It might, for example, be enacted as an amendment to the legislation giving effect to MLCBI.

Discussion in UNCITRAL and the Working Group

A/CN.9/898, paras. 40–41
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 54–57, 84–85
A/CN.9/WG.V/WP.150
A/CN.9/931, paras. 40–41

VI. Assistance from the UNCITRAL Secretariat

A. Assistance in drafting legislation

128. The UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the Model Law. Further information may be obtained from the UNCITRAL secretariat (mailing address: Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria; telephone: (+43-1) 26060-4060; fax: (+43-1) 26060-5813; email: uncitral@un.org; Internet home page: http://www.uncitral.org).

B. Information on the interpretation of legislation based on the Model Law

129. The Model Law is included in the Case Law on UNCITRAL Texts (CLOUT) information system, which is used for collecting and disseminating information on case law relating to the conventions and model laws developed by UNCITRAL. The purpose of the system is to promote international awareness of those legislative texts and to facilitate their uniform interpretation and application. The Secretariat publishes abstracts of decisions in the six official languages of the United Nations and the full, original decisions are available, upon request. The system is explained in a user's guide that is available on the above-mentioned Internet home page of UNCITRAL.

J. Note by the Secretariat on facilitating the cross-border insolvency of enterprise groups: draft legislative provisions

(A/CN.9/WG.V/WP.158)

[Original: English]

Contents

I. Introduction

1. At its forty-fourth session in December 2013, following a three-day colloquium, the Working Group agreed to continue its work on the cross-border insolvency of enterprise groups[1] by developing provisions on a number of issues that would extend the existing articles of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and part three of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide), as well as involving reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. While the Working Group considered that those provisions might, for example, form a set of model provisions or a supplement to the existing MLCBI, it noted that the precise form they might take could be decided as the work progressed.

2. At its forty-fifth (April 2014), forty-sixth (December 2014) and forty-seventh (May 2015) sessions, the Working Group considered the goals of a text that might be developed to facilitate the cross-border insolvency of enterprise groups; the key elements of such a text, including those that might be based upon part three of the Legislative Guide and on MLCBI; and the form that the text might take, noting that some of the key elements lent themselves to being developed as a model law, while others were perhaps more in the nature of provisions that might be included in a legislative guide (A/CN.9/WG.V/WP.120, 124 and 128 respectively).

3. At its forty-eighth session (December 2015), the Working Group agreed a set of key principles for a regime to address cross-border insolvency in the context of enterprise groups (A/CN.9/WG.V/WP.133) and considered a number of draft provisions addressing three main areas (A/CN.9/WG.V/WP.134): (a) coordination and cooperation of insolvency proceedings relating to an enterprise group; (b) elements needed for the development and approval of a group insolvency solution involving multiple entities; and (c) the use of so-called "synthetic proceedings" in lieu of commencing non-main proceedings. Two additional supplemental areas were also considered. These might include (d) the use of so-called "synthetic proceedings" in lieu of commencing main proceedings, and (e) approval of a group insolvency solution on a more streamlined basis by reference to the adequate protection of the interests of creditors of affected group members.

4. At its forty-ninth session (May 2016), the Working Group considered a consolidated draft legislative text incorporating the agreed key principles and draft provisions addressing the five areas indicated in paragraph 3 (A/CN.9/WG.V/WP.137 and Add.1). That draft text was further considered at the fiftieth (December 2016), fifty-first (May 2017) and fifty-second (December 2017) sessions

[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), subpara. 259(a); A/CN.9/763, paras. 13–14; *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 326.

(A/CN.9/WG.V/WP.142 and Add.1; A/CN.9/WG.V/WP.146 and A/CN.9/WG.V/WP.152 respectively).

5. The draft text below reflects the discussion and decisions taken at the fifty-second session (A/CN.9/931) and revisions the Secretariat was requested to make, together with various suggestions and proposals arising from the Secretariat's work on the draft text.

General drafting issue

6. As a general drafting matter, the Working Group may wish to consider the form in which this draft text should be completed. If it is decided to retain the text as "Legislative Provisions", the references in some of the draft articles to "this Law" might need to be replaced (e.g., preamble and articles 1, 2 bis, 2 ter, 2 quater, 11 and 19). In addition, the relationship of this text to the UNCITRAL Model Law on Cross-Border Insolvency could be considered, particularly with respect to additional definitions that might be required if this draft text is to be a standalone text (see notes on article 2).

II. Draft legislative provisions on facilitating the cross-border insolvency of enterprise groups

[Part A]

Chapter 1. General Provisions

Preamble

The purpose of this Law is to provide effective mechanisms to address cases of cross-border insolvency affecting the members of an enterprise group, in order to promote the objectives of:

(a) Cooperation between courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency affecting members of an enterprise group;

(b) Cooperation between insolvency representatives appointed in this State and foreign States in cases of cross-border insolvency affecting members of an enterprise group;

(c) Development of a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States;

(d) Fair and efficient administration of cross-border insolvencies concerning enterprise group members that protects the interests of all creditors and other interested persons, including the debtors;

(e) Protection and maximization of the overall combined value of the operations and assets of enterprise group members affected by insolvency and of the enterprise group as a whole;

(f) Facilitation of the rescue of financially troubled enterprise groups, thereby protecting investment and preserving employment; and

(g) Adequate protection of the interests of the creditors of each group member participating in a group insolvency solution.

Notes on the preamble

1. The substance of the preamble as drafted was approved at the fifty-second session (A/CN.9/931, para. 65). The Working Group may wish consider, to ensure consistent usage in the draft text, whether there is a need to reflect the two dimensions of subparagraph (e), that is the "overall combined value of the operations and assets of enterprise group members affected by insolvency ***and*** of the enterprise group as a whole" *[emphasis added]* in other articles which refer to the "overall combined value

of the group members" but not to the group as a whole. These are article 2, subparagraph (f), the definition of "group insolvency solution" and article 14, subparagraph 3(c), which relates to the statement to accompany an application for recognition.

Article 1. Scope

This Law applies to enterprise groups, where insolvency proceedings have commenced for one or more of its members, [and addresses] [including] the conduct and administration of insolvency proceedings for those enterprise group members and cross-border cooperation between those proceedings.

Notes on article 1

2. Draft article 1 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, para. 66), based upon what was previously variant 2 of article 1 in A/CN.9/WG.V/WP.152. The opening words have been revised and the words following "including" have been retained for further consideration. In view of the additional wording, the word "including" seems inapt and might be replaced by words such as "and addresses".

Article 2. Definitions

For the purposes of these provisions:

(a) "Enterprise" means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;

(b) "Enterprise group" means two or more enterprises that are interconnected by control or significant ownership;

(c) "Control" means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;

(d) "Enterprise group member" means an enterprise that forms part of an enterprise group;

(e) "Group representative" means a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding;

(f) "Group insolvency solution" means a set of proposals developed in a planning proceeding for the reorganization, sale, or liquidation of some or all of the operations or assets of one or more enterprise group members, with the goal of preserving or enhancing the overall combined value of the group members involved;

(g) "Planning proceeding" means an insolvency proceeding commenced in respect of an enterprise group member at its centre of main interests provided:

(i) One or more other enterprise group members are participating in that proceeding for the purpose of developing and implementing a group insolvency solution;

(ii) The enterprise group member subject to the proceeding is a necessary and integral part of that group insolvency solution; and

(iii) A group representative has been appointed.

Notes on article 2

3. Draft article 2 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 67–75). Paragraphs (a), (b), (c) and (e) were approved as drafted; paragraph (d) has been shortened to remove unnecessary words; variant 2 of subparagraph (f) has been retained and subparagraph (g) has been redrafted in accordance with a proposal contained in paragraph 72 of A/CN.9/931.

4. The Working Group may wish to consider the drafting of subparagraph (f), in particular replacing the last phrase "the group members involved" with "those group members", which more clearly links that phrase with the preceding reference to "one

or more enterprise group members" and removes the uncertainty created by the use of the word "involved". The Working Group may also wish to consider whether the phrase "and of the enterprise group as a whole", might, as raised in the notes on the preamble above, be added to subparagraph (f).

5. Additional definitions that might be added to the Legislative Provisions, depending on the final form of the text, might include: "court", "insolvency representative", "establishment", and "main" and "non-main" proceedings. These are terms used and defined in MLCBI and the Legislative Guide.

Article 2 bis. Jurisdiction of the enacting State

Where the centre of main interests of an enterprise group member is located in this State, nothing in this Law is intended to:

(a) Limit the jurisdiction of the courts of this State with respect to that enterprise group member;

(b) Limit any process or procedure (including any permission, consent or approval) required in this State in respect of that enterprise group member's participation in a group insolvency solution being developed in another State;

(c) Limit the commencement of insolvency proceedings in this State under [*identify laws of the enacting State relating to insolvency*], if required or requested to address the insolvency of that enterprise group member; or

(d) Create an obligation to commence insolvency proceedings [in respect of that enterprise group member] in this State when no such obligation exists.

Notes on article 2 bis

6. Article 2 bis has been revised in accordance with the report of the fifty-second session (A/CN.9/931, para. 76), in particular by revising subparagraph (d) to retain the last four words without square brackets.

7. The Working Group may wish to consider whether, to ensure consistent usage and drafting of the various subparagraphs, the words in square brackets in subparagraph (d) should be added; the other subparagraphs already refer to "that group member".

Article 2 ter. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

Article 2 quater. Competent court or authority

The functions referred to in this Law relating to the recognition of an insolvency proceeding or a planning proceeding and cooperation with foreign courts shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

Chapter 2. Cooperation and coordination

Article 3. Cooperation and direct communication between a court of this State and foreign courts, foreign representatives and a group representative

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts, foreign representatives and a group representative, where appointed, either directly or through a [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] or other person appointed to act at the direction of the court.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts, foreign representatives or a group representative, where appointed.

Article 4. Cooperation to the maximum extent possible under article 3

For the purposes of article 3, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Communication of information by any means considered appropriate by the court;

(b) Participation in communication with a foreign court, a foreign representative or a group representative, where appointed;

(c) Coordination of the administration and supervision of the affairs of enterprise group members;

(d) Coordination of concurrent proceedings commenced with respect to enterprise group members;

(e) Appointment of a person or body to act at the direction of the court;

(f) Approval and implementation of agreements concerning the coordination of proceedings relating to two or more enterprise group members located in different States, including where a group insolvency solution is being developed;

(g) Cooperation among courts as to how to allocate and provide for the costs associated with cross-border cooperation and communication;

(h) Use of mediation or, with the consent of the parties, arbitration, to resolve disputes between enterprise group members concerning claims;

(i) Approval of the treatment of claims between enterprise group members;

(j) Recognition of the cross-filing of claims by or on behalf of enterprise group members and their creditors; and

(k) [*The enacting State may wish to list additional forms or examples of cooperation*].

Article 5. Limitation of the effect of communication under article 3

1. With respect to communication under article 3, the court is entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.

2. Participation by a court in communication pursuant to article 3, paragraph 2, does not imply:

(a) A waiver or compromise by the court of any powers, responsibilities or authority;

(b) A substantive determination of any matter before the court;

(c) A waiver by any of the parties of any of their substantive or procedural rights;

(d) A diminution of the effect of any of the orders made by the court;

(e) Submission to the jurisdiction of other courts participating in the communication; or

(f) Any limitation, extension or enlargement of the jurisdiction of the participating courts.

Article 6. Coordination of hearings

1. The court may conduct a hearing in coordination with a foreign court.

2. The substantive and procedural rights of the parties and the jurisdiction of the court may be safeguarded by the parties reaching agreement on the conditions to govern the coordinated hearing and the court approving that agreement.

3. Notwithstanding the coordination of the hearing, the court remains responsible for reaching its own decision on the matters before it.

Article 7. Cooperation and direct communication between a group representative, foreign representatives and foreign courts

1. A group representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives of other enterprise group members to facilitate the development and implementation of a group insolvency solution.

2. A group representative is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from foreign courts and foreign representatives of other enterprise group members.

Article 7 bis. Cooperation and direct communication between a [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*]**, foreign courts, foreign representatives and a group representative**

1. A [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts, foreign representatives of other enterprise group members and a group representative, where appointed.

2. A [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from foreign courts, foreign representatives of other enterprise group members and a group representative, where appointed.

Article 8. Cooperation to the maximum extent possible under articles 7 and 7 bis

For the purposes of article 7 and article 7 bis, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning enterprise group members, provided appropriate arrangements are made to protect confidential information;

(b) Negotiation of agreements concerning the coordination of proceedings relating to two or more enterprise group members located in different States, including where a group insolvency solution is being developed;

(c) Allocation of responsibilities between a [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*], a foreign representative and a group representative, where appointed;

(d) Coordination of the administration and supervision of the affairs of the enterprise group members; and

(e) Coordination with respect to the development and implementation of a group insolvency solution, where applicable.

Article 9. Authority to enter into agreements concerning the coordination of proceedings

A [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] may enter into an agreement concerning the coordination of proceedings involving two or more enterprise group members located in different States, including where a group insolvency solution is being developed.

Article 10. Appointment of a single or the same insolvency representative

1. The court may coordinate with foreign courts with respect to the appointment and recognition of a single or the same insolvency representative to administer and coordinate insolvency proceedings concerning members of the same enterprise group in different States.

2. The appointment of an insolvency representative in this State and in another State under paragraph 1 does not diminish the obligations of the insolvency representative under the law of this State.

Notes on articles 2ter to 10

8. The substance of those articles as drafted was approved at the fifty-second session (A/CN.9/931, paras. 77–87). Sharing of information and protection of confidentiality under article 8 and potential conflicts of interest under article 10 will be addressed in the draft guide to enactment of those articles.

9. The Working Group may wish to consider several issues:

(a) Whether there is a need in articles 7 and 7bis to include the possibility that cooperation and direct communication might also concern (i) in article 7, an insolvency representative appointed for a group member in the same State as the group representative, and (ii) in article 7 bis, several insolvency representatives appointed for a group members in the enacting State; and

(b) Whether, under article 9, a group representative might also enter into an agreement of the type mentioned; article 8 would seem to suggest that possibility is contemplated.

Article 11. Participation by enterprise group members in a proceeding under [*identify laws of the enacting State relating to insolvency*]

1. Subject to paragraph 2, if a proceeding under [*identify laws of the enacting State relating to insolvency*] has commenced with respect to an enterprise group member whose centre of main interests is located in this State, any other enterprise group member may participate in that proceeding for the purpose of facilitating cooperation and coordination under chapter 2 of this Law, including developing and implementing a group insolvency solution.

2. An enterprise group member whose centre of main interests is located in another State may participate in a proceeding referred to in paragraph 1 unless a court in that other State prohibits it from so doing.

3. The sole fact that an enterprise group member is participating in a proceeding referred to in paragraph 1 does not subject the enterprise group member to the jurisdiction of the courts of this State for any purpose unrelated to that participation.

3 bis. Participation means that the enterprise group member has the right to appear, make written submissions and be heard in that proceeding on matters affecting that enterprise group member's interests and to take part in the development and implementation of a group insolvency solution.

4. Participation by any other enterprise group member in a proceeding referred to in paragraph 1 is voluntary. An enterprise group member may commence its participation or opt out of participation at any stage of such a proceeding.

5. A participating enterprise group member shall be notified of actions taken with respect to the development of a group insolvency solution.

Notes on article 11

10. Article 11 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 88–90): the words "for the purpose of facilitating cooperation and coordination under chapter 2" have been added to paragraph 1, together with the words "of this Law" to clarify the reference (see the note in para. 6 of the Introduction to this paper) and the words "for the purpose of" that followed the

word “including” have been deleted. Paragraph 3 has been revised, taking into account article 10 of MLCBI, to provide greater certainty and clarity with respect to the limited jurisdiction intended by the provision. The description of what constitutes participation has been separated from paragraph 3 and placed in new paragraph 3bis. Limits that might be applicable under domestic law to a group member’s ability to opt in or out of participation in a planning proceeding under paragraph 4 will be addressed in the draft guide to enactment of this article.

Chapter 3. Conduct of a planning proceeding in this State

Article 12. Appointment of a group representative

1. When one or more enterprise group members participate in a proceeding referred to in article 11, and the requirements of article 2, subparagraphs (g)(i) and (ii) are [otherwise] met, the court may appoint a group representative, by which the proceeding becomes a planning proceeding.

2 [3]. A group representative is authorized to seek relief in this State to support the development and implementation of a group insolvency solution.

3 [4]. A group representative is authorized to act in a foreign State on behalf of a planning proceeding and, in particular, to:

(a) Seek recognition of the planning proceeding and relief to support the development and implementation of the group insolvency solution;

(b) Seek to participate in a foreign proceeding relating to an enterprise group member participating in the planning proceeding; and

(c) Seek to participate in a foreign proceeding relating to an enterprise group member not participating in the planning proceeding.

Notes on article 12

11. Article 12 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, para. 91), adding the references in the chapeau to subparagraphs (g)(i) and (g)(ii); deleting subparagraph 2; removing the square brackets from around paragraph 3 (now para. 2) and deleting the text “as permitted by the applicable foreign law” previously in square brackets in paragraph 4 (now para. 3).

12. The Working Group may wish to consider the following drafting changes:

(a) The word “otherwise” in paragraph 1 might be deleted as it creates some uncertainty as to what is intended; and

(b) The references in subparagraphs (b) and (c) to a “foreign proceeding” (which is not currently a defined term) might need to be expanded to make it clear whether they are intended to refer to proceedings commenced under the laws of the foreign State relating to insolvency or more generally to any proceeding relating to an enterprise group member. The substance of article 18, which is the inbound provision complementary to subparagraph 3(b) which authorizes that participation in the foreign State, would suggest that the same drafting should be used in article 12, subparagraphs 3(b) and possibly 3(c) (although noting that there is no inbound authorization in article 18 equivalent to article 12, subparagraph 3(c), as it was previously deleted (see A/CN.9/903, para. 125 and A/CN.9/931, para. 92)).

Article 13. Relief available to a planning proceeding

1. To the extent needed to preserve the possibility of developing or implementing a group insolvency solution or to protect the assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court, at the request of the group representative, may grant any of the following relief:

(a) Staying execution against the assets of the enterprise group member;

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Staying any insolvency proceedings concerning a participating enterprise group member;

(d) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(e) Entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to the group representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy;

(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

(g) Recognizing arrangements concerning the funding of enterprise group members participating in the planning proceeding where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply; and

(h) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that enterprise group member is not subject to insolvency proceedings [unless not commencing an insolvency proceeding is a consequence of an undertaking given under articles 21 or 22].

3. With respect to the assets or operations located in this State of an enterprise group member that has its centre of main interests in another State, relief under this article may only be granted if that relief does not interfere with the [conduct and] administration of insolvency proceedings taking place in that State.

Notes on article 13

13. Article 13 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 56 and 93); aligning paragraph 2 with the equivalent paragraphs of articles 15 and 17 and deleting the square brackets around “or implementing” in paragraph 1.

Subparagraph (c)

14. Subparagraphs (c) and (g), unlike the other subparagraphs of the draft article, concern only those group members participating in a planning proceeding. For that reason, it may improve the drafting if subparagraph (c) was to be placed at the end of paragraph 1. That might avoid any confusion in the subparagraphs that follow subparagraph (c) and refer to “the group member”, meaning the group member as referred to in the chapeau of paragraph (both “subject to” and “participating in” the planning proceeding) rather than the group member referred to in subparagraph (c).

Subparagraph 1(g)

15. The drafting of subparagraph (g) could be aligned with the drafting used in subparagraph (c) which refers, in the singular, to “a participating group member”. In that case, the drafting of subparagraph (g) could be “Recognizing arrangements concerning the funding of a participating enterprise group member where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply” (see also article 15, subparagraph 1(g) and article 17, subparagraph(h)).

16. The proviso in article 13, subparagraph (g), "subject to any appropriate safeguards the court may apply" is already contained in article 19, paragraph 2, and thus may not be required in article 13. The guide to enactment of article 13 could draw attention to the relevance of article 19, paragraph 2. This observation applies to the same drafting in articles 15, subparagraph 1(g) and 17, subparagraph 1(h).

Paragraph 3

17. The Working Group may wish to consider whether the words in square brackets "[conduct and]" in article 13, paragraph 3, should be deleted to align the drafting with article 15, paragraph 5 and article 17, paragraph 4.

Issue for consideration with respect to the relief provisions – articles 13, 15 and 17

18. The Working Group may wish to consider the following scenario in terms of the application of the relief articles – article 13, paragraph 2, article 15, paragraph 4, article 17, paragraph 3, and article 23, paragraph 1.

> Four members of an enterprise group have their respective COMIs in States A, B, C, and D. All four group members are insolvent. All four States have enacted articles 1–21 of the Legislative Provisions, but only C and D have enacted articles 22 and 23.
>
> A proceeding in State A becomes a planning proceeding, and the other three group members all choose to participate. The group representative seeks, and is granted, recognition of the A planning proceeding in B, C, and D. In C, the court uses article 23, paragraph 1 to decline to open a main proceeding for the insolvent group member with its COMI in C, on the basis that the A planning proceeding will adequately protect the interests of creditors. The court sees no need to commence a proceeding in C at this stage, given that the development of a group solution seems likely. Articles 21 and 22 have not been used in any of the States.
>
> In that situation, none of the remaining States A, B or D – regardless of whether they are the location of the planning proceeding (A) or have enacted the supplemental provisions (D) – would be able to grant any relief (whether interim or otherwise) with respect to establishments or assets of the C entity in their territories. The court in A would be precluded from ordering such relief under article 13, paragraph 2 because no insolvency proceeding has been commenced for the C entity and no undertaking has been given under article 21 or 22. For similar reasons, the courts in B and D could not use article 15, paragraph 4 to provide interim relief or article 17, paragraph 3 to provide relief following recognition of the planning proceeding.

19. If the entity in C is important for the group solution to work, States A and B in the hypothetical may wish to be able to grant relief if needed; it might be asserted that C's choice to enact and use article 23, paragraph 1 shouldn't effectively preclude other States from using articles 13, 15 and 17 as needed within their own territories.

20. Various solutions might be considered. The first could be to address that issue through the drafting used in article 13, paragraph 2 (and arts. 15, para. 4 and 17, para. 3) to address the prohibition on ordering relief with respect to the assets of what are, essentially, "solvent" entities. The more neutral drafting of "not subject to insolvency proceedings" was used to avoid use of the word "solvent" (given the difficulty of reaching an agreed definition) and the need for the court to resolve the question of whether a particular entity was solvent. It does not, however, sufficiently describe an exception that is intended to reflect the financial status of the group member and the fact that it is not subject to the insolvency law on the basis of that status.

21. Another solution might be to describe the entity as "solvent" (with the guide to enactment explaining what the use of that word is intended to convey), in which case the proviso ("unless not commencing …") may not be required. The problem posed in the hypothetical above would not arise.

22. A further solution might be to add a reference to article 23 in the proviso. In that case, it might be helpful to refer to articles 21bis, 22bis and 23 (rather than articles 21, 22 and 23) on the basis that it is those articles that directly address the power of the court to decline to commence a proceeding. The proviso might thus be revised along the lines of "unless a [competent] court has declined to commence an insolvency proceeding with respect to that group member under article 21bis, 22bis or 23." That drafting would address the problem posed by the hypothetical, albeit from a different angle unrelated to the financial status of the "solvent" group member.

Chapter 4. Recognition of a foreign planning proceeding and relief

Article 14. Application for recognition of a foreign planning proceeding

1. A group representative may apply in this State for recognition of the planning proceeding to which the group representative was appointed.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision appointing the group representative; or

(b) A certificate from the foreign court affirming the appointment of the group representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the appointment of the group representative.

3. An application for recognition shall also be accompanied by:

(a) A statement identifying each enterprise group member participating in the planning proceeding;

(b) A statement identifying all members of the enterprise group and all proceedings commenced in respect of enterprise group members participating in the planning proceeding that are known to the group representative; and

(c) A statement to the effect that the enterprise group member subject to the planning proceeding has its centre of main interests in the State where the planning proceeding is taking place and that that proceeding is likely to result in added overall combined value for the enterprise group members subject to or participating in that proceeding.

4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Notes on article 14

23. Article 14 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 53–55). The drafting clarifies that the subparagraphs in paragraph 2 are alternatives; the previous requirement for "evidence" in subparagraph 3(a) has been replaced with a requirement for "a statement"; and the word "involved" at the end of subparagraph 3(c) has been replaced by a reference to those group members subject to or participating in the planning proceeding. The draft guide to enactment will explain the difference between those two categories of group members.

Subparagraph (b)

24. For greater clarity, it may be helpful to add the word "insolvency" before the first reference to "proceedings" in subparagraph (b), if the subparagraph is intended to be limited in that manner. It may also be helpful to clarify whether the words "are known to the group representative" refer to the enterprise group members known to the group representative or to the proceedings known to the group representative, or both.

Subparagraph (c)

25. With respect to the statement on overall value in subparagraph (c), see the note above with respect to the preamble.

Article 15. Provisional relief that may be granted upon application for recognition of a foreign planning proceeding

1. From the time of filing an application for recognition [of a planning proceeding] until the application is decided upon, where relief is urgently needed to preserve the possibility of developing or implementing a group insolvency solution or to protect the assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court may, at the request of the group representative, grant relief of a provisional nature, including:

(a) Staying execution against the assets of the enterprise group member;

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Staying any insolvency proceedings concerning the enterprise group member;

(d) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(e) In order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task;

(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

(g) Recognizing arrangements concerning the funding of enterprise group members participating in the planning proceeding where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply; and

(h) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. [*Insert provisions of the enacting State relating to notice*.]

3. Unless extended under article 17, subparagraph 1(a), the relief granted under this article terminates when the application for recognition is decided upon.

4. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that group member is not subject to insolvency proceedings [unless not commencing an insolvency proceeding is a consequence of an undertaking given under articles 21 or 22].

5. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place in the centre of main interests of an enterprise group member participating in the planning proceeding.

Notes on article 15

26. Article 15 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 56–57). The title has been revised to refer to "Provisional" relief; the word "appropriate" has been deleted from the chapeau; the words "in any jurisdiction" have been deleted at the end of paragraph 4 and the words in square brackets have been added at the end of paragraph 4, in response to the issue raised in document A/CN.9/WG.V/WP.152, para. 21, for further consideration (see also the note under article 13 relating to the relief provisions and the drafting of the proviso in para. 4).

27. The Working Group may wish to note it was agreed at its fifty-second session (A/CN.9/931, para. 57), that additional analysis was required to ensure that that draft text would address situations arising in connection with paragraph 4 in which articles 21 and 22 did not apply.

Paragraph 1

28. The words "of a planning proceeding" might be added to paragraph 1 as indicated.

Subparagraph 1(e)

29. An issue to be considered with respect to subparagraph 1(e) is whether the existing language ("Where an insolvency representative is not able to administer or realize …") would be sufficient to address the situation where no insolvency representative was appointed in the enacting State (e.g., because article 21 bis or 22 bis is applicable) and whether further language along the lines of "or no insolvency representative has been appointed" might be required, for example, in the second sentence.

Subparagraph 1(g)

30. With respect to the drafting of subparagraph 1(g), see the note above concerning the drafting of article 13, subparagraph 1(g).

31. The proviso in article 15, subparagraph 1(g) "subject to any appropriate safeguards the court may apply" is already covered by article 19, paragraph 2 and thus may not need to be repeated in article 15. The guide to enactment of article 15 could ensure the relevance of article 19 is highlighted. As noted above with respect to article 13, this observation applies also to articles 13 and 17.

Article 16. Decision to recognize a foreign planning proceeding

1. Subject to article 2 ter, a planning proceeding shall be recognized if:

(a) The application meets the requirements of article 14, paragraphs 2 and 3;

(b) The proceeding is a planning proceeding within the meaning of article 2, subparagraph (g); and

(c) The application has been submitted to the court referred to in article 2 quater.

2. An application for recognition of a planning proceeding shall be decided upon at the earliest possible time.

3. Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

4. For the purposes of paragraph 3, the group representative shall inform the court of material changes in the status of the planning proceeding or in the status of its own appointment occurring after the application for recognition is made, as well as changes that might bear upon the relief granted on the basis of recognition.

Notes on article 16

32. On the basis that paragraph 1 lists the elements to be satisfied to grant recognition, the Working Group may wish to consider whether a further requirement might be added to paragraph 1 to reflect the approach taken by the drafting of article 17, subparagraph 1(b) of MLCBI, that is, that the group representative applying for recognition should be a group representative within the meaning of article 2, subparagraph (e) or whether article 14 is sufficient addresses that issue in the context of an application for recognition.

33. Article 16, paragraph 4 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, para. 58): the word "material" has been retained in paragraph 4 and the words "as well as" have been added before the word "changes" in the final phrase of that paragraph.

Article 17. Relief that may be granted upon recognition of a foreign planning proceeding

1. Upon recognition of a planning proceeding, where necessary to preserve the possibility of developing or implementing a group insolvency solution or to protect the assets of an enterprise group member subject to or participating in the planning proceeding or the interests of the creditors of such an enterprise group member the court, at the request of the group representative, may grant any of the following relief:

(a) Extending any relief granted under article 15, paragraph 1;

(b) Staying execution against the assets of the enterprise group member;

(c) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(d) Staying any insolvency proceedings concerning the enterprise group member;

(e) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(f) In order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task;

(g) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

(h) Recognizing arrangements concerning the funding of enterprise group members participating in the planning proceeding where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply; and

(i) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. In order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the distribution of all or part of the enterprise group member's assets located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group

representative or another person designated by the court may be entrusted with that task.

3. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that enterprise group member is not subject to insolvency proceedings [unless not commencing an insolvency proceeding is a consequence of an undertaking given under articles 21 or 22].

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place in the centre of main interests of an enterprise group member participating in the planning proceeding.

Notes on article 17

34. Article 17 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 56, 60 and 93), deleting the words "in any jurisdiction" and adding the words in square brackets at the end of paragraph 3 in order to conform article 17 with articles 13 and 15.

Subparagraph 1(h)

35. See the note with respect to the drafting of the equivalent subparagraph in article 13 (subparagraph 1(g)) and 15 (subparagraph 1(e)) above.

Article 18. Participation of a group representative in a proceeding under [*identify laws of the enacting State relating to insolvency*]

Upon recognition of a planning proceeding, the group representative may participate in any proceeding under [*identify laws of the enacting State relating to insolvency*] concerning enterprise group members that are participating in the planning proceeding.

Notes on article 18

36. The substance of article 18 as drafted was approved at the fifty-second session (A/CN.9/931, para. 61).

Article 19. Protection of creditors and other interested persons

1. In granting, denying, modifying or terminating relief under this Law, the court must be satisfied that the interests of the creditors and other interested persons, including the enterprise group member subject to the relief to be granted, are adequately protected.

2. The court may subject relief granted under this Law to conditions it considers appropriate, including the provision of security.

3. The court may, at the request of the group representative or a person affected by relief granted under this Law, or at its own motion, modify or terminate such relief.

Notes on article 19

37. The substance of article 19 as drafted was approved at the fifty-second session (A/CN.9/931, para. 62).

38. Article 19 raises issues that are also addressed in the Preamble, subparagraph (g) and article 23, concerning the identity of creditors whose interests are to be protected. The Preamble, subparagraph (g), refers to adequate protection of the interests of the "creditors of each group member" participating in the group solution, thereby recognising the integrity of the individual group member and the fundamental importance of protecting its particular creditors within the enterprise group and the group insolvency solution. Article 19, paragraph 1, does not seem to draw this distinction, referring generally to "the creditors". In addition to the lack of certainty arising from that drafting, it may create a possibility that the interests of one group

member's creditors could be traded off against the aggregated interests of the creditors of all participating members. This would appear to interfere with the separate legal identity of group members, and might tend to discourage participation in group solutions.

39. Additionally, article 19, paragraph 1, seeks to protect the interests of the group member itself (not just its creditors and others interested in it) as a separate criterion to be satisfied. This is not reflected in subparagraph (g) of the Preamble (although it may be reflected in part in subparagraph (d) of the Preamble by the reference to protection of the interests of debtors). The Working Group may wish to consider (a) whether the requirement to protect the interests of the group member itself is unnecessary and poses an additional hurdle to be overcome in order for the court to grant relief; and (b) what interests a group member would have that are distinctly different from the interests of its creditors and warrant be separate protection.

40. Any revision of article 19 might take into account article 23, which refers to protecting the interests of creditors of affected group members participating in a planning proceeding.

Article 20. Approval of [local elements of] a group insolvency solution

Variant 1 of paragraph 1

1. Where a group insolvency solution affects an enterprise group member participating in a planning proceeding that has its centre of main interests or establishment in this State and a proceeding under [*identify the laws of the enacting State relating to insolvency*] has commenced in this State, the group insolvency solution shall be submitted to the court in this State for approval.

Variant 2 of paragraph 1

1. When a proceeding under [*identify the laws of the enacting State relating to insolvency*] has commenced in this State with respect to an enterprise group member that (a) has it centre of main interests or establishment in this State, (b) is participating in a planning proceeding, and (c) is affected by a group insolvency solution, the group insolvency solution shall be submitted to the court in this State for approval.

2. The court shall refer the portion of the group solution affecting the enterprise group member referred to in paragraph 1 for approval in accordance with [*identify the laws of the enacting State relating to insolvency*].

3. If the approval process referred to in paragraph 2 results in approval of the relevant portion of the group insolvency solution, the court shall [confirm that portion relating to assets or operations in this State] [*specify the role to be played by the court in accordance with the law of the enacting State with respect to approval of a reorganization plan*].

Variant 1 of paragraph 4

4. Where a group solution affects an enterprise group member participating in the planning proceeding that has its centre of main interests or establishment in this State and no proceeding under [*identify the laws of the enacting State relating to insolvency*] has commenced in this State or article 21 applies, no such proceeding needs to be commenced if unnecessary to confirm the portion of the group insolvency solution affecting the enterprise group member.

Variant 2 of paragraph 4

4. When no proceeding under [*identify the laws of the enacting State relating to insolvency*] has commenced in this State with respect to an enterprise group member that (a) has it centre of main interests or establishment in this State, (b) is participating in a planning proceeding, and (c) is affected by a group insolvency solution, or article 21 applies, no such proceeding needs to be commenced if unnecessary to confirm the portion of the group insolvency solution affecting the enterprise group member.

4 bis. A group insolvency solution shall have effect in this State if it has received all approvals required in accordance with the laws of this State.

4 ter. A group representative may request additional assistance under other laws of this State to confirm the portion of the group insolvency solution affecting the enterprise group member.

5. A group representative is entitled to apply directly to a court in this State to be heard on issues related to approval and implementation of a group insolvency solution.

Notes on article 20

41. Article 20 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 63–64).

Title

42. The Working Group may wish to consider whether the title of the article might be simplified to "Approval of a group insolvency solution".

Relevance of recognition to article 20

43. It might be noted that while article 20 appears in chapter 4 dealing with recognition of a planning proceeding, article 20 itself makes no reference to recognition of a planning proceeding as a pre-condition for either seeking approval of a group insolvency solution or for the group representative to apply directly to the court to be heard on issues relating to approval and implementation of the solution under article 20, paragraph 5. The Working Group may wish to consider whether recognition is required in order to seek approval of a group insolvency solution; if not, that issue might be addressed in the guide to enactment.

Paragraph 1

44. Variant 2 of paragraph 1 attempts to give greater clarity to the three conditions concerning the group member that will lead to submission of the group insolvency solution for approval in the enacting State. It applies to the situation where an insolvency proceeding concerning the affected group member has commenced in the enacting State.

Paragraph 3

45. Paragraph 3 retains two alternative approaches to approval of a group insolvency solution – the first requires confirmation by the court, the second leaves it up to the law of the enacting State to specify the role to be played by the court. Not all States require court confirmation of a reorganization plan approved in accordance with domestic law (e.g. by creditors), as recognized by the Legislative Guide on Insolvency Law (part two, chapter IV, paras. 56–65). If the two alternatives are retained, the use of the word "confirm" in paragraph 4ter may need to be reconsidered. Moreover, for jurisdictions that do not require "confirmation" in a domestic setting, it may not be clear what is required in the Legislative Provisions by way of "confirmation"; this could be explained in the guide to enactment along the lines of, or by reference to, the material in the Legislative Guide.

Paragraph 4

46. Variant 2 of paragraph 4 uses the same approach to drafting as Variant 2 of paragraph 1 in the situation in which no proceeding has commenced in the enacting State. Paragraph 4bis reflects additional text approved by the Working Group at its fifty-second session (A/CN.9/931, para. 64). Paragraph 4ter, previously 4bis, has been slightly revised to refer to confirmation rather than implementation of a group insolvency solution (A/CN.9/931, para. 64).

Paragraph 5

47. Consideration might be given to whether article 20, paragraph 5 might be moved to article 12, paragraph 4, which identifies the activities the group representative is authorized to conduct. This would have the advantage of placing related provisions on the powers of the group representative together in the same article. The guide to enactment could provide relevant explanation.

Chapter 5. Treatment of foreign claims

Article 21. Undertaking on the treatment of foreign claims: non-main proceedings

1. To minimize the commencement of non-main proceedings and facilitate the treatment of claims in an enterprise group insolvency, a claim that could be brought by a creditor of an enterprise group member in a non-main proceeding in another State may be treated in a main proceeding commenced in this State in accordance with the treatment it would be accorded in the non-main proceeding, provided:

(a) An undertaking to accord such treatment is given by the insolvency representative appointed in the main proceeding in this State. Where a group representative is appointed, the undertaking should be given jointly by the insolvency representative and the group representative;

(b) The undertaking meets the formal requirements, if any, of this State; and

(c) The court approves the treatment to be accorded in the main proceeding.

2. An undertaking given under paragraph 1 shall be enforceable and binding on the insolvency estate.

Notes on article 21

48. Article 21 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 45–47), based upon variant 2 of the text contained in document A/CN.9/WG.V/WP.152 and a proposal for redrafting the article as set forth in document A/CN.9/931, para. 46. The heading has been aligned with the revised article. It may be helpful to add the words “of the enterprise group member” at the end of paragraph 2 for greater clarity.

Article 21 bis. Powers of the court of this State with respect to an undertaking under article 21

If a foreign representative of an enterprise group member or a group representative from another State in which a main proceeding is pending has given an undertaking in accordance with article 21, a court in this State, may:

(a) Approve the treatment to be provided in the foreign main proceeding to the claims of creditors located in this State; and

(b) Stay or decline to commence a non-main proceeding.

Notes on article 21 bis

49. Article 21 bis has been revised in accordance with the report of the fifty-second session (A/CN.9/931, para. 48), based upon variant 2 of the text contained in document A/CN.9/WG.V/WP.152. The word “commitment” has been replaced with the word “undertaking” and the cross-reference to article 19 deleted (the relevance of article 19 will be addressed in the guide to enactment).

[Part B]

Supplemental provisions

Article 22. Undertaking on the treatment of foreign claims: main proceedings

To facilitate the treatment of claims that could otherwise be brought by a creditor in a[n insolvency] proceeding in another State, an insolvency representative of an enterprise group member or a group representative appointed in this State may

undertake, and the court in this State may approve, to accord that claim the treatment in this State that it would have received in a[n insolvency] proceeding in that other State. Such undertaking shall be subject to the formal requirements, if any, of this State and shall be enforceable and binding on the insolvency estate.

Notes on article 22

50. Article 22 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, para. 50). The word "would" in the first line has been replaced with the word "could", the word "commitment" has been replaced with the word "undertaking", the reference to the treatment of creditors has been replaced with a reference to the treatment of claims. The heading has been aligned with the revised article.

51. Replacing the word "commitment" with the word "undertaking" makes the drafting of the phrase "may undertake, and the court in this State may approve, to accord" somewhat awkward in English. A solution may be to place the reference to approval by the court in a separate sentence along the lines of "The court may approve the treatment to be accorded by the undertaking." An alternative approach would be delete any reference to approval by the court from article 22 on the basis that it is already covered by article 22bis.

52. Articles 21 and 21bis have been revised to make it clear that they refer to an undertaking given to avoid or minimize the commencement of non-main proceedings. While article 22 is intended to refer to avoiding the commencement of main proceedings, there is nothing in the drafting that specifically indicates that intent and it is unclear how it differs from article 21. As currently drafted, the reference to the "proceeding in another State" could be either a non-main proceeding, in which case the article repeats the content of article 21, or it could be a main proceeding, in which case it is different. The Working Group may wish to consider whether any further clarification is required, including adding "insolvency" before the word "proceeding" as indicated.

Article 22 bis. Powers of a court of this State with respect to an undertaking under article 22

If a foreign representative of an enterprise group member or a group representative from another State in which a[n insolvency] proceeding is pending has given an undertaking under article 22, a court in this State may:

(a) Approve the treatment in the foreign proceeding of the claims of creditors located in this State; and

(b) Stay or decline to commence a main proceeding.

Notes on article 22 bis

53. Article 22 bis has been revised in accordance with the report of the fifty-second session (A/CN.9/931, para. 51), based upon variant 2 of the text contained in document A/CN.9/WG.V/WP.152. The word "commitment" has been replaced with the word "undertaking" and the cross-reference to article 19 deleted. The Working Group may wish to consider whether "insolvency" should be added before the word "proceeding" as indicated.

Article 23. Additional relief

1. If, upon recognition of a planning proceeding, the court is satisfied that the interests of the creditors of affected enterprise group members would be adequately protected in [the planning] [that] proceeding, particularly where an undertaking under article 21 or 22 has been given, the court, in addition to granting any relief described in article 17, may stay or decline to commence insolvency proceedings in this State relating to any enterprise group member participating in the planning proceeding.

2. Notwithstanding article 20, if, upon submission of a proposed group insolvency solution by the group representative, the court is satisfied that the interests of the

creditors of the affected enterprise group member [are] [or will be] adequately protected, the court may approve the relevant portion of the group insolvency solution and grant any relief described in article 17 that is necessary for implementation of the group insolvency solution.

Notes on article 23

54. Article 23 was approved at the fifty-second session of the Working Group as drafted (A/CN.9/931, para. 52); the word "commitment" has been replaced with the word "undertaking". See the note on relief under article 13 above. The Working Group may wish to consider whether words "the planning" in paragraph 1 might be replaced by the word "that" as indicated and the words "or will be" might be added in paragraph 2 as indicated.

K. Note by the Secretariat on insolvency of micro, small and medium-sized enterprises

(A/CN.9/WG.V/WP.159)

[Original: English]

Contents

I. Introduction

1. At its forty-sixth session (2013), the Commission requested Working Group V to conduct a preliminary examination of issues relevant to the insolvency of MSMEs, and in particular to consider whether the UNCITRAL Legislative Guide on Insolvency Law (the Guide) provided sufficient and adequate solutions for MSMEs.

2. At its forty-fifth session (April 2014), Working Group V agreed that (i) the issues facing MSMEs were not entirely novel and solutions should be developed in light of the key insolvency principles and the guidance provided by the Guide (see A/CN.9/WG.V/WP.121); (ii) it was not necessary to wait for the results of the work being done by Working Group I in order to commence the study of insolvency regimes for MSMEs; and (iii) while the work might form an additional part to the Guide, no firm conclusion on that point could be reached in advance of a thorough analysis of the issues.

3. At its forty-seventh session (2014), the Commission gave Working Group V a mandate to undertake work on the insolvency of MSMEs as a next priority, following completion of the work on the cross-border insolvency of enterprise groups and recognition and enforcement of insolvency-related judgments.

4. At its forty-ninth session (May 2016), Working Group V (i) noted the importance of MSME insolvency and the wide support that had been expressed in favour of work being undertaken on that topic; and (ii) recommended that the Commission clarify the mandate given at its forty-seventh session to Working Group V as follows: "Working Group V is mandated to develop appropriate mechanisms and solutions, focusing on both natural and legal persons engaged in commercial activity, to resolve the insolvency of MSMEs. While the key insolvency principles and the guidance provided by the UNCITRAL Legislative Guide on Insolvency Law should be the starting point for discussions, the Working Group should aim to tailor the mechanisms already provided in the Legislative Guide to specifically address MSMEs and develop new and simplified mechanisms as required, taking into account the need for those mechanisms to be equitable, fast, flexible and cost efficient. The form the work might take should be decided at a later time based on the nature of the various solutions that were being developed."

5. At its forty-ninth session (2016), the Commission clarified the mandate of Working Group V in accordance with the wording quoted in paragraph 4.

6. At its fifty-first session, Working Group confirmed that work could proceed by examining each of the topics addressed in the Guide and considering whether the

treatment provided was appropriate and necessary for an MSME insolvency regime, building upon the brief outline provided in A/CN.9/WG.V/WP.121. If such treatment was not appropriate, consideration should be given to how it might need to be adjusted for MSME insolvency. Additionally, consideration should be given to issues not covered by the Guide that should nevertheless be addressed in an MSME insolvency regime. The Working Group also expressed interest in considering how the modular approach might contribute to the arrangement of the elements required for an effective and efficient insolvency regime for MSMEs.

7. This note, which should be read in conjunction with A/CN.9/WG.V/WP.121 and A/CN.9/WG.V/WP.147 addresses issues relevant to the insolvency of MSMEs, by reference to the Guide. Given that MSMEs can be found across a very wide and heterogeneous spectrum, no common definition is attempted here. Nonetheless, it is clear that all forms of MSMEs would fall within the scope of the Guide, which covers all debtors, whether legal or natural persons, engaged in economic activity.[1]

II. Core provisions of the Guide as they relate to MSME insolvency

A. Liquidation

8. In order to identify, protect and liquidate the limited assets of the MSME debtor while minimizing further losses, key issues for consideration include:

(a) Access to low-cost and swift liquidation proceedings;

(b) Treatment of assets that may constitute or be excluded from the insolvency estate;

(c) Funding the administration of liquidation proceedings; and

(d) Resolving the above issues to provide a fresh start.

1. Access by MSME debtors

9. Recommendation 15 of the Guide presents two alternative standards for commencement of liquidation proceedings: the debtor is or will be generally unable to pay its debts as they mature (the cessation of payments test); or the debtor's liabilities exceed the value of its assets (the balance sheet test). Where a single test is adopted, it should be based on the cessation of payments test and not the balance sheet test.

10. Since many informal MSMEs do not maintain proper records, the balance sheet test may be impractical and the inconvenience of filing financial documents can act as a disincentive for MSMEs to seek timely commencement. Moreover, personal assets and liabilities are likely to be mingled with business assets and liabilities, particularly where the MSME debtor is a natural person. Where the business is doing poorly but the individual debtor is asset-rich, a balance sheet analysis could preclude access to liquidation. Given the prevalence of personal guarantees used for borrowing by MSMEs, the balance sheet analysis could be under-inclusive if it fails to reflect the liabilities of the individuals behind MSMEs.

11. The cessation of payments test may be more workable in comparison. As discussed in the Guide (part two, chapter I, paras. 23, 33 to 34), the law may accept a financial declaration from the debtor that it is unable or does not intend to pay its debts; specify the indicators of the debtor's inability to pay its debts; or establish a presumption to that effect when the debtor suspends payment of its debts. However, the cessation of payments test may face the same problem with accurately assessing an MSME's state of solvency if it fails to capture personal debts that may be intertwined with business debts.

[1] Legislative Guide, introduction, para. 1.

12. Several alternative approaches to determining access, involving objective or subjective indicators, may be considered. Objective indicators may be tied to debt levels, the value of income and/or assets available, or debt-to-income ratios, using minimum and/or maximum thresholds that differ from State to State. Subjective indicators may require the debtor to demonstrate "good faith", reasonableness, or that the debts are caused by events beyond a debtor's control or not caused intentionally or through gross negligence. Access may also be dependent on factors such as the debtor's ability to cover the administrative costs of the proceedings (see paras. 23–25 below).

13. Whichever test is adopted, the overarching consideration is that the burden of proving insolvency should not be so time-consuming or difficult that MSME debtors would avoid or delay seeking commencement of liquidation proceedings. Moreover, an holistic approach to assessing MSME insolvency is desirable, so that personal assets, liabilities or guarantees used by natural persons to support MSME business are included. Likewise, as noted in the Guide (part two, chapter VI, para. 12), where a legal system distinguishes business debts from personal debts, it may not be feasible to apply different rules. This is particularly true in the context of natural persons operating MSMEs, where business and personal debts are often intertwined. A procedure dealing with both types of debts might therefore be desirable. A procedure for joint application for commencement and procedural coordination of related proceedings might also be useful where MSME involves family members.

14. The most liberal approach would be to enable MSME debtors to access liquidation proceedings without having to declare or prove any particular financial state.[2] Lowering the barriers to access and removing the stigma of declaring insolvency can encourage timely action, provided safeguards against abuse are in place.

15. One safeguard might be to restrict the frequency of access by either preventing multiple applications by the same debtor within a certain time period or subjecting a repeated applicant to more intense scrutiny, with commencement permitted only in exceptional circumstances. Other solutions involve review and potential sanction of the debtor's conduct by permitting creditors and other interested persons to raise objections with the court.[3]

2. Assets constituting the insolvency estate

16. The Guide (recommendations 38 and 109) deals with assets that might be excluded from the estate where the debtor is a natural person. Those recommendations are not only applicable to a MSME debtor who is a natural person, but should also apply where the MSME debtor is a legal person but its business assets are intertwined with the personal assets of a natural person. In the latter case, the natural person conducting MSME may be effectively exposed to personal insolvency and should, therefore, be afforded the same protection.

17. Three possible approaches to asset exclusion might be identified.

18. First, the law may set aside a range of assets with a total value up to a specified limit, which the debtor may seek to have excluded from the estate. This means that all of the debtor's qualified assets automatically become property of the estate, and the burden is on the debtor to apply to the court for exclusion. The range of assets available for exclusion may include, for example, furniture, household equipment, bedding, clothing and tools of trade.

19. Second, the law may establish different categories of excluded assets, respectively capped at certain values. This approach may be more flexible than the first approach. The categories of assets that are relevant may differ according to the individual situation of the debtor. In some systems, if the debtor does not use up the exclusion limit in one category of assets (e.g., the family home), the law may allow

[2] Ibid., part two, chap. I, para. 33.
[3] Ibid., chap. III, rec. 137.

application of the unused amount to other categories of assets. Other systems allow the debtor to sell off some assets to buy excluded assets.

20. Third, the law may take a more general standards-based approach that, unlike the other two approaches, excludes the debtor's assets from the estate by default and places the burden on the insolvency representative to object to the exclusion of particular assets. The court may order those assets to be reclaimed for the estate. Because the insolvency representative would only need to intervene if the debtor had particular assets that could be of value to creditors, it may be more efficient in some cases where there are few assets available for distribution. In other cases, however, it may require the insolvency representative to investigate the debtor's assets, especially where personal and business assets are mingled or assets have been hidden or transferred in close proximity to insolvency.

21. The use of reasonable limits with an emphasis on rehabilitating the debtor is to be encouraged and the law might grant the court discretion to increase the scope of excluded assets beyond the default limits to meet the needs of individual debtors. Where there is evidence of bad faith or unfair conduct by the debtor, the law could allow the court to claw back assets that would otherwise be excluded.[4]

22. The law may permit business assets to be sold before personal assets. Private sales, in addition to public auctions, may be permitted to provide a choice for best realizing the value of the debtor's assets.

3. No-asset cases

23. In practice, MSMEs are more likely than other debtors to have insufficient or no assets to fund the administration of liquidation proceedings. While these "no-asset cases" are a regular phenomenon, responses have differed, as indicated in the Guide (part two, chapter I, paras. 72–75). Some laws require the court to refuse commencement or terminate the proceedings, while others provide specific mechanisms for the administration of the proceedings, including levying a surcharge on creditors to fund administration; establishing a public office or using an existing office; establishing a fund out of which the costs may be met; or appointing a listed insolvency professional on the basis of a roster or rotation system. Such mechanisms could be coupled with other measures to reduce the costs of liquidation proceedings for MSME debtors (see paras. 26–29 below).

24. Because a large number of no-asset MSME cases involves debtors who are natural persons, the treatment of those cases should address the possibility of granting a fresh start. If the court declines to commence or terminates liquidation proceedings because of lack of assets, the debtor's financial situation will remain unresolved.

25. An exception for individuals with limited assets who may otherwise be eligible for discharge could be considered.[5] In one jurisdiction, for example, an individual debtor's application for liquidation is deemed to be an application for discharge, and even if the debtor is unable to cover the costs of the proceeding, the termination of the liquidation proceeding leads to the immediate commencement of the discharge proceeding, thereby providing a speedy exit option for the debtor. The court can reduce the amount to be prepaid by the debtor to cover the costs of the proceeding. In other jurisdictions, alternatives in the form of debt relief schemes have been established, where qualifying no-asset debtors may seek discharge from their debts after a short time period (e.g. one year). However, the potential for serial bankruptcy may need to be addressed.

4. Simplified proceedings

26. Several legal systems provide a simplified or expedited form of liquidation proceedings, which tend to include shorter timelines[6] and procedural formalities, and less court supervision to save time and costs.

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[4] On avoidable transactions, see ibid., chap. II, rec. 87 and paras. 170–179.

[5] Ibid., chap. I, rec. 26(a) and para. 74.

[6] Greece: A/CN.9/WG.V/WP.147, para. 23; India: A/CN.9/WG.V/WP.147, para. 26.

27. Measures to simplify the process of claims admission include reducing evidentiary requirements for proof of claims; limiting claims that need to be verified to those that are likely to be paid; referring submitted claims to an immediate creditor meeting for verification; eliminating the need for a court hearing to verify claims; and accelerating timelines for expressing objections and resolving disputed claims.[7]

28. A common problem for MSME liquidation is that a single disputed or unpaid claim is the main asset of the business. One straightforward solution might be for the court, another institution or an insolvency representative to perform a summary determination of the disputed claim, with the possibility of a full review on appeal to the court. Other options may include permitting the sale of the disputed claim at a discount, provided there is a secondary market for small claims or assigning the claim to the insolvency representative or public office, which will then be responsible for litigating and collecting the claim. The proceeding could be completed after the MSME debtor has handed over other assets for liquidation, and not only after the litigation and collection of the disputed claim.

29. A simplified process may be achieved for distribution, particularly where the assets available are below a certain statutory limit, by, for example, reducing notice requirements; permitting the court to make a final decision in lieu of the creditors; or establishing one-time distribution as the norm, provided that additional dividends may be distributed on a discretionary basis. In the event that all creditors agree on the amounts and priorities of claims, together with the timing and method of distribution, the court may order distribution to be carried out on a consensual basis.

B. Reorganization

30. The design of a reorganization framework may be adapted and modified from part two, chapter IV of the Guide to promote MSME reorganization and could address:

(a) Early access to reorganization proceedings;

(b) Limiting costs and delays involved in reorganization; and

(c) Reducing requirements for creditor participation to address creditor passivity.

1. Early access

31. Given its preventive aim, reorganization should be available before MSME debtors become insolvent. As stated in the Guide (part two, chapter I, para. 46), the standard for commencing reorganization proceedings should be more flexible than the standard for commencing liquidation proceedings. The law may not require the MSME debtor to declare a state of insolvency when applying for reorganization, but permit commencement when there is a risk or likelihood of insolvency. This may be proved if, for example, the MSME debtor can demonstrate it is unable to overcome the economic, financial or legal difficulties it is facing.

32. There is, however, no consensus on whether MSME's viability should be a precondition for seeking reorganization. Some laws require the debtor to demonstrate that it is unable to pay debts that fall due without significantly hindering the continuation of its business, while others leave the assessment of viability to be made by creditors. To provide the court with an independent assessment of viability, the law may require the appointment of an insolvency representative or another person to investigate the debtor's affairs. In one jurisdiction, an individual self-employed debtor with no income and no assets is legally entitled to propose a "zero-plan" providing for no payments to his or her creditors (effectively a proposal to be discharged from all debts).[8]

33. The Guide (recommendation 139) addresses proposal of a reorganization plan on or after commencement of the insolvency proceeding, rather than as a first step.

[7] Greece: ibid.

[8] Germany: A/CN.9/WG.V/WP.147, para. 21.

As the MSME debtor may not be in a position to draw up a feasible plan at an early stage, allowing proposal after commencement could facilitate early access to reorganization.[9] It may also give the debtor some "breathing space" to negotiate with creditors if a stay of enforcement actions comes into effect upon commencement.[10] These benefits are particularly significant for MSMEs, which are more susceptible to financial distress than larger businesses and less likely to recover from an extended period of financial distress once it occurs.

34. There are varying approaches to the role of creditors in the proposal of a plan, as noted in the Guide (part two, chapter IV, paras. 10, 11 and 13). These include giving the debtor an exclusive opportunity to propose a plan without the involvement of creditors; giving the debtor a chance to propose a plan within a time limit, failing which the creditor(s) may propose a standalone plan; or permitting parties to propose competing plans at the same time. Other options may involve both the debtor and some or all of its creditors: the law may permit the debtor to propose a plan with the support of a creditor holding a certain proportion of the debt; or impose a duty on parties to cooperate in negotiating and proposing a plan.[11] The extent of creditor involvement at the proposal stage is closely linked to the procedure for approval of the proposed plan by the creditors or the court (see para. 47 below). In addition, it may be helpful to shorten the time period for MSME debtors to propose a plan, since they tend to have less complicated operations and financial arrangements

2. Debtor-in-possession

35. Recommendation 112 of the Guide notes that different approaches may be taken to the debtor's continuing role in the business during reorganization.

36. The emerging trend favours debtor-in-possession with an emphasis on rehabilitation of MSMEs. The justifications include that MSME owners and managers often have private knowledge about the business as well as ongoing relationships with creditors, suppliers and customers; the value at stake can be insufficient to fund the appointment of an insolvency representative; and the risk of being displaced from the helm can creates a powerful disincentive for small, family-run businesses to seek timely intervention.

37. The benefits of a debtor-in-possession approach should be weighed against the potential hazards of irresponsible or fraudulent conduct by the debtor. That may be addressed by providing, in certain circumstances, for the court to appoint an insolvency representative or other person to supervise the debtor-in-possession. In one jurisdiction, the court appoints a supervisor to oversee the debtor-in-possession's management in almost all cases of MSMEs that are not stock companies (in those cases a trustee is mandatorily appointed), while in another, the law enables the court to appoint a custodian where the individual debtor or the debtor's representative(s) was responsible for misappropriation or concealment of property or poor management that caused the MSME's financial distress.

38. The confidence of creditors should also be considered. Where the law permits involuntary commencement, the debtor may be hostile to creditors and should not be allowed to frustrate the proceeding. In such a scenario, the court may appoint an insolvency representative to take on a supervisory role or even displace the debtor or make an interim stay order preventing the debtor from taking certain actions (such as disposing of assets or incurring liabilities capped by a specific value) for a limited period of time. In considering these options, a balance may be needed between the incentives provided for the debtor to act in good faith while in control of the business and potential for abuse by creditors. Safeguards may include requiring the measure to be supported by a certain proportion of creditors. Other situations where debtor-in-possession may not be appropriate might include where the plan needs to be confirmed by the court by way of a cram-down on creditors (see para. 46 below).

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[9] Legislative Guide, part two, chap. IV, para. 7.
[10] Ibid., part two, chap. II, para. 28.
[11] Ibid., chap. IV, para. 8.

3. Simplified plans

39. To meet the needs of MSMEs, basic forms and models may be provided as templates for designing a reorganization plan. Where an insolvency representative is appointed by the court, the plan should be prepared by the debtor with the insolvency representative's assistance.[12]

40. Provided the plan contains sufficient information to enable its viability to be assessed, the MSME debtor may not need to submit a disclosure statement[13] or financial information or audited documents.[14] The law may also permit an MSME debtor to use business and personal assets for the purposes of reorganization.

41. The parties affected by the plan will largely depend on the size and structure of MSME. Secured creditors holding a significant portion of the debt or that are entitled to satisfy their claims from encumbered assets that are critical to the reorganization of the business, should be involved in the plan, as should family members or close friends who have given personal guarantees or provided their personal assets as security for the MSME's debts. The need to modify shareholder rights, which may be restricted in some jurisdictions, is generally reduced in the case of MSMEs, since they may be unincorporated or, though incorporated, may be conducted through sole owners or as family businesses.

42. However, not all creditors will take an active role in ensuring their claims are included in the plan. To overcome passivity, the law may include a presumption of accuracy of the claims in the debtor's plan. For instance, one regime for rehabilitation of individuals requires the debtor to submit a list of claims to the court at the time of commencement; any claims not included are not subject to the proceeding. The burden is upon creditors to verify correct reflection of their claims and to raise objections within a stipulated time period. In the absence of timely objection, creditors are deemed to have waived their right to object, and the claims listed by the debtor will be confirmed with final and conclusive effect. Thus, deemed waiver raises the costs of creditor non-participation. Alternatively, if the law requires creditors to submit their claims, it can make participation easier by dispensing with submission of supporting evidence of the claims, unless specifically requested by the debtor, the insolvency representative (if appointed) or the court.

4. Quick approval

43. The Guide discusses (recommendations 145–154; part two, chapter IV, paras. 26–65) the process of voting on, approval or confirmation of, and challenges to a plan. Not all considerations involved in those steps will be applicable to the reorganization of MSMEs and the entire process could be simplified and shortened.

44. Requirements for the approval of the plan by creditors may be relaxed by eliminating the need for a creditor committee;[15] reducing the quorum required for a creditor meeting; dispensing with the need to convene a creditor meeting if adequate information has been provided by the debtor;[16] accepting a creditor's written consent to a plan without the need to attend a creditor meeting; permitting creditors to approve a plan by written resolution; permitting informal agreement to replace a formal voting process; or lowering the approval threshold of the plan.

45. Nonetheless, creditor apathy in MSME cases can make creditor approval difficult to obtain or a "majority" vote may reflect the decision of a random majority if most creditors did not participate. To incentivize creditor participation, a few systems rely on deemed approval, which interprets a lack of creditor opposition as implicit acceptance of the plan, rather than excluding those creditors from the

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[12] OHADA: A/CN.9/WG.V/WP.147, paras. 29 and 30.
[13] United States of America: A/CN.9/WG.V/WP.147, para. 27; *C.f.* Legislative Guide, part two, chap. IV, recs. 141–143 and paras. 23–25.
[14] OHADA: A/CN.9/WG.V/WP.147, paras. 29 and 30.
[15] Argentina: A/CN.9/WG.V/WP.147, para. 18; United States: A/CN.9/WG.V/WP.147, para. 27. C.f. Legislative Guide, part two, chap. IV, rec. 129.
[16] United States: A/CN.9/WG.V/WP.147, para. 27. C.f. Legislative Guide, ibid., rec. 128.

quorum.[17] In other words, the plan may be approved by the actual and deemed votes of all creditors.

46. Where a plan has been approved by the requisite majority of creditors, the law may provide that the plan takes effect automatically, or require court confirmation before it becomes effective and binding upon all relevant parties. A middle ground is to require court confirmation in limited circumstances, such as where the plan affects the interests of dissenting parties. While there may not be many MSME cases in which a plan is actively opposed, the law may permit a cram-down mechanism for the court to bind dissenting creditors to the plan, subject to certain safeguards[18] (see paras. 48–55 below). The law may also permit the court to take a more proactive role in facilitating the cram-down; in at least one civil law regime, the court may approve the plan by modifying its terms to protect the rights of dissenting creditors.

47. The need for creditors to vote on a plan may be replaced with court approval.[19] However, consistent with recommendation 137 of the Guide, affected creditors should be entitled to be heard if they wish to object to the plan. In one reorganization regime for individual debtors, unsecured creditors have the opportunity to be heard, but are not required to vote on a payment plan, and the plan becomes effective following court approval. Because both debtors and creditors that are MSMEs may not be well informed about the reorganization process and may have limited or no access to advice, the court may be the best placed decision-maker.

5. Conditions for approval

48. Recommendation 152 of the Guide sets out certain conditions to be satisfied before the court can approve or confirm a plan. Those conditions may apply whenever the court reviews a plan, or only in limited instances, such as a cram-down on dissenting creditors or a challenge to an approved plan.[20]

49. To discourage frivolous complaints and minimize delays in MSME reorganization, some laws have narrowed the scope for objections to be made on procedural grounds and the court can authorize a plan that does not strictly satisfy those grounds. For instance, the court may approve or confirm a plan, notwithstanding an objection that the approval process was not properly conducted or that the plan contains a provision contrary to law, by taking into account the extent of the irregularity in the process or the plan, the state of the MSME debtor, or other circumstances.

50. Other conditions serve to protect the interests of creditors, including that they should receive at least as much under the plan as they would have received in liquidation, unless specifically agreeing to lesser treatment (the best interest test).[21] While that test can be applied to MSME cases, the law could permit the court to determine the outcome of an alternative liquidation scenario without the involvement of expert opinion.

51. As an alternative, a more general test of fairness could be considered to simplify the reorganization proceeding and remove any need for the court to evaluate and compare alternative scenarios. Instead, the court assesses whether the interests of all creditors are sufficiently protected under the plan, such as whether the minority creditors were fairly represented at the meeting, whether the majority creditors acted in good faith, and whether the plan would be approved by a reasonable and honest person who was affected. At the same time, the court should not have to examine the substance of the commercial terms to which the majority creditors have agreed.[22] Such a test may be suitable for MSME cases, provided it can be applied with certainty.

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[17] Germany: A/CN.9/WG.V/WP.147, para. 21.
[18] Legislative Guide, part two, chap. IV, paras. 54–55.
[19] C.f. ibid., recs. 127, 145.
[20] Ibid., recs. 151, 153.
[21] Ibid., rec. 152(b).
[22] Ibid., para. 63.

52. Application of the absolute priority rule may need to be considered in MSME reorganization.[23]

53. The strict application of the rule may hinder implementation of the plan. Because the aim is to rescue the MSME debtor, the plan may provide for payment to creditors over several months or even years, using both current assets and future income. If senior creditors must be paid in full ahead of junior creditors, the debtor's assets may be exhausted all at once, before there is even a chance of rescue. It may thus be desirable for junior creditors to be paid before senior creditors are paid in full, provided the plan observes the relative priority between the creditors. That may create more flexibility for the parties and the court, particularly where a cram-down is needed to give effect to the plan.

54. Second, the absolute priority rule renders creditors that are MSMEs (MSME creditors) especially vulnerable since, as noted above, they may require payment during the reorganization in order to continue trading. That could, in turn, jeopardize the plan where the successful reorganization of the MSME debtor depends on the survival of those creditors as its transaction partners. The law can recognize the vulnerable status of MSME creditors by placing them in a class separate from other unsecured creditors. Where the law permits court approval by way of a cram-down, that class of MSME creditors may be exempted from the cram-down. Alternatively, the law may carve out specific exceptions to the absolute priority rule by granting priority, in limited circumstances, to those creditors' claims, for instance, for goods supplied to the debtor within a specified time period before commencement of the reorganization proceeding. The law may also give the court discretion, on a case-by-case basis, to order preferential payment of MSME creditors' claims, such as where necessary for continuation of those creditors' businesses. Another approach excludes MSME creditors' claims from the plan.

55. Third, the absolute priority rule may create a disincentive for owner/managers of incorporated MSMEs to seek reorganization, because they risk losing their ownership of the business to creditors with higher priority. Consistent with the debtor-in-possession approach, MSME owners should usually be allowed to continue running the business without surrendering their ownership interests under the plan. At the same time, the law may stipulate that the plan should not allow payments to MSME owners as long as there are payments outstanding to creditors, thus respecting the priority of creditors ahead of shareholders. The court would need to assess the funds required for the MSME's survival and the disposable income available for payment. However, a wholly discretionary approach may lead to inconsistent outcomes in practice. A different approach may be a bright-line standard. For example, to protect creditors in the absence of absolute priority, the law may permit the plan to be approved or confirmed only if it provides a minimum level of payment to creditors over a certain time period. Alternatively, the law could establish a minimum standard of protected income for MSME.

6. Expedited proceedings

56. As discussed in the Guide (recommendations 160–168 and part two, chapter IV, paras. 76–94), expedited reorganization proceedings may be used to give effect to an informally negotiated plan at greater speed and lower cost.

57. The documentary requirements for commencement would differ from those applicable to full reorganization proceedings. In addition to submitting the negotiated plan, the MSME debtor would need to demonstrate the plan has received the requisite support by providing the written consent of the affected creditors or, where a creditor meeting has been held, a report of the creditors' votes.[24] As to disclosure requirements,

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[23] On the priority of tax claims, see ibid. chap. V, paras. 69 and 74; see also para. 72 below. On the special treatment of claims by related persons, see ibid., chap. V, paras. 48 and 77 and chap. IV, rec. 152(e); see also paras. 82–84 below.

[24] Ibid., part two, chap. IV, rec. 162(d).

(see para. 40 above), the same approach as taken in simplified proceedings should apply in expedited proceedings.[25]

58. The law may also reduce court supervision and waive certain requirements leading to the approval of the plan. Claims included in the plan may be admitted without examining proof of those claims;[26] the plan may be referred to an immediate creditor meeting or court hearing (as the case may be);[27] or the court may directly confirm the plan with final and binding effect. Once the plan is confirmed by the court, affected creditors would be bound in the same manner as in full reorganization proceedings.

7. Appeals

59. The possibility of an appeal against a court decision (e.g., on the confirmation or approval of a plan) will be influenced by concerns about certainty, delay and costs. Some jurisdictions do not necessarily provide a right of appeal, whereas other jurisdictions permit an appeal, but it does not have the effect of suspending implementation of the plan. The latter can be crucial for MSMEs, since the success of the plan will often depend greatly on prompt implementation. Any risk of irrecoverable loss caused by implementation of the plan may be balanced by the provision of security or other provisional measures.

60. Should the appeal succeed after the plan is implemented, however, setting aside or unravelling the plan may cause more harm than good to all parties involved. As an alternative, the court may be authorized to order the debtor to pay monetary compensation to dissenting creditors or creditors who voted in favour of the plan.

8. Conversion to liquidation

61. Recommendation 158 of the Guide states that the law should permit the court to convert reorganization to liquidation proceedings on five grounds.

62. In the event that full reorganization proceedings are unsuccessful due to grounds (a)–(d), it may be appropriate for the law to allow automatic conversion to liquidation proceedings, avoiding the delay and expense of a separate application by either the MSME debtor or creditors. However, as noted in the Guide (recommendation 168 and part two, chapter IV, para. 91), conversion may not be appropriate where MSME commenced expedited reorganization proceedings to address financial difficulties at an early stage, but was not necessarily eligible for liquidation proceedings.

63. The possibility of allowing a creditor to pre-emptively apply for conversion, on the ground that the debtor's plan is doomed to fail, may also be considered.

64. There may be other circumstances which could affect the debtor's ability to implement the plan. One State provides that, if an individual debtor has paid at least 75 per cent of their debts according to the plan and it becomes difficult to continue payment for reasons beyond the debtor's control, the court may grant a "hardship discharge".

C. Discharge

65. Discharge is another core element of MSME insolvency. As noted in the Guide (part two, chapter VI, para. 1), several States have recognized the need to focus on facilitating a fresh start for insolvent debtors after resolving their financial difficulties and reducing the stigma associated with business failure.

66. Recommendations 194 to 196 of the Guide concern discharge where the debtor is a natural person. These recommendations are generally applicable to MSMEs conducted through natural persons, whether as sole proprietors or in a group, such as a partnership, association or other unincorporated entity, which exposes them to

[25] C.f. Ibid., recs. 162(a) and (e).
[26] C.f. Ibid., recs. 165(b)–(c).
[27] Ibid., rec. 164(d).

personal liability for unpaid debts. As for MSMEs conducted through companies and other legal entities with limited liability, the owners and managers of the liquidated entity will not be personally liable for unsatisfied claims per se.[28] Nonetheless, many of these individuals may have incurred personal debts for their business activities by taking personal loans to start and run the business or may have guaranteed business loans with personal assets. In such cases, the question of discharge arises as a result of the mixing of business and personal debts.

1. Quick discharge

67. The most debtor-friendly approach is to permit a full discharge (or "straight" discharge) of debt immediately following distribution in liquidation. This is offered in some legal systems and grants complete debt relief to the debtor without requiring a payment plan. For example, the law may provide for an immediate discharge following a brief evaluation and possible liquidation of the debtor's assets or if the court determines the debtor's circumstances make it clear no distribution to creditors can reasonably be expected.

68. The need to balance the interests of the debtor and creditors has led many insolvency regimes to stipulate a period of time that must elapse before an honest and cooperative debtor can obtain a full discharge. This approach can be combined with a reorganization plan, which ensures that the discharge is conditional on partial repayment or, at least, on good faith efforts to make repayment. The starting point of the discharge period may differ; it may be pegged to the commencement of the liquidation proceeding, to conversion of a reorganization into a liquidation (see paras. 61–64 above) or, where there is a reorganization plan, to the court's approval of the plan or to its commencement or completion date. The length of the discharge period varies from jurisdiction to jurisdiction, but the emerging trend is to shorten the discharge period to encourage entrepreneurial activities and reduce stigma.

69. Where the discharge is conditional on partial repayment, the law may ensure the repayment obligation is not overly onerous by requiring, for example, that the repayment obligation is based on each debtor's situation and is proportionate to disposable income over the discharge period. Another approach is to establish a sliding scale which calibrates the length of the discharge period according to the rate of return to creditors; the more the debtor is able to pay, the sooner they will obtain a discharge. The law may also provide for exceptional circumstances in which a debtor may apply to the court for a discharge (see para. 64 above).

70. In terms of procedure, discharge may take place either automatically or upon application to the court. The former is more expeditious, eliminating the need for judicial intervention. The latter may be required if automatic discharge is unconstitutional or if some judicial supervision is preferred. Following discharge, claims that have not been satisfied would be rendered unenforceable.

71. The benefits of a quick discharge are more pronounced in the context of MSME insolvency, particularly where the debtor is towards the "micro" end of the spectrum. Due to MSMEs' limited resources, creditors often do not expect to receive substantial returns and may have written off the claims long before the expiry of the discharge period. At the same time, a shorter discharge period incentivizes the debtor to seek timely commencement of the insolvency proceeding and to comply with obligations to creditors as far as possible in order to obtain an early discharge.

2. Scope of discharge

72. The effectiveness of a discharge regime in achieving the debtor's rehabilitation depends on the scope of debts covered by the discharge. Certain types of debt, such as debts based on tort claims, maintenance obligations, fraud, criminal penalties, and taxes, tend to be excluded from discharge.[29] Some countries, however, have eliminated special treatment for taxes and other public revenue claims, which are

[28] Ibid., chap. VI, para. 3.
[29] Ibid., chap. VI, para. 7.

often among the largest debts of small business owners. This is in line with recommendation 195 of the Guide, which states that the exclusion of debts from a discharge should be kept to a minimum in order to facilitate a fresh start.

73. Given the likelihood that business and personal debts are intertwined, it may be burdensome for an MSME debtor to apply for separate procedures to discharge all debts, especially if they have different criteria and discharge periods. As noted above (see para. 13), it is desirable that both types of debt can be dealt with in a single discharge regime or, at least, that separate proceedings may be consolidated. It may also be possible to consider a reduction of the debtor's personal guarantee as a de facto discharge, without necessarily declaring the debtor bankrupt, so as to facilitate the debtor's fresh start.

3. Conditions for discharge

74. To provide safeguards against abuse, the insolvency law can regulate the availability of a discharge or the length of a discharge period in specific circumstances, although such conditions should be kept to a minimum, as stated in the Guide (recommendation 196). In addition, a key feature of the MSME-specific approach is a presumption of honesty. This grants the debtor the benefit of a discharge unless they are proven to have acted fraudulently or in bad faith. The experience of some jurisdictions with debtor-friendly discharge regimes shows that it does not result in a rise in unpaid claims or widespread misuse of discharge options by debtors.

75. A discharge of debt may be accompanied by disqualification, which precludes the debtor from starting or carrying on a business, practising in a profession, or acting as a company director or manager. The disqualification period may be long or even indefinite or may be linked to the discharge period. Disqualification could occur automatically or upon a court order, and may be subject to carve-outs to prevent abuse. The disqualification period may be extended in exceptional situations if the debtor's conduct justifies such a sanction, such as where the debtor was guilty of criminal misconduct or otherwise ordered to be disqualified by a court in criminal proceedings.[30] For sole traders or entrepreneurs who manage their own businesses or who entered into insolvency after giving personal guarantees, a blanket disqualification may be inappropriate, since it would effectively prohibit them from being involved in future enterprises, defeating the concept of a fresh start.

76. Restrictions on obtaining new credit can also have a major impact on the debtor's ability to start afresh, particularly if the impact lasts long after the debtor's discharge. In many countries, borrowers are required to disclose whether they are or have been subject to insolvency, which can lower their credit scores or be reflected as negative entries in their credit histories, leading to discrimination against former debtors. To mitigate this, restrictions on borrowing should be imposed carefully and the period of such restrictions reduced. Such measures can be coupled with efforts beyond the formal insolvency framework, such as out-of-court restructuring with financial institutions, to provide individual debtors with the benefits of discharge without affecting their personal credit scores or the use of data protection laws to regulate the collection and retention of personal information by credit providers or bureaux.

D. Related persons and third party guarantors

77. Third parties related to the natural person conducting MSME, such as family members or close friends, can be drawn into the MSME's insolvency because they have taken on personal loans, given personal guarantees or provided their property as collateral security for business loans.[31] Since the involvement of related persons tends

[30] Ibid., para. 9.

[31] Ibid., Introd., see subpara. 12(jj): for the definition of a "related person". On levels of connection to the debtor see part two, chap. II, para. 183.

to be more ubiquitous in MSMEs than in larger enterprises, their position under insolvency law merits consideration in greater detail.

78. In addition, competing policies have to be weighed in the treatment of third party guarantors in MSME cases. On one hand, the purpose of requiring a personal guarantee or security is precisely to hedge against the principal debtor's insolvency by ensuring the creditor will get paid. Adjusting the guarantor's liability in the insolvency proceeding would reduce the protection for the creditor. This could, in the long run, restrict access to credit for MSMEs, many of which may not be able to obtain financing in other ways. On the other hand, where the MSME's insolvency implicates family members or household assets, allowing unrestricted enforcement of guarantees could leave an entire family destitute.

79. Several aspects of the Guide deal with related persons, recommending that the law should specify the categories of persons with sufficient connection to the debtor to be treated as related persons;[32] any proposed disposal of an asset to a related person should be carefully scrutinized before being allowed to proceed;[33] the suspect period for avoidable transactions involving related persons may be longer than for transactions with unrelated persons;[34] related persons may not be eligible for appointment to a creditor committee;[35] claims by related persons should be subject to scrutiny and, where justified: (a) the voting rights of the related person may be restricted; (b) the amount of the claim of the related person may be reduced; or (c) the claim may be subordinated;[36] and the related persons whose claims have been denied or subjected to such treatment should be permitted to request the court to review their claims.[37] The Guide does not address third party guarantors, apart from noting that the discharge of a natural person debtor generally does not affect the liability of the guarantor.[38]

80. One issue for consideration is whether the law should permit a court to extend the reach of a stay (Guide, part two, chapter II, recommendation 46; paras. 30–34) to protect the guarantor of an MSME debtor. Staying enforcement against the guarantor, whose role is often crucial to the financing of MSME, can assist in the successful reorganization of the MSME debtor. It would extend the scope of the "breathing space" for a rational decision to be made collectively about the entirety of the MSME debtor's obligations and affairs.

81. Any extension of a stay to guarantors would, however, be an extraordinary departure from the usual approach in business insolvency cases and should be restricted to appropriate circumstances. For example, the benefit of a stay may be granted by the court on a case-by-case basis where it is deemed necessary to protect a related person guarantor that has provided a personal guarantee without receiving any consideration. Further, the stay of enforcement against guarantors may be limited to a short time period, following which creditors are free to take action. In any event, to protect the rights of creditors, the court may permit enforcement against guarantors who demonstrate bad faith or unfair conduct, such as by hiding property.

82. As to the treatment of claims by related persons, the Guide acknowledges (part two, chapter V, para. 48) that the mere fact of a special relationship with the debtor may not be sufficient in all cases to justify special treatment of a creditor's claim. In some cases, the claim will be entirely transparent and should be treated in the same manner as similar claims made by creditors who are not related persons. In other cases, the special relationship may give rise to doubts regarding whether the related person creditor will be impartial when voting on a reorganization plan or whether the debtor unfairly favoured the related person creditor over other creditors before the onset of insolvency. In one system, the claim of a related person who

[32] Ibid., chap. II, rec. 91.
[33] Ibid., rec. 61.
[34] Ibid., rec. 90.
[35] Ibid., chap. III, rec. 131.
[36] Ibid., chap. V, rec. 184.
[37] Ibid., rec. 181.
[38] Ibid., chap. VI, para. 13.

received a cash loan from the MSME debtor or became a guarantor for the MSME debtor may be subordinated to other claims in the plan.

83. Considerations of proportionality and potential hardship to the MSME debtor's guarantor may, however, justify giving the court discretion to favour the guarantor's claim when approving or confirming a reorganization plan, or permitting the guarantor to apply for an extended payment period to alleviate the guarantee obligation. Such measures may be appropriate where the guarantor has made great sacrifices to pay the debt and the other creditors are institutions. Similar considerations may support an exercise of discretion in favour of the guarantor's discharge.

84. The need to provide debt relief to related persons who face insolvency because they provided personal guarantees for the MSME business, especially in cases where a reduction or discharge of their obligations was not achieved through a reorganization plan, could be factored into the discharge regime. Although the guarantor can apply for relief separately, providing standing to apply for relief in the proceeding concerning the MSME debtor could be a more cost-efficient approach and more consistent with the aim of providing a fresh start to the MSME debtor, particularly if it mitigated the potentially undesirable consequences of enforcing the guarantee. One legal system permits natural persons and gratuitous sureties to petition for a discharge of the surety's obligation that is implicated in the principal's insolvency if that obligation is disproportionate to the surety's revenue and patrimony.

III. MSME issues not considered in the Guide

85. As noted above (para. 4), the Working Group's mandate includes, in addition to considering the applicability of the Guide to MSMEs, the development of new and simplified mechanisms for MSMEs as required. Document A/CN.9/WG.V/WP.121, paragraph 33 raises several issues not addressed in the Guide, such as personal insolvency, treatment of group debt, use of informal insolvency processes and debt adjustment mechanisms. The Working Group may wish to identify additional issues relevant to MSME insolvency that should be addressed in any work product to be developed.

L. Note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law

(A/CN.9/955)

[Original: English]

Contents

I. Introduction

1. This note sets forth revisions of the draft guide to enactment of the draft model law on recognition and enforcement of insolvency-related judgments as agreed by Working Group V (Insolvency Law) at its fifty-third session (New York, 7–11 May 2018). The report of that session is contained in document A/CN.9/937. This note should be read in conjunction with the text of the draft guide, which is set forth in document A/CN.9/WG.V/WP.157 and the latest version of the draft model law, which is contained in the annex to document A/CN.9/937.

2. Minor amendments are indicated by reference to the paragraph of the report of the fifty-third session (A/CN.9/937, chapter IV.B) in which they were recorded. Where redrafting of a paragraph was requested at that session, the revised text of that paragraph, as proposed by the Secretariat, is included in this note.

3. It is intended that the guide to enactment, as published, will include the final text of the articles of the model law once both texts have been finalized and adopted by the Commission.

II. Revisions to the draft guide to enactment contained in document A/CN.9/WG.V/WP.157

4. Paragraph 13, first sentence: delete the words “and its interpretation and application” (A/CN.9/937, para. 40).

5. Paragraph 18: replace the words “it is recommended that States” with the words “States may wish to” in the third sentence, delete the last sentence and add explanation of benefits of enacting the model law (A/CN.9/937, para. 41). From the third sentence, the paragraph might read:

> “Therefore, in order to achieve a satisfactory degree of harmonization and certainty, States may wish to make as few changes as possible when incorporating the Model Law into their legal systems. That approach will not only assist in making national law as transparent and predictable as possible for foreign users. It will also contribute to fostering cooperation between insolvency proceedings as the laws of different States will be the same or very similar; to reducing the costs of proceedings because of greater efficiency in the recognition of judgments; and to improving consistency and fairness of treatment of insolvency judgments in the cross-border context.”

6. Chapter III.B: insert a section explaining references to “courts” (A/CN.9/937, paras. 19 and 39). The following section might be added after paragraph 27:

> “*Competent court or authority*
>
> “As indicated in article 2, subparagraph (c), the Model Law envisages that a judgment can be issued by a court or an administrative authority in the

originating State, provided that a decision issued by an administrative authority has the same effect as a court decision. This usage is consistent with the approach taken to the concept of 'court' in the MLCBI (art. 2, subpara. (e)), and the UNCITRAL Legislative Guide on Insolvency Law (glossary, para. 8).

"Moreover, article 4 contemplates that the body competent to perform the functions of the Model Law with respect to recognition and enforcement in the receiving State may be either a court or administrative authority, as designated by the enacting State. For ease of reference, the Model Law uses the word 'court' to refer to that authority. In the event that the body designated under article 4 is an administrative authority, the State may wish to consider replacing the word 'court', where it refers to the receiving State, with the word 'authority'."

7. Paragraph 30: add a cross-reference to paragraph 57 (A/CN.9/937, para. 44(a)).

8. Paragraph 37: revise the paragraph (A/CN.9/937, paras. 42 and 44(b)). The paragraph might read as follows:

"37. As discussed in more detail in the article-by-article remarks below, the Model Law includes an optional provision that permits recognition of an insolvency-related judgment to be refused when the judgment originates from a State whose insolvency proceeding (being an insolvency proceeding that met the definition of that term as used in the Model Law) is or would not be susceptible of recognition under the MLCBI. Under the terms of the MLCBI, the insolvency proceeding may not be recognizable because that State is neither the location of the insolvency debtor's centre of main interests (COMI) nor of an establishment of the debtor (i.e. it is neither a main nor a non-main proceeding).

"37bis. That principle of non-recognition of insolvency proceedings under the MLCBI is acknowledged in article 13, subparagraph (h) of the Model Law, which is an optional provision for consideration by States that have enacted (or are considering enactment of) the MLCBI. The substance of subparagraph (h) also provides an exception to that general principle. The exception permits recognition of a judgment, notwithstanding its origin in a State whose insolvency proceeding is or would not be recognizable under the MLCBI, provided: (i) the judgment relates only to assets that were located in the originating State; and (ii) certain conditions are met. The exception could facilitate the recovery of additional assets for the insolvency estate, as well as the resolution of disputes relating to those assets. Such an exception with respect to the recognition of insolvency proceedings is not available under the MLCBI (discussed further below, paras. …)."

9. Paragraph 41: delete the paragraph (A/CN.9/937, para. 44(c)).

10. Paragraph 44, last sentence: delete the last part of the sentence, commencing with the words "as that judgment" (A/CN.9/937, para. 44(d)). The last sentence of the paragraph will thus read:

"Subparagraph 2(d) of the Preamble confirms that the Model Law is not intended to apply to a judgment commencing an insolvency proceeding."

11. Paragraph 46: add examples of other possible exemptions from the scope of the model law (A/CN.9/937, para. 44(e)). The sentence might read as follows:

"These might include, for example, judgments concerning foreign revenue claims, extradition for insolvency-related matters, family law matters, or judgments relating to entities excluded from the Model Law, such as banks and insurance companies."

12. Paragraph 49: reflect that the "insolvency representative", although defined in the model law, might be referred to by different names in various jurisdictions (A/CN.9/937, para. 44(f)). The paragraph, after the first sentence, might read as follows (along the lines of the Legislative Guide on Insolvency Law, part two, chapter III, para. 35):

> "Insolvency laws refer to the person responsible for administering the insolvency proceedings by a number of different titles, including 'administrators', 'trustees', 'liquidators', 'supervisors', 'receivers', 'curators', 'official' or 'judicial managers' or 'commissioners'. The term 'insolvency representative' is used in the Model Law to refer to the person fulfilling the range of functions that may be performed in a broad sense without distinguishing between those different functions in different types of proceeding. The insolvency representative may be an individual or, in some jurisdictions, a corporation or other separate legal entity."

13. Paragraph 55: replace the words "without more" with the words "without additional court orders" (A/CN.9/937, para. 44(g)).

14. Paragraph 57: remove the reference to first day orders (A/CN.9/937, para. 44(h)). That might be achieved by deleting the words "and other judgments that might in some jurisdictions be described as first day orders" in the third sentence and combining that sentence with the next sentence along the following lines:

> "The Model Law does, however, cover judgments issued at the time of commencement of insolvency proceedings, such as appointment of an insolvency representative, judgments or orders addressing payment of employee claims and continuation of employee entitlements, retention and payment of professionals, acceptance or rejection of executory contracts, and use of cash collateral and post-commencement finance."

15. Subparagraph 59(d): revise the paragraph as follows (A/CN.9/937, para. 44(i)):

> "Judgments determining whether the debtor owes or is owed a sum or any other performance not covered by subparagraph (a) or (b). The enacting State will need to determine whether this category should extend to all such judgments regardless of when the cause of action arose. While it might be considered that a cause of action that arose prior to the commencement of the insolvency proceedings was sufficiently linked to the insolvency proceeding, as it was being pursued in the context of, and could have an impact on, that proceeding, it might also be considered that a judgment on such a cause of action could have been obtained by or against the debtor prior to the commencement of the insolvency proceeding and, thus, lacked a sufficiently material association with the insolvency proceedings."

16. Paragraph 63, last sentence: add the word "could" before the word "apply" (A/CN.9/937, para. 44(j)).

17. Paragraph 73: delete the paragraph in the light of the clear explanation already contained in paragraph 72 (ACN.9/937, para. 44(k)).

18. Paragraph 78: delete the fifth sentence starting with the word "Thus" and the first part of the sixth sentence up to the words "a decision" (A/CN.9/937, para. 44(l)). The fourth and fifth sentences will thus read:

> "Enforcement, on the other hand, means the application of the legal procedures of the receiving court to ensure compliance with the judgment issued by the originating court. A decision to enforce the judgment must, for the purposes of the Model Law, be preceded or accompanied by recognition of the judgment."

19. Paragraph 80, first sentence: replace the words "review by an appellate court" with the words "review by way of an appeal to an appellate court" (A/CN.9/937, para. 44(m)).

20. Paragraph 83: replace the words "entitlement to apply" with the words "the conditions for applying" and the word "defines" with the word "sets" (A/CN.9./937, para. 44(n)). Noting that the last sentence of paragraph 83 as drafted was taken from the Guide to Enactment and Interpretation of the MLCBI (see para. 127), add a cross-reference to article 10, paragraph 2 (A/CN.9/937, para. 46). Paragraph 83 might thus read:

> "Article 10 establishes the conditions for applying for recognition and enforcement of an insolvency-related judgment in the enacting State, as set out

in paragraph 2, and the core procedural requirements. Article 10 thus provides a simple, expeditious structure to be used for obtaining recognition and enforcement."

21. Paragraph 110, first sentence: add the word "solely" before the words "on a ground" (A/CN.9/937, para. 44(o)).

22. Paragraph 111: add the following sentences at the end of the paragraph (A/CN.9/937, para. 44(p)):

"The originating court does not need to have explicitly relied on or made findings regarding the relevant basis for jurisdiction, so long as that basis for jurisdiction existed at the relevant time. The originating court's reliance on additional or different jurisdictional grounds does not prevent one of the 'safe harbours' from applying."

23. Paragraph 113: delete the fourth sentence and the first part of the last sentence up to the words "it does not prevent" (A/CN.9/937, para. 44(q)). To adjust the drafting, the third and fourth sentences might read:

"The method of raising the objection to jurisdiction is a matter for the law of the originating State. A receiving court, in an appropriate case, may make inquiries where matters giving rise to concern become apparent."

24. Between paragraphs 115 and 116, heading relating to subparagraph (h): delete the phrase "and relating only to assets" (A/CN.9/937, para. 44(r)).

25. Paragraph 118: move the paragraph before paragraph 117 (A/CN.9/937, para. 44(s)).

26. Paragraph 121: delete the last sentence (A/CN.9/937, para. 44(t)).

27. Paragraph 121 and paragraph 122, second sentence: replace references to "relief" with references to "a form of relief" (A/CN.9/937, para. 44(u)).

28. Paragraph 126: add the following sentence at the end of the paragraph (A/CN.9/937, para. 44 (v)):

"The enactment of this provision is not necessary in jurisdictions where the MLCBI is interpreted as covering the recognition and enforcement of insolvency-related judgments".

M. Note by the Secretariat on the finalization and adoption of a model law on cross-border recognition and enforcement of insolvency-related judgments and its guide to enactment: compilation of comments on the draft model law as contained in an annex to the report of Working Group V on the work of its fifty-second session (A/CN.9/931)

(A/CN.9/956 and Add.1-3)

[Original: English/Spanish/French]

Contents

I. Introduction

1. At its forty-seventh session, in 2014, the Commission mandated its Working Group V (Insolvency Law) to develop a model law or model legislative provisions providing for the recognition and enforcement of insolvency-related judgments.[1] In pursuance of that mandate, the Working Group worked to develop a draft model law from its forty-sixth (Vienna, 15–19 December 2014) to its fifty-third session (New York, 7–11 May 2018). At its fifty-second session (Vienna, 18–22 December 2017), the Working Group requested the Secretariat to transmit the revised text of the draft model law (as set forth in the annex to the report of that session (A/CN.9/931)) to Member States for comment, before referring the draft model law to the Commission for consideration at its fifty-first session, in 2018.

2. In February 2018, Governments and invited international organizations were invited to submit comments on the draft model law on the recognition and enforcement of insolvency-related judgments, as approved by the Working Group at its fifty-second session.

3. The present document reproduces, in chronological order, comments on the draft model law as received by the Secretariat, with formatting changes.

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

II. Compilation of comments

A. Governments

1. Thailand

[Original: English]
[11 April 2018]

1. Article 2(c) "Judgment"

The definition should add the following sentence at the end of the current meaning: A criminal case judgment stemming from an insolvency case is not a judgment under this Law. This exclusion should be written explicitly as a model law provision, not simply in the Guide to Enactment. This statement will reassure the United Nations members especially the parliament of each country, when deliberating about this, that the Law will not interfere/go into the area of criminal case.

2. Article 15 Severability

Second line: should change from "shall be granted" to "may be granted". For this article, the Law needs to provide flexibility to the local court in recognizing the judgment.

2. Mexico

[Original: Spanish]
[16 April 2018]

Article 9 bis, paragraph 1

- The note by the Secretariat on the draft model law (A/CN.9/WG.V/WP.150) should be taken into account, particularly paragraph 14 on refusal of recognition or enforcement of the judgment, and paragraph 15 on the provision of security. In addition, a definition should be provided of "ordinary review", because the nature of such review varies from State to State.

Article 12, subparagraph (d)

- It is proposed to return to the previous wording, namely: "(d) Recognition and enforcement is sought from or arises by way of defence or as an incidental question before a court referred to in article 4", because enforcement may also arise as an incidental question.

3. Bolivarian Republic of Venezuela

[Original: Spanish]
[16 April 2018]

1. Background

The Secretariat of the United Nations, through note LA/TL 133 (15) CU2018/44/OLA/ITLD of 7 February 2018, invited the Permanent Mission of the Bolivarian Republic of Venezuela to the United Nations to submit comments on the draft model law on the recognition and enforcement of insolvency-related judgments, as approved by Working Group V (Insolvency Law) of the United Nations Commission on International Trade Law (UNCITRAL).

2. Legal commentary

The scope of application of the draft model law comprises the cross-border recognition and enforcement of insolvency-related judgments, as reflected in its title and article 1.

In that regard, it is first necessary to consider what is meant by cross-border insolvency. To do so, we must examine the definition provided by UNCITRAL, which

establishes that cross-border insolvency is essentially an economic phenomenon that occurs where a debtor becomes insolvent and has assets in more than one State, or where some of the creditors of the debtor are not from the State in which the insolvency proceedings have been instituted.

In the light of the foregoing, it appears that the definition of cross-border insolvency encompasses two situations involving foreign legal systems, namely:

1. Where the insolvent debtor has assets in more than one State;
2. Where some of the creditors of the insolvent debtor are not nationals of the State in which the debtor is declared insolvent.

It is therefore necessary to examine cross-border insolvency in the light of the provisions of the Act on Private International Law of the Bolivarian Republic of Venezuela, which establishes that the creation, content and extension of rights over assets are governed by the law of the place where the asset or assets are located, a principle that is also reflected in the Commercial Code. In addition, the Act does not establish any specific rules in relation to insolvency, which is why it is necessary to refer to the provisions of the Commercial Code, which governs the insolvency regime through the legal concepts of arrears and bankruptcy.

In that regard, it should be noted that arrears is a commercial law concept that covers situations in which a trader, finding itself temporarily unable to repay outstanding debts, requests the competent commercial court to declare it in arrears in order to enable the voluntary liquidation of its business, within a reasonable time frame not exceeding 12 months, and undertakes not to carry out any business other than simple retail business while its request is being considered. The declaration of arrears requires that the assets of the company should exceed its liabilities.

Furthermore, the Commercial Code of the Bolivarian Republic of Venezuela provides that any trader that is not in arrears but is unable to repay its outstanding debts may initiate bankruptcy proceedings.

Thus, bankruptcy is an economic term that refers to a trader whose assets are insufficient to meet its debts. Accordingly, laws in the collective interest have hitherto regulated such situations and established substantive rules whose purpose is to determine the scope of the concept of bankruptcy in domestic legislation, as well as procedural rules that regulate the proceedings.

It follows from the foregoing that domestic legislation governs insolvency, and in that regard it is important to make a number of comments regarding jurisdiction to determine bankruptcy in the case of the Bolivarian Republic of Venezuela, given that the outcome of bankruptcy proceedings has consequences erga omnes, which is a derogation from the principle according to which a judgment is considered to have the force of res judicata only with respect to the parties: the principle of “relativity of res judicata”.

Thus, in the Bolivarian Republic of Venezuela, as a general rule, the court that has jurisdiction over a bankruptcy proceeding is the court of the place of business of the bankrupt party, in other words, its principal place of business and interests. It is important to note that, accordingly, legal opinion has tended to favour the principle of “unity of bankruptcy”, which means that bankruptcy proceedings may be initiated only in the place of business of the trader. Therefore, in cases involving multiple places of business, the main place of business shall be the registered office, or the place where the headquarters is located.

However, in cases in which a trader is declared bankrupt by a foreign court and has a branch in the Bolivarian Republic of Venezuela, the court’s decision must be subject to an exequatur procedure in order to take effect.

To a certain extent, the previous statement conflicts with legal opinion and international legislation insofar as they defend the absolute unity of bankruptcy, which entails the extraterritorial application of bankruptcy judgments without an exequatur.

However, the position of the Venezuelan legislator is based on the principle of effective judicial protection, enshrined in article 26 of the Constitution of the Bolivarian Republic of Venezuela, which provides for judicial guarantees, also known as the right to effective judicial protection, which has been defined as the right of every person to seek the assistance of the organs responsible for the administration of justice so that their claims can be considered through proceedings that ensure basic guarantees. Judicial guarantees therefore constitute the right to access justice through proceedings conducted by an organ in order to obtain a decision issued in accordance with the law.

Effective judicial protection is a constitutional procedural guarantee that must be in place from the moment a person accesses the judicial system until the judgment issued in the case concerned is definitively enforced. In other words, once access to justice is guaranteed, every other constitutional guarantee and principle that shapes the proceedings, such as due process, expeditiousness, defence and cost-free legal assistance must be protected on the basis that the undermining of any of those guarantees would violate the principle of effective judicial protection.

Therefore, the right to effective judicial protection is intended to ensure an effective mechanism that enables individuals to redress a situation in which their rights have been violated, and comprises the right to access; the right to cost-free legal assistance; the right to an appropriate, coherent and duly grounded judgment that is issued without undue delay; interim protection; and guaranteed enforcement of the sentence.

Furthermore, article 53 of the Act on Private International Law establishes that foreign judgments shall have effect in the Bolivarian Republic of Venezuela provided that, inter alia, they do not concern rights in rem over immovable property located in the Bolivarian Republic of Venezuela, and that the Bolivarian Republic of Venezuela has not been deprived of any exclusive jurisdiction it may have over the matter; and that the courts of the sentencing State have jurisdiction to hear the case, in accordance with the general principles governing jurisdiction that are recognized in national legislation.

3. Final consideration

In the light of the above, the Office of the Legal Adviser is of the view that, taking into account the different legal systems, the scope of application of the model law will not achieve the effectiveness sought, as the recognition and enforcement of foreign judgments necessarily involves domestic proceedings, for which an exequatur is required in most States.

Thus, it is believed that a domestic law would be unable to regulate foreign judicial cooperation mechanisms effectively given that its scope of application would not enable it to be enforcemable or effective against another State.

4. Colombia

[Original: Spanish]
[24 April 2018]

1. CONTENT OF THE DRAFT LAW

The draft model law on the recognition and enforcement of insolvency-related foreign judgments is the result of work carried out by Working Group V (Insolvency Law) of the United Nations Commission on International Trade Law with the aim of achieving the application, in each of the States parties, of judgments issued as a result of a judicial or administrative decision in the context of an insolvency proceeding.

The draft model law contains a preamble and 15 articles.

It should first be noted that in accordance with article 3 of the draft model law, the law “shall not apply to a judgment where there is a treaty in force concerning the recognition or enforcement of civil and commercial judgments (whether concluded before or after this Law comes into force), and that treaty applies to the judgment”.

In that regard, and having examined the constitutionality rulings of the court in respect of international treaties and conventions signed by Colombia, we have not found any multilateral documents on that subject.

2. COMMENTS REGARDING THE TEXT OF THE DRAFT MODEL LAW

Paragraph 1 (f) of the preamble to the draft model law states that the purpose of the law is, "where legislation based on the Model Law on Cross-Border Insolvency has been enacted, to complement that legislation", and paragraph 2 of the preamble notes that the purpose of the law is not "(a) To [replace or] displace other provisions of the law of this State with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment" or "(b) To replace [or displace] legislation enacting the Model Law on Cross-Border Insolvency or limit the application of that legislation". In that regard, it should be noted that in 2006, Colombia adopted Act No. 1116 establishing an enterprise insolvency regime, which addresses cross-border insolvency in part III.

[…]

Thus, it is considered that the provisions of Colombian legislation that govern matters related to insolvency and the enforcement of related judgments go beyond the purposes set out in paragraph 1 of the preamble to the draft model law on the recognition and enforcement of insolvency-related judgments, which does not cover any aspects that might complement those provisions.

In respect of article 4 of the draft model law, it is recommended that the competent authorities referred to in article 89 of Act No. 1116 of 2006 should be taken into account.

3. ANALYSIS OF CONSTITUTIONALITY

The content of the preamble and the articles of the draft model law affects neither constitutional values and principles nor fundamental rights.

4. CONCLUSIONS

We note that part III of Act No. 1116 of 2006 amply and extensively captures the content of the draft model law, that text having been fully incorporated into the Colombian legal system.

5. Uruguay

[Original: Spanish]
[4 May 2018]

1. This Directorate recently received the document in which the Government of Uruguay was requested to provide comments in relation to the draft model law on the recognition and enforcement of insolvency-related judgments, which has been drafted within the framework of the United Nations Commission on International Trade Law (UNCITRAL).

2. Of the possible methods for standardizing international legislation in a given area, UNCITRAL has opted for a draft model law, which will be made available to States so that they can incorporate it into their domestic law in full or in part, in accordance with their national legislation. Other options included the creation of a treaty, agreement or convention, which would presuppose the existence of common, basic rules for the distribution of legislative and jurisdictional powers at the international level.

3. With regard to comments and concrete suggestions, we wish to provide the following information:

(a) In subparagraph 1 (d) of the preamble, it is stated that the purpose of the law is "To promote comity and cooperation between jurisdictions regarding insolvency-related judgments". With regard to that paragraph, it is suggested to delete the reference to "comity", since in modern international law it is understood that

foreign law is applied or foreign judgments are recognized, where appropriate, on the basis of a legal obligation rather than a discretionary act based on "comity" towards other States in the international community. Therefore, the law should simply state "To promote cooperation between jurisdictions regarding insolvency-related judgments".

(b) Furthermore, subparagraph 2 (a) of the preamble states that the purpose of the law is not "To [replace or] displace other provisions of the law of this State with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment". Given that international insolvency or bankruptcy provisions can be found in both national and international legislation on private international law, it is suggested to adjust that wording as follows: "To [replace or] displace other provisions of the law of this State**, whether those provisions have national or international law as their source,** with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment".

(c) Article 3, paragraph 1, of the draft law states, under the heading "International obligations of this State", that: "To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail." Given that if this draft law were adopted by a number of States at the domestic level, it would constitute private international law with national law as its source, it is clear that there is no possibility of "conflict" with treaties or other agreements (which form a part of private international law with international law as its source) because the scope of application of each is distinct (see, inter alia, art. 27 of the Vienna Convention on the Law of Treaties, and art. 1 of the Inter-American Convention on General Rules of Private International Law). The following alternative wording is therefore suggested with respect to paragraph 1 of article 3: "The provisions of this Law shall apply in the absence of a treaty or other form of agreement to which this State is a party with a State or States whose legal systems are involved in a particular case."

(d) Article 7 refers, as is traditional, to public policy exception, stating that "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State". In keeping with the position traditionally taken by Uruguay on the subject, as reflected in its national legislation on private international law, and in line with the declaration that Uruguay made at the time of signing the Inter-American Convention on General Rules of Private International Law (Montevideo, 1979), it is suggested to add the word "international" to the references to that exception, both in the *nomen juris* and in subsequent references, so as to reduce to a minimum the number of cases in which the exception applies, that is, limiting its application to situations in which basic rules and principles that shape the individual legal system of a particular country are violated in a concrete, serious and flagrant manner. Similarly, it is suggested to replace the reference to "procedural fairness" with the broader, more comprehensive and universal concept of "due process". Accordingly, the following wording is suggested: "International public policy exception. Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the international public policy, including the fundamental principles of due process, of this State". Alternatively, if it is not possible to include the word "international", reference should be made to "the basic principles of its public policy".

(e) Article 9, paragraph 1, states that "An insolvency-related foreign judgment [...] shall be enforced only if it is enforceable in the originating State". It would be appropriate to change "shall" to "may", since the judgment does not necessarily have to be enforced; its recognition may suffice.

(f) Article 10, paragraph 1, establishes the legal standing to apply for recognition and enforcement of an insolvency-related judgment, stating that "An insolvency representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment..." shall

have that legal standing. Our understanding is that such standing should be accorded both under the law of the originating State and under the law of the State where recognition and enforcement are sought, as there may be local creditors interested in initiating that process, with the effects and scope established by the law of the forum. It is therefore suggested to add text to that effect.

(g) Article 13 establishes res judicata as one of the grounds to refuse recognition and enforcement of a foreign insolvency-related judgment, both in relation to a judgment issued in the enacting State and in relation to a judgment issued in another State (paras. (c) and (d), respectively). However, the wording of those provisions differs in that paragraph (c) does not state whether the judgment issued in the State where recognition and enforcement is sought should be an earlier judgment, or whether it should relate to the same subject matter. In order to bring that wording into line with paragraph (d), it is suggested that paragraph (c) should be modified to read: "The judgment is inconsistent with an earlier judgment issued in this State in a dispute between the same parties on the same subject matter".

(h) Lastly, article 13 (g) establishes the cases in which recognition and enforcement may be refused on the basis of matters of indirect international jurisdiction, in other words, positive criteria on the basis of which a court is considered to have jurisdiction, from an international perspective, to issue a judgment with extraterritorial effects. The current draft of the model law considers valid the criterion of party autonomy, including the extension of jurisdiction (subparas. (i) and (ii)); the criterion of lex fori (i.e. jurisdiction was exercised on the same basis on which a court in the enacting State could have exercised jurisdiction (subpara. (iii))); and lastly, a criterion that is yet to be defined, as indicated by alternatives set out in square brackets: "(iv) The court exercised jurisdiction on a basis that was not [inconsistent] [incompatible] with the law of this State". In our view, subparagraph (iv) should be replaced with a more comprehensive provision that states: "The court exercised jurisdiction in accordance with its own law", i.e. establishing a *lex causae* criterion. From a practical point of view, that wording would more clearly provide for the possibility for judgments issued by Uruguayan judges to be recognized and enforced abroad, as, in the case of Uruguay, it would be a Uruguayan law that would establish the bases for the jurisdiction of Uruguayan judges, without such provisions being subject to any arrangements that might have been agreed between the parties (which is not allowed under Uruguayan legislation) or the procedural law of the State receiving the judgment.

4. It should be noted that Uruguay has modern legislation in relation to the international insolvency regime, both with regard to aspects linked to and the law applicable to jurisdiction and in respect of the effectiveness in Uruguay of foreign judicial decisions in that area. Those provisions are contained in articles 239 to 247 of part XIII of Act No. 18.387 of 23 October 2008, which are reproduced below for ease of reference. Legislation on private international law is complemented by the provisions of the international commercial law treaties of 1889 (concluded with Bolivia, Colombia and Peru and in force) and 1940 (concluded with Argentina and Paraguay and in force).

[…]

5. Lastly, it should be noted that currently, in the context of the Hague Conference on Private International Law, a special commission has been working to prepare a draft convention on the recognition and enforcement of foreign judgments, the most recent version of which excludes from its scope of application "insolvency, composition, resolution of financial institutions, and analogous matters" (art. 2 (1) (e) of the draft convention as at November 2017).

The information provided is submitted for consideration.

6. Mexico

[Original: Spanish]
[7 May 2018]

Title of the draft law

1. The reference to "insolvency-related judgments" is erroneous because the judgments in question are judgments on insolvency cases. The same expression is used in articles 2 (d); 4; 5; 9; 10; 11 (1) (a) and (b); 11 (3); 12 (b); and 13.

Comment: In that regard, it is recommended to specify that it is a **draft law on judgments on insolvency cases**.

2. The square brackets in paragraph 2 of article 1 would usually contain information as to the situations in which the model law would not apply, such as matters that are regulated in other documents or that fall within the exclusive jurisdiction of States.

3. In article 2, on definitions, there is a problem with the definition of judgments contained in paragraph (c).

3.1. The draft law states: "'Judgment' means any decision, whatever it may be called".

3.1.2 In that paragraph, the definition refers to "any decision" and in the second sentence of the paragraph, a "decision" is defined as follows: "For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses by the court".

3.1.3. Here it should be noted that according to the definition of "decision", a judgment does not refer to any proceeding and is limited to decrees or orders issued by a court.

3.1.4. In addition to the above limitation, the final sentence of paragraph (c) states: "An interim measure of protection is not to be considered a judgment for the purposes of this Law".

3.1.5. It is indeed correct to state that an interim measure of protection is not a judgment; however, the definition of "judgment" is undermined by its additional description as "any decision".

3.1.6. In conclusion, the provision is made unclear by the introduction of concepts that give rise to contradictions.

3.1.7. Subparagraph (d) (ii) of article 2 states: "Does not include a judgment commencing an insolvency proceeding". In the Spanish version of the text, the meaning of that paragraph is unclear unless the word "como" is added after the words "no se entenderá".

Comment: In summary, it is necessary to clarify article 2 in the light of the above-mentioned points.

4. Articles 4, 5 and 6 refer to the concept of "enacting State", a term that is incorrect. In view of the context, the words "enforcing State" should be used.

5. The final sentence of paragraph 1 of article 10 states that "The issue of recognition may also be raised as a defence or as an incidental question in the course of proceedings".

5.1. That sentence addresses two situations:

- One in which recognition is considered as a defence, and
- One in which recognition is raised as an incidental question.

5.1.1. To state that recognition is a procedural defence is completely incorrect; the legal nature of recognition involves the finding by a foreign judge that a judgment or decision is valid and their endorsement of a decision or judgment issued by another judge.

5.1.2. It is correct that recognition is an incidental question; a judgment is recognized incidentally.

6. Article 11 (b) begins with the words "(b) Granting other legal or equitable relief, as appropriate".

6.1. In the Spanish version of the text, it is recommended to modify the words "hacer lugar", which is the translation given for "granting", because the context of the article indicates that the correct wording should be "habrá lugar".

7. Article 12 (d) emphasizes that the question of recognition arises by way of defence; that is an error for the reasons given above with respect to article 10 (1).

8. Article 15 echoes the earlier reference to the granting of recognition, with the words "Se hará lugar al reconocimiento" in the Spanish text. Although the meaning is understood, the correct wording would be: "habrá lugar al reconocimiento".

Conclusions: The draft law is unclear in its definitions, certain concepts are used incorrectly, and recognition can in no way be a means of defence.

7. Mali

[Original: French]
[8 May 2018]

Comments:

Firstly, it is important to remember that unlike a uniform law, which is incorporated without modification into the domestic legal system of the States concerned, the model law provides only a framework that States can use when drawing up their draft text. It follows that the draft model law is not a ready-to-adopt draft law. It should be analysed from that perspective.

Turning to the substance of the draft law, that is, the problem that it addresses, we have a number of reservations:

- Usually, issues regarding the enforcement of foreign judgments (which is essentially the matter at hand) are addressed either through the exequatur provisions of domestic procedural texts or through agreements on judicial cooperation or mutual legal assistance, which are fundamentally bilateral in nature. That is all the more understandable given that States do not have the same legal systems or the same judicial organizations. In Mali, exequatur is dealt with by articles 515 et seq. of the Code of Civil, Commercial and Social Procedure. The draft model law addresses insolvency, but Malian legislation is more comprehensive because it covers all foreign acts and judgments. It should be noted that, in addition to the procedure and conditions set out in articles 516 and 517 of the Code of Civil, Commercial and Social Procedure, article 518 of the Code states that judgments issued in a foreign country may be granted an exequatur only if, on the basis of reciprocity, decisions issued in Mali may be granted an exequatur in that foreign country.
- We also note that the draft model law is focused on collective proceedings. Mali is a member of a community that has passed legislation in that area: the Organization for the Harmonization of Business Law in Africa (OHADA). Those collective proceedings (discharge of liabilities, court-supervised reorganization proceedings and liquidation of assets) are comprehensively addressed in a uniform act.
- While the draft model law covers the recognition of judgments, it appears that there are substantive implications, for example, with regard to provisional relief. We believe that it would have been judicious to first elicit a response from that community, in view of the subject specifically addressed, rather than presenting the draft model law to States individually.

8. Albania

[Original: English]
[10 May 2018]

Comment (National Bankruptcy Agency):

UNCITRAL experts have to take into consideration that the creditor who has been partially satisfied in respect of its claim in a proceeding pursuant to a law relating to bankruptcy in a foreign State may not be satisfied for the same claim in a bankruptcy proceeding in another State, regarding the same debtor, so long as the satisfied amount to the other creditors of the same rank is proportionately less than the amount that the creditor has already received, without affecting in this situation, secured creditor's claims.

(A/CN.9/956/Add.1) (Original: English)

Note by the Secretariat on the finalization and adoption of a model law on cross-border recognition and enforcement of insolvency-related judgments and its guide to enactment: compilation of comments on the draft model law as contained in an annex to the report of Working Group V on the work of its fifty-second session (A/CN.9/931)

ADDENDUM

Contents

IV. Possible reform of investor-State dispute settlement (*continued*)

4. Other procedural issues

Early dismissal mechanism

1. The Working Group recalled its discussion of concerns stemming from the lack of an early dismissal mechanism to deal with unfounded claims – that is, unmeritorious, frivolous and abusive claims (see para. 39 of A/CN.9/930). The importance of those concerns from a legitimacy perspective was highlighted. Accordingly, it was agreed that there was merit in considering the possible provision of an early dismissal mechanism in ISDS.

2. In that context, it was also noted that such consideration should take into account existing mechanisms that had been developed by States (as well as in the ICSID Arbitration Rules) to provide for early dismissal and that the focus of the work should be on addressing circumstances where such mechanisms were not yet in place. It was added that other issues should be borne in mind, including possible barriers to access to ISDS (see para. 59 of A/CN.9/930), which might increase the risk of unfounded claims. It was suggested that claims by shell companies, other abusive procedures and inflated or unsubstantiated claims, which might not be considered unfounded claims per se but had the potential to increase duration and costs, should also be brought into consideration at a later stage.

Counterclaims

3. The Working Group undertook a consideration of the question of the limited ability of respondent States to make counterclaims in ISDS. Noting that that issue was closely related to the substantive obligations in investment treaties, a suggestion was made that the Working Group should not address the topic, as it had decided that its work should focus on the procedural aspects of dispute settlement rather than on the substantive provisions in investment treaties (see para. 20 of A/CN.9/930).

4. It was added that provisions permitting counterclaims were provided for in recent investment treaties. Certain arbitration rules, such as Rule 40 of the ICSID Arbitration Rules on ancillary claims, also provided for such a possibility. It was underlined that the main issue arose from the fact that investment treaties were generally formulated to provide protection to investors. As the latter had limited reciprocal obligations, the respondent States did not have a basis to bring a counterclaim. It was further mentioned that the basis for counterclaims might be and were often included in investment contracts, which then raised other practical difficulties not only with respect to the jurisdiction of the forum but also to the applicable law (public international law/domestic law). A cautious approach was suggested, given that there might be drawbacks in undertaking work in that area.

5. A different view was that providing a mechanism for States to raise counterclaims was an important aspect of ensuring an appropriate balance between respondent States and claimant investors as well as for promoting procedural efficiency, fairness and the rule of law. It was mentioned that allowing States to raise counterclaims could eliminate parallel proceedings and thus might have a positive impact on duration and costs as well as on a number of other procedural issues, including third-party funding.

6. While an approach taken by some arbitral tribunals happened to accept jurisdiction to address counterclaims in reliance on substantive obligations in investment treaties, it was reiterated that the nature of the substantive obligations themselves was not the focus of the Working Group. It was noted that there was a distinction between substantive obligations provided for in investment treaties and the dispute settlement mechanisms used to enforce those obligations.

7. After discussion, the general understanding was that any work by the Working Group would not foreclose consideration of the possibility that a State might bring a counterclaim where there was a legal basis (or an underlying provision) for so doing.

Account to be taken of ongoing reforms

8. It was widely felt that any reform of ISDS procedure should take into account ongoing States' reforms of the underlying treaties. Accordingly, it was suggested that provisions in more recent treaties on procedural matters in dispute settlement might inform the future deliberations of the Working Group. Such procedural matters, it was added, sought to address some concerns discussed earlier in the session. Indeed, more recent treaty provisions also included procedures to address subject-matter specific claims, and the relief that arbitral tribunals could grant.

5. Outcomes: coherence and consistency

9. The Working Group undertook its consideration of coherence and consistency in ISDS outcomes, based on document A/CN.9/WG.III/WP.142, paragraphs 31 to 38.

10. At the outset of the deliberations, it was noted that a coherent system would ensure that its components were logically related with no contradictions and that a consistent system would ensure that identical or similar situations were treated in the same manner. In that context, a distinction was made between circumstances in which inconsistent interpretations might be justified due to, for example, variations in the language of the investment treaties and circumstances in which such inconsistencies would not be justified, as the same measure and the same underlying treaty provision were being addressed. Similarly, the need to distinguish between achieving consistency of interpretation within the same investment treaty and consistency of interpretation across investment treaties was highlighted.

11. Acknowledging the importance of ensuring a coherent and consistent ISDS regime as described in paragraph 31 of A/CN.9/WG.III/WP.142, it was said that such a regime would support the rule of law, enhance confidence in the stability of the investment environment and further bring legitimacy to the regime. It was also said that inconsistency and lack of coherence, on the other hand, could negatively affect the reliability, effectiveness and predictability of the ISDS regime and, in the longer term, its credibility and legitimacy. It was mentioned that criticism of a lack of consistency and coherence was one of the reasons behind the Commission's decision to embark on work on possible ISDS reform. It was underlined that consistency was a crucial element of the rule of law and would contribute to the development of investment law. However, it was also noted that consistency and coherence were not objectives in themselves and extreme caution should be taken in trying to achieve uniform interpretation of provisions across the wide range of investment treaties.

12. Yet another view was that the discussions should fully take into account the historical background of ISDS as an effort to provide investors a neutral mechanism to resolve their disputes with States.

13. The fragmented nature of the underlying investment treaties, as well as the ad hoc nature of arbitration, in which individual tribunals were tasked with interpreting investment treaties, were mentioned as contributing to a lack of consistency and predictability in outcomes. It was further said that international rules on treaty interpretation and customary international law were not always consistently applied by ad hoc tribunals.

14. It was added that the long-term nature of investment treaties was such that multiple disputes might be expected to arise under them. Therefore, ensuring consistent interpretation of the treaty provisions would enhance the stability of the overall investment framework. It was further mentioned that many treaties contained similar provisions on investment protection (such as fair and equitable treatment, the most favoured nation obligation, the umbrella clause and provisions on compensation for expropriation). It was reported that, in the experience of some States that had concluded a number of investment treaties with similar provisions, those investment treaties had been interpreted differently by tribunals, including in an instance of concurrent proceedings in which the facts, parties, treaty provisions and applicable arbitration rules were identical.

15. It was said that predictability of treaty interpretation was also critical to allow States to understand whether their actions, such as possible future legislative or regulatory activities, might breach their obligations, and to set their investment policies. Predictability would also allow investors to assess whether certain treatment was in accordance with treaty obligations. It was further said that the existing lack of consistency imposed significant costs because of the consequent lack of predictability, as each party could often point to differing interpretations from other cases in support of its arguments. Interpretation of certain standards in investment treaties by tribunals was further said to be important for States when negotiating their treaties, as many elements of interpretation could be drawn from disputes under different treaties.

16. It was said that other solutions that had been tried, such as seeking to address concerns about consistency through case law analysis, following quasi precedent, and through references in awards to other decisions, had not proved sufficient. Continuing uncertainties in the interpretation of key notions, such as the definition of an investment and whether investments were required to be made in or for the benefit of the host country, were cited in that regard. Consequently, it was suggested that other mechanisms were needed.

17. A different view was that the lack of coherence and consistency was a logical result of the fragmentation of existing underlying investment treaties and that seeking to achieve coherence and consistency might not be feasible nor desirable considering that the underlying investment treaty regime itself was not uniform. In that context, the possible drawbacks of a consistent and coherent regime based on unified standards of protection were mentioned.

18. In that regard, the reasons for the development of a non-uniform regime were highlighted, noting that the investment treaty regime had been developed taking into consideration elements of foreign policy, economic and trade policy as well as development strategies. It was emphasized that each investment treaty was the result of negotiation among States, with particular State interests and needs in mind and, in some cases, taking into account the interests of a particular region.

19. It was said that varied treaty practice with a wide range of differing investor protection standards as well as ISDS provisions were natural results of that process. It was noted that such divergence was a reflection of the different approaches to and peculiarities of investment protection, which were deliberate in nature and should not be overridden in the pursuit of consistency and predictability.

20. With regard to the interpretation of same or similar provisions in different investment treaties, it was recalled that, though not in the context of ISDS, certain international judicial bodies had stated in their decisions that the mere fact that provisions of a treaty were identical or similar to those of another treaty did not necessarily mean that they should be interpreted identically. From this perspective,

the different interpretations by ad hoc tribunals could also be considered as not indicating a lack of consistency.

21. It was also argued that a lack of consistency and coherence as well as fragmentation might be perceptions based on anecdotal evidence. For example, different factual situations might lead to different interpretations of the same treaty provision. It was added that there was a need for more experience sharing among States on inconsistent cases and any negative impact. Furthermore, it was stated that experience showed that domestic courts as well as international judicial bodies, permanent in nature, with an appeal mechanism and bound by precedent, had reached inconsistent decisions.

22. During the deliberations, reference was made to articles 31 and 32 of the Vienna Convention on the Law of Treaties, which provided for general and supplementary rule of interpretation of treaties respectively. It was highlighted that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Therefore, it was said that articles 31 and 32 provided a certain latitude to tribunals to interpret the same provisions in a number of investment treaties differently according to the intention of the parties to such treaties.

23. In the context of discussions of the issue of consistency and coherence, several possibilities for States to tackle the issues through provisions in their investment treaties were mentioned. Examples included clarity in substantive protection standards and in procedural provisions, the inclusion of detailed and perhaps mandatory guidance for arbitral tribunals (for example, binding interpretation) and other procedural tools (such as allowing submissions from non-disputing treaty parties). It was added that consistency in States' instructions to their own legal counsel with respect to their submissions would be critical. As a further measure to achieve consistency and coherence the possibility of issuing joint interpretations by treaty parties to be taken into account by the tribunal was mentioned.

24. In response, it was said that the above-mentioned measures might not be sufficient to provide a comprehensive solution for existing (as opposed to future) treaties. It was added that joint interpretations were rarely used in practice, as once treaties had been concluded, treaty parties might find it difficult to agree on the interpretations. It was therefore stated that a systemic solution was needed, to address both lack of consistency and coherence, which might include a system of precedent. Such a system might also promote the accountability of adjudicators. Possible systemic solutions might include an appellate mechanism or a multilateral court. In that context, the example of the Dispute Settlement Body of the World Trade Organization system, which combined an ad hoc panel and a standing appellate body was given.

6. Concluding remarks on coherence and consistency

25. Another view was that desirable consistency in ISDS should be clarified, as divergences in outcomes might be derived from legitimate distinctions, themselves arising from different facts before the tribunals and the arguments presented by counsel, as well as from differences in the underlying treaty provisions. Second, clarity was also needed on the extent to which undesirable inconsistency in ISDS raised concerns.

26. With respect to the first aspect of the question, there was discussion of two types of potential inconsistency, inconsistency in the interpretation of a single treaty, and inconsistency in the interpretation of an identical or similar provision in different treaties. There was broad agreement that inconsistent interpretations of a provision in a single treaty could be a concern.

27. On the second issue, it was pointed out that divergent outcomes did not raise concerns if they were appropriately based on the proper interpretation of the language in those treaties. However, it was noted that differences in treaty language had been exaggerated and that the vast majority of investment treaties contained very similar if not identical language, and examples were provided to the Working Group.

28. It was also stated that rigid adherence to principle of consistency between arbitral decisions could be dangerous in that it could create a jurisprudence constante that was itself inconsistent with the intentions of the parties. A further view was that consistency did not necessarily ensure accuracy.

29. It was said that the more appropriate consideration was whether decisions were correctly interpreting treaties in line with the rules of public international law, rather than whether they were ensuring consistency with decisions by other tribunals. It was added that the goal of consistency should not be to ensure that same or similar provisions were interpreted identically in all circumstances but to ensure that unjustifiable inconsistencies did not arise. One cause of inconsistency, it was added, was treaty language that was vague or in need of clarification.

30. It was also noted that there had been inconsistent decisions with respect to general rules of customary international law involving the state of necessity/emergency, the law of attribution, and the legal principles regarding damages.

31. It was suggested that inconsistencies in ISDS arose not from legitimate distinctions but rather from the nature of the system itself, and in some cases from the arbitrators.

32. It was also said that efforts of tribunals to react to concerns and to ensure consistency had not proved successful, and that revising all existing treaties would not be a feasible approach.

33. It was said that consistency and coherence in a legal system were in the interests of all stakeholders, and that a dispute settlement mechanism that issued unjustified conflicting decisions would be unpredictable, and that an unpredictable system would lack credibility and legitimacy.

34. In that light, some States suggested that the Working Group might consider, at the appropriate time, potential solutions to include some type of hierarchical system, an appellate body, an investment court, and a mechanism through which tribunals could direct questions to the treaty partners prior to the issuance of awards. Other States questioned whether such a formal structure was necessary and whether it would provide the appropriate remedy.

35. The Working Group recalled that its deliberations at the 34th session on these issues were to be continued at its 35th session.

(A/CN.9/956/Add.2) (Original: English)

Note by the Secretariat on the finalization and adoption of a model law on cross-border recognition and enforcement of insolvency-related judgments and its guide to enactment: compilation of comments on the draft model law as contained in an annex to the report of Working Group V on the work of its fifty-second session (A/CN.9/931)

ADDENDUM

Contents

II. Compilation of comments (*continued A/CN.9/956*)

A. Governments (*continued*)

10. Sri Lanka

[Original: English]
[11 June 2018]

General Comments

- The term insolvency is not used in Sri Lankan law to define the final outcome of a proceeding (e.g. section 273 (2); section 278 of the Companies Act). In Sri Lanka, companies are wound up for several reasons, e.g. a company being unable to pay its debts. It is assumed the word "insolvency" is used to refer to a situation where a company is unable to pay its debts. However, there are several other grounds on which a company can be wound up in Sri Lanka. These include situations where the company is not insolvent. Therefore, Sri Lanka suggests that a definition of insolvency be included in order that a Sri Lankan court can assess whether a judgment in respect of which recognition and enforcement is sought, is consistent with the laws of Sri Lanka.
- It is also noted that the term "reorganization" used in the treaty is not a concept that is legally recognized in Sri Lanka. Therefore, it is recommended that "reorganization" be defined for the same reasons as mentioned above in requesting a definition for "insolvency".
- Judgments sought to be enforced or recognized under the treaty should necessarily be final judgments. If the purpose of the treaty is to avoid duplication of proceedings, finality on issues ought to be reached in one country prior to seeking enforcement/recognition in another. Therefore, Sri Lanka should recommend that the Working Group consider the implications of seeking recognition or enforcement of judgments which are not final, and suitable amendments.
- It is also noted that the rights of creditors in the country where recognition and enforcement is sought should be preserved and enforcement and recognition of insolvency related judgments should not be permitted if the creditor's rights in that country would be violated in the process. Sri Lanka requests that the Working Group consider this aspect of rights of creditors and make suitable provision to protect the creditors right and not conflict with the same.

Comments on Articles of the Model law

Paragraph 2 of the Preamble

It is recommended that the following provisions be added.

(e) To restrict, suspend or interfere with or prejudice in any way insolvency proceedings in the State in which recognition is sought.

(f) To prejudice the rights of creditors in the country in which the judgment is sought to be enforced.

Article 1 – Scope of Application

It is recommended that the following provisions be added.

"(2) This law does not apply to insolvency related judgments where parallel proceedings have commenced in the country which the judgment is sought to be enforced."

Article 2 – Definitions

(a) The reference to administrative proceedings is not appropriate given that they do not culminate in a judgment. This reference should be removed or qualified.

Please see General Comments above on interim proceedings and reorganization. Accordingly, necessary changes ought to be made to this definition.

(b) The reference to "administer the reorganization" should be removed as it is not part of judicial proceedings.

(c) The reference to administrative authority is inappropriate and should be removed. It is unclear how to define whether or not "administrative decision has the same effect as a court a decision". Clarification should be sought on how an administrative decision has the same effect as a judicial decision.

As already noted above under General comments, it is essential that the definition of a judgment is limited to a final judgment, maybe subject to review by appellate courts, but not wide enough to encompass an interim order/award, etc.

(d)(i)(a) The term "whether or not that insolvency proceeding has closed" denotes that the judgment may be an interim order and not a "judgment" which is a term used under Sri Lankan law to refer to the final outcome of a case, from which an appeal or review mechanism to appellate courts may or may not be available. As already highlighted reference to interim orders should be removed.

Proposed new addition between Article 3 and 4

New Article

"To the extent that this law conflicts with the Constitution of a State, the Constitution of the Country in which the enforcement is sought will prevail."

Article 5

The purpose of this Article is unclear; e.g. what is the function of the person/body authorized to act in another state; whose interests does that person or body represent.

Article 7

The Court should also be entitled to refuse to take action where the action could be contrary to the fundamental principles of the laws of the State in which the recognition and enforcement is sought.

Article 8

A proviso should be included to Article 8 as follows; "provided that such interpretation is consistent with the laws in the State in which the judgment recognition and enforcement is sought."

Article 9

A time bar should be included for the purposes of this model law. Time should commence to run from the point at which the judgment (with regard to which enforcement and recognition is sought) is delivered in the originating State.

Article 10

The procedural laws in the country in which recognition and enforcement is sought should apply.

Article 11

Procedural laws relating to the grant of provisional relief will be the laws of the country in which recognition and enforcement is sought.

Article 13

It is recommended that the following provisions be included as additional grounds for refusing enforcement.

Where the effect of recognition would be:

To restrict, suspend or interfere with or prejudice in any way insolvency proceedings in the State in which recognition is sought.

To prejudice the rights of creditors in the country in which the judgment is sought to be enforced.

(A/CN.9/956/Add.3) (Original: English/French)

Note by the Secretariat on the finalization and adoption of a model law on cross-border recognition and enforcement of insolvency-related judgments and its guide to enactment: compilation of comments on the draft model law as contained in an annex to the report of Working Group V on the work of its fifty-second session (A/CN.9/931)

ADDENDUM

Contents

II. Compilation of comments (*continued from A/CN.9/956 and Add.1 and 2*)

A. Governments (*continued*)

11. Canada

[Original: English/French]
[27 June 2018]

In addition to comments that will be provided during the discussion on the draft Model Law on Cross-border Recognition and Enforcement of Insolvency-related Judgments during the Commission Session, the Government of Canada makes the following proposals.

Article 13 – Grounds to refuse recognition and enforcement of an insolvency-related judgment

Subparagraph (h)

This provision should be eliminated. Under 13 (h), a valid ground for exercise of insolvency jurisdiction over an insolvent debtor could be the mere presence of the debtor's assets in the jurisdiction, without any other connections with the jurisdiction. As such, it does not permit a receiving jurisdiction to refuse recognition of an insolvency-related judgment where an insolvency court exercised jurisdiction over a subject matter and a person in situations where the nexus is tenuous.

New subparagraph

An additional ground to refuse the recognition and enforcement of an insolvency-related judgment should be added in article 13.

Under the existing Model Law on Cross-border Insolvency (e.g., Articles 21 and 22), and the draft Model Law, courts can rely on the concept of "adequate protection" to protect the interests of creditors and interested parties. A challenge under the proposed text is that recognition of judgments does not necessarily involve local or foreign courts who could issue adequate protective measures. As a result, foreign creditors could find themselves in a situation where they are better off than they would have been had they been subject to local insolvency proceedings in the receiving State.

The unavailability of court-ordered adequate protection in relation to incoming foreign judgments facilitates and increases the possibility of forum shopping to the detriment of local creditors. This would be the case when foreign insolvency law rules are different from local rules. For example, in Canada, when a security interest lapses, it can be renewed under certain conditions without being considered a preferential

treatment. Similarly, payments by the insolvent debtor under leasehold agreements are considered to be done in the ordinary course of business, while this may not necessarily be the case in foreign jurisdictions. The recognition of foreign judgments could in effect limit the ability of local creditors to protect their rights under insolvency and security interest laws applicable to local elements of the debtor's assets. It also raises the prospect of anti-avoidance proceedings.

This exclusion would essentially target foreign judgments the effect of which is to place a creditor, or a group of creditors, in a better situation than they would be if the judgment had been issued by the receiving court. This new subparagraph could read:

[*Recognition and Enforcement may be refused if*]

(x) The judgment affects the rights of creditors in this State, who could have opened an insolvency proceeding in relation to the same debtor whose insolvency proceeding issued the insolvency-related judgment, and these creditors would be better off if the laws of this State apply, unless they have agreed to this treatment.

Commentaires du gouvernement du Canada sur le projet de loi type sur la reconnaissance et l'exécution internationales des jugements liés à l'insolvabilité

En plus des commentaires qui seront fournis au cours de la discussion sur le projet de loi type sur la reconnaissance et l'exécution internationales des jugements liés à l'insolvabilité au cours de la session de la Commission, le gouvernement du Canada fait les propositions suivantes.

Article 13. Motifs de refus de reconnaissance et d'exécution d'un jugement étranger lié à l'insolvabilité

Alinéa h)

Cette disposition devrait être éliminée. En vertu de 13 h), un motif valable pour l'exercice de la compétence en insolvabilité à l'égard d'un débiteur insolvable serait la simple présence des biens du débiteur dans la juridiction, sans aucun autre lien avec la juridiction. Ainsi, elle ne permet pas à une cour réceptrice de refuser la reconnaissance d'un jugement lié à l'insolvabilité lorsqu'un tribunal d'insolvabilité a exercé sa compétence sur une matière et une personne dans des situations où le lien est ténu.

Nouvel alinéa

Un motif supplémentaire de refuser la reconnaissance et l'exécution d'un jugement lié à l'insolvabilité devrait être ajouté à l'article 13.

En vertu de la Loi type sur l'insolvabilité internationale existante (les articles 21 et 22, par exemple) et du projet de loi type, les tribunaux peuvent s'appuyer sur le concept de "protection suffisante" pour protéger les intérêts des créanciers et des parties intéressées. Un défi dans le texte proposé est que la reconnaissance des jugements n'implique pas nécessairement des tribunaux locaux ou étrangers qui pourraient prendre des mesures de protection suffisante. En conséquence, les créanciers étrangers pourraient se trouver dans une situation où ils sont avantagés par rapport au traitement qu'ils auraient reçu s'ils avaient été soumis à une procédure dans l'état de reconnaissance.

L'indisponibilité de mesures de protection suffisante ordonnées par un tribunal en relation avec les jugements étrangers visés par la reconnaissance facilite et même augmente la possibilité de faire la recherche d'un tribunal le plus favorable au détriment des créanciers locaux. Ce serait le cas lorsque les règles du droit de l'insolvabilité étranger sont différentes des règles locales. Par exemple, au Canada, lorsqu'une sûreté arrive à son terme, elle peut être renouvelée sous certaines conditions sans qu'un tel traitement ne soit considéré préférentiel. De même, les paiements effectués par le débiteur insolvable en vertu de contrats de location sont réputés avoir été effectués dans le cours normal des activités, bien que cela ne soit pas nécessairement le cas en vertu des règles étrangères. La reconnaissance des jugements étrangers pourrait en pratique

limiter la capacité des créanciers locaux à protéger leurs droits en vertu des lois sur l'insolvabilité et sur les sûretés applicables aux éléments locaux des actifs du débiteur. Cela soulève en outre la perspective des procédures d'annulation.

Cette exclusion viserait essentiellement les jugements étrangers ayant pour effet de placer un créancier ou un groupe de créanciers dans une situation plus favorable que si le jugement avait été rendu par le tribunal de reconnaissance. Ce nouvel alinéa pourrait se lire comme suit:

[*La reconnaissance et l'exécution peuvent être refusées si*]

x) le jugement affecte les droits des créanciers dans cet État qui auraient pu ouvrir une procédure d'insolvabilité concernant le même débiteur dont la procédure d'insolvabilité a émis le jugement lié à l'insolvabilité, et ces créanciers bénéficieraient de droits plus favorables si les lois de cet État s'appliquent, sauf s'ils ont accepté ce traitement.

VI. SECURITY INTERESTS

A. Report of the Working Group on Security Interests on the work of its thirty-second session (Vienna, 11–15 December 2017)

(A/CN.9/932)

[Original: English]

I. Introduction

1. At its present session, the Working Group commenced its work on the preparation of a draft practice guide to the UNCITRAL Model Law on Secured Transactions (the draft "Practice Guide"), pursuant to a decision taken by the Commission at its fiftieth session (Vienna, 3–21 July 2017).[1] At that session, there was support in the Commission to provide guidance to users (such as parties to transactions, judges, arbitrators, regulators, insolvency administrators and academics) of the UNCITRAL Model Law on Secured Transactions (the "Model Law") to maximize the benefits of secured transactions laws.[2]

2. The Commission agreed that broad discretion should be accorded to the Working Group in determining the scope, structure and content of the draft Practice Guide and that the draft Practice Guide could address the following: (a) contractual issues (such as the types of secured transaction that were possible under the Model Law); (b) transactional issues (such as the valuation of collateral); (c) regulatory issues (such as the conditions under which movable assets were treated as eligible collateral for regulatory purposes); and (d) issues relating to finance to micro-businesses (such issues relating to the enforcement of security interests).[3]

II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its thirty-second session in Vienna from 11 to 15 December 2017. The session was attended by representatives of the following States members of the Working Group: Armenia, Australia, Belarus, Brazil, Bulgaria, Canada, Chile, China, Colombia, Czechia, Ecuador, El Salvador, France, Germany, Greece, Hungary, India, Indonesia, Italy, Japan, Kenya, Kuwait, Malaysia, Mexico, Panama, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

4. The session was attended by observers from the following States: Algeria, Belgium, Bolivia (Plurinational State of), Cyprus, Democratic Republic of the Congo, Dominican Republic, Malta, Peru, Saudi Arabia, Slovakia, Syrian Arab Republic and Turkmenistan.

5. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: World Bank;

(b) *Intergovernmental organizations*: European Investment Bank (EIB);

(c) *International non-governmental organizations invited by the Commission*: Centro de Estudios de Derecho, Economía y Política (CEDEP), Commercial Finance Association (CFA), Factors Chain International and the EU Federation for Factoring

[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 227 and 449.
[2] Ibid., para. 222.
[3] Ibid., paras. 227 and 449.

and Commercial Finance Industry (FCI and EUF), International Insolvency Institute (III), Law Association for Asia and the Pacific (LAWASIA) and National Law Centre for Inter-American Free Trade (NLCIFT).

6. The Working Group elected the following officers:

Chairperson: Mr. Bruce WHITTAKER (Australia)

Rapporteur: Mr. André João RYPL (Brazil)

7. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.74 (Annotated Provisional Agenda) and A/CN.9.WG.VI/WP75 (Draft Practice Guide to the UNCITRAL Model Law on Secured Transactions: Annotated List of Contents).

8. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Draft Practice Guide to the UNCITRAL Model Law on Secured Transactions.
5. Future work.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

9. The Working Group considered the note by the Secretariat entitled "Draft Practice Guide to the UNCITRAL Model Law on Secured Transactions: Annotated List of Contents" (A/CN.9.WG.VI/WP.75). The deliberations and decisions of the Working Group are set forth below in chapter IV. At the close of its session, the Working Group requested the Secretariat to prepare a first draft of the Practice Guide reflecting the deliberations of the Working Group. It was agreed that the Secretariat should be given flexibility in further consulting with experts and practitioners in the relevant areas and in structuring the material in that first draft of the Practice Guide.

IV. Draft Practice Guide to the UNCITRAL Model Law on Secured Transactions

A. Preliminary considerations (A/CN.9/WG.VI/WP.75, paras. 5–15 and 75–84)

10. At the outset of its deliberations, the Working Group was reminded of the mandate given to it by the Commission as well as the flexibility given to it in determining the scope, structure and content of the draft Practice Guide. It was stressed that the Working Group should take due caution in addressing issues not specifically dealt with in the Model Law and the UNCITRAL Guide to Enactment on the Model Law (the "Guide to Enactment") as they might not necessarily fall within the mandate. Accordingly, the Working Group had a preliminary discussion on the purpose of the draft Practice Guide to reach some working assumptions on how the Working Group intended to progress in its preparation.

11. It was generally observed that the purpose of the Working Group was not to prepare an official commentary on the Model Law but rather to provide practical guidance to users of secured transactions (for example, parties to secured transactions, other relevant parties affected by those transactions and legal advisors to those parties) in States that have enacted, or were considering enacting, the Model Law. It was stressed that the main objective would be to illustrate how the Model Law

operated and how potential users could benefit from such operation (particularly focusing on practical transactional opportunities that would be available under the Model Law). Furthermore, it was widely felt that another key purpose of the draft Practice Guide was to bridge the gap between law and business practice.

Intended audience

12. It was widely felt that the draft Practice Guide could provide guidance to a variety of users in a State that has enacted, or was considering enacting, the Model Law. It was suggested that the Model Law could be used to the greatest extent possible if respective parts of the Practice Guide were drafted towards the specific user groups that the parts were intended to benefit. For example, portions of the draft Practice Guide that would discuss contractual and transactional issues could be drafted with an eye towards businesses, financiers, debtors and other parties that would participate in transactions covered by the Model Law. Similarly, portions of the draft Practice Guide on regulatory issues could be targeted at relevant regulators and financial institutions affected by such regulations.

13. In that context, diverging views were expressed about the extent to which the draft Practice Guide would target other types of users (for example, judges, bailiffs as well as registry operators). One view was that it would not be necessary as existing UNCITRAL texts on secured transactions already provided guidance to those users, whereas another view was that there was merit in providing additional guidance in the draft Practice Guide.

14. Given the variety of levels of familiarity with secured transactions law contemplated by the Model Law among the potential readers of the draft Practice Guide, the need to draft the Practice Guide in a comprehensible manner was noted. In that context, it was suggested that the draft Practice Guide should take into account the needs of those that might not necessarily be familiar with the approaches underlying the Model Law.

15. It was agreed that the draft Practice Guide should aim at providing guidance to users from all legal traditions and regions, irrespective of whether the Model Law had been adopted in the respective jurisdictions.

16. Differing views were expressed with regard to the extent to which the draft Practice Guide should incorporate references to different legal systems. One view was that the draft Practice Guide should focus on elaborating on the unitary, functional and comprehensive approach of the Model Law without drawing a comparison with other legal systems. A concern was raised that drawing such comparisons would require a lengthy analysis and might not fall within the purpose of the draft Practice Guide. In that context, it was suggested that the draft Practice Guide could highlight some novel features of the Model Law, for example, the registry system as well as the possibility of out-of-court enforcement.

17. Another view was that in order for the draft Practice Guide to highlight the benefits of the Model Law, some comparison with the traditional secured transactions regimes would be useful, particularly by highlighting certain types of transactions that would become possible under the Model Law.

18. It was noted that the Working Group would benefit from a draft text before considering whether to incorporate, and to what extent, references to various legal traditions in the draft Practice Guide. After discussion, it was widely felt that the introductory part of the draft Practice Guide could include a general section on the benefits of the Model Law as well as the approaches therein without references to any other legal system. It was also felt that when the draft Practice Guide provided examples of individual transactions, it could possibly include brief commentary on other traditional approaches.

Scope

19. With regard to contractual and transactional issues to be dealt with in the draft Practice Guide, it was suggested that the draft Practice Guide could provide examples

and focus on some key transactions rather than address the entirety of transactions possible under the Model Law. In that context, it was highlighted that the draft Practice Guide should reiterate the general rule in the Model Law that a security right might encumber any type of movable assets subject to the exclusions provided therein. In the same vein, it was noted that the draft Practice Guide should focus on key transactions rather than on transactions involving specific types of assets.

20. It was widely felt that the draft Practice Guide could focus on transactions involving equipment, inventory and receivables, as they constituted core commercial assets for businesses. Noting the increasing importance of intellectual property as collateral, it was generally felt that the draft Practice Guide should also deal with transactions involving intellectual property, which would build upon the Supplement on Intellectual Property.

21. Noting that the Model Law provided asset-specific rules for certain types of assets, it was also mentioned that the draft Practice Guide could possibly address, for example, transactions involving bank accounts. Another suggestion was that the draft Practice Guide could deal with secured transactions involving agricultural and aquaculture products. However, it was reiterated that caution should be taken when focusing on transactions involving specific types of assets as the discussion might run contrary to the unitary and functional approach underlying the Model Law. It was suggested that such transactions should only be addressed to the extent that the nature of those assets required different treatment in structuring the secured transaction.

22. It was also suggested that the draft Practice Guide should not aim at addressing sophisticated financial transactions (in particular, those not involving secured transactions) and insolvency-related financing transactions.

23. With regard to the extent to which the draft Practice Guide should deal with financing in general, it was stated that its focus should be on secured lending and the legal relationships that arose from such transactions (for example, between the secured creditor and the grantor). It was suggested that the draft Practice Guide should not attempt to deal with lending in general, particularly the legal relationship between the lender and the debtor.

24. It was therefore generally felt that the draft Practice Guide should not provide guidance on the fundamentals of good lending practices and that its focus should be on issues related to secured lending practices, while it might touch upon some general lending practices as relevant to taking a security right.

25. With respect to the extent to which the draft Practice Guide should address regulatory issues, it was generally felt that the Working Group should take due caution so that it did not inadvertently address aspects which were outside its mandate. In that context, it was questioned whether the draft Practice Guide was an appropriate and effective means to address such issues, considering that such regulatory authorities had not taken part in the preparation of the Model Law and that regulations themselves reflected conscious policy decisions. It was also pointed out that in contrast to contractual and transactional issues for which the Working Group had developed relevant principles and rules over the years, regulatory issues had not been considered in depth.

26. Noting that the mandate given to the Working Group included addressing regulatory issues, it was pointed out that one purpose of the Practice Guide would be to support the secured transactions framework contemplated by the Model Law and that in not addressing regulatory aspects, the draft Practice Guide could run contrary to that objective. It was highlighted that the Working Group should not overlook the fact that financial institutions providing secured lending were subject to rigorous financial regulations. It was therefore noted that the draft Practice Guide should draw the attention of its readers to the existence of such regulations, and at the same time inform relevant regulatory authorities on how secured transaction laws contemplated by the Model Law would operate. It was further mentioned that regulatory issues were closely related to transactional issues, in particular, the conditions under which certain types of movable assets were recognized as eligible collateral.

27. On the manner in which regulatory issues would be addressed in the draft Practice Guide, it was suggested that any work by the Working Group should fully respect established international regulatory standards, should not involve substantive discussions about the underlying policies and should not attempt to provide recommendations on such aspects. It was suggested that the material to be prepared should be minimal and explanatory in nature, particularly focusing on the interaction between such regulations and secured transactions law. Recalling that the Working Group had addressed the interaction between secured transactions law and other laws (for example, intellectual property law), it was suggested that the draft Practice Guide should focus on coordination. It was reiterated that lack of coordination might lead regulated financial institutions to treat transactions secured by movable property as being no better for capital adequacy purposes than unsecured credit, which would make it difficult for the Model Law to achieve its objective of enhancing access to credit.

28. In that context, calls for enhanced cooperation between the Secretariat and relevant international regulatory authorities as well as for coordination within national authorities were mentioned. It was suggested that discussions in the Working Group could benefit from input from relevant international as well as domestic regulatory authorities.

29. After discussion, the Working Group reached the working assumption that the draft Practice Guide should address regulatory issues in a brief and explanatory manner, without questioning or making any suggestions regarding the policy underlying such financial regulations. It was emphasized that the focus of the draft Practice Guide should be to address the interaction and coordination between secured transaction laws and relevant financial regulations, including but not limited to the treatment of movable property under the capital adequacy requirements and how the operation of the Model Law could assist in meeting those requirements. In that context, the Secretariat was requested to engage with the Basel Committee on Banking Supervision as well as other relevant international organizations to share information and to seek coordination. Similarly, it was suggested that States should coordinate closely with their domestic regulatory authorities in advance of the relevant discussions in the Working Group.

Structure

30. Diverging views were expressed with regard to the extent to which the draft Practice Guide should be self-contained. One view was that a straightforward text without too many references to other relevant material would make the text easier to comprehend. Another view was that an attempt to produce a self-contained text might inadvertently result in a cumbersome text, which would run contrary to the general understanding that the draft Practice Guide should be simple and concise. In that context, the Working Group considered the utility of reproducing certain text for the benefit of the readers and of using cross-references.

31. After discussion, it was generally agreed that the objective of the Working Group was to prepare a user-friendly Practice Guide and accordingly, it would need to balance the need for it to contain all relevant information and the need to keep it concise. It was also felt that appropriate use of cross-references to UNCITRAL and other texts may enhance the readability of the draft Practice Guide.

32. It was also agreed that the draft Practice Guide should include a short introduction on the Model Law and other relevant UNCITRAL texts, further explaining their relationship and how they related to the draft Practice Guide.

33. On how the draft Practice Guide would deal with diverse types of transactions, as well as a wide range of parties to those transactions, it was generally felt that the draft Practice Guide should begin with providing examples of simple and standard transactions to elucidate the core principles of the Model Law and build upon those examples to illustrate more complex transactions (see also paras. 60–64 below).

34. The Working Group further agreed that the draft Practice Guide would contain separate parts, one dealing with contractual and transactional issues and another dealing with regulatory issues, as each pertained to a different audience.

35. The Working Group then discussed whether the discussion of issues affecting finance to micro-businesses should be dealt with separately or as part of the general discussion of contractual and transactional issues. In that context, the Working Group was informed of the legislative developments currently being undertaken by Working Group I (Micro, Small and Medium-sized Enterprises) to reduce legal and regulatory issues faced by MSMEs and the need to take a consistent approach was emphasized.

36. At the outset, the need for the draft Practice Guide to highlight the importance of finance to micro-businesses, particularly in developing economies, was noted. While acknowledging that the Model Law adequately addressed secured financing to SMEs in general, it was stated that due to the vulnerable nature of micro-businesses and individuals, special considerations needed to be taken into account with regard to their financing in the draft Practice Guide. It was also stated that the draft Practice Guide could draw the attention of potential lenders to micro-businesses.

37. It was also clarified that giving special considerations to micro-businesses would not imply that the draft Practice Guide would deal with micro-finance or unsecured lending to micro-businesses, both of which were outside the mandate of the Working Group. However, it was suggested that to the extent that unsecured lending practices had an impact on secured lending to micro-businesses, the draft Practice Guide could touch upon relevant aspects as many of those issues were intertwined (for example, personal guarantees).

38. While a suggestion was made that there was merit in having a stand-alone portion in the draft Practice Guide to deal comprehensively with issues affecting finance to micro-businesses, it was generally felt that those issues could be dealt with in the portion dealing with contractual and transactional issues. It was stated that most of the contractual and transactional issues would apply similarly to micro-businesses and that from a structural perspective, having a separate portion could be duplicative. In that context, it was suggested that the introduction to the draft Practice Guide could contain a general discussion including how the Model Law could benefit micro-businesses in getting access to financing.

39. After discussion, the Working Group reached a working assumption that issues relating to finance to micro-businesses would be mentioned generally in the introduction to the draft Practice Guide and specific issues that could arise with regard to transactions would be dealt respectively in the portion dealing with contractual and transactional issues. It was further affirmed that the draft Practice Guide would not create a separate secured transactions regime for micro-businesses or suggest any changes to the provisions of the Model Law. In that context, it was widely felt that the introduction to the Practice Guide could outline the following: (i) difficulties micro-businesses face in obtaining credit and the reasons for the draft Practice Guide to address relevant issues; (ii) common features or descriptions of micro-businesses and typical transactions involving micro-businesses; (iii) benefits of the Model Law and opportunities that the implementation of the Model Law would provide to lenders extending credit to micro-businesses as well as to micro-businesses as potential grantors; and (iv) a list of instances where the portion of the draft Practice Guide dealing with contractual and transactional issues included relevant discussions.

Style

40. It was generally felt that, to the extent possible, the draft Practice Guide not be a lengthy and inaccessible text, but rather be simple and concise. It was also emphasized that the draft Practice Guide should be user-friendly. In order to avoid duplication with existing UNCITRAL texts, it was also suggested that cross-references should be included whenever possible.

41. While some concerns were expressed about the use of technical legal terms making it difficult to understand the draft Practice Guide, the need to use consistent terminology as contemplated in the Model Law as well as other UNCITRAL texts

was emphasized. In that context, the need to use precise terminology as well as to provide some explanation of other technical terms used in the draft Practice Guide were mentioned. After discussion, it was felt that it would be preferable for the draft Practice Guide to refer to terms already defined in the Model Law and to the extent necessary, provide further elaborations in plain language.

42. With the purpose of making the draft Practice Guide as concise and user-friendly as possible, the Working Group expressed general support for using visual aids (such as text boxes, diagrams and flowcharts) while acknowledging that there might be technicalities to be taken into account.

43. It was generally agreed that the draft Practice Guide should include references to relevant texts of other international organizations, in particular to assist readers where a particular international instrument might become applicable to a certain transaction (for example, the Convention on International Interests in Mobile Equipment and its Protocols and the Unidroit Convention on Substantive Rules for Intermediated Securities) and where such text provided useful guidance.

44. With respect to the use of annexes, it was generally felt that efforts should be made to contain the contents of the draft Practice Guide in the main body of its text, whereas some supporting material (for example, sample templates or forms) could be included as an annex.

45. It was generally understood that the Working Group would aim at preparing the draft Practice Guide as a United Nations publication (also in electronic form). In that context, it was said that the possibility of preparing the Practice Guide as an interactive online interface could be sought, which would nonetheless be subject to obtaining a further mandate from the Commission and identifying available resources.

B. Introduction (A/CN.9/WG.VI/WP.75, paras. 17–29)

Benefits of the Model Law

46. There was general support for the suggested format and content of the introductory portion to be included in the draft Practice Guide. It was also agreed that the introductory portion should include an explicit statement of the purpose of the Practice Guide. It was also widely felt that the introductory portion should be concise, focusing on the benefits of the Model Law.

47. It was felt that the draft Practice Guide, in illustrating the comprehensive scope of the Model Law, should include a more thorough explanation of its functional approach. It was felt that clear examples highlighting the practical impact of such an approach should be provided, which would also address stakeholder concerns and reactions to the Model Law, particularly during the transition phase. For example, it was stated that users would benefit from an explanation of provisions in the Model Law, which might require certain actions by parties to preserve their rights under the previous regime.

48. In addition, it was said that the draft Practice Guide should provide concrete examples of transactions that were made possible under the Model Law as well as those outlining the consequences of extending the scope of the Model Law to outright transfer of receivables.

49. Regarding the illustration of the registry system as the cornerstone of the Model Law, a number of views were expressed. There was general interest in providing guidance on practical aspects of the registry contemplated by the Model Law, including on how it would be used and how it might differ from other registries (for example, a title registry). While views were expressed that the draft Practice Guide could provide guidance on the general operation of the registry, including coordination with other registries and features that should not be incorporated, it was generally felt that such policy considerations were sufficiently dealt with in the UNCITRAL Guide on the Implementation of a Security Rights Registry. However, it was noted that there might be merit in the draft Practice Guide addressing some

practical issues that could arise during the transition phase, for example, with regard to registrations that have been made in specialized registries.

50. With respect to the section on enforcement of security rights, it was said that reference should be made to domestic procedural laws that might become relevant and that emphasis could be put on providing guidance to judges as well as bailiffs.

Cross-border transactions

51. During the discussion, the view was expressed that there would be merit in addressing conflict-of-law issues in the introductory portion, providing guidance to users in determining which law would apply to their transactions. It was stated that even simple transactions (for example, factoring arrangements and transactions involving mobile goods) could raise issues relating to the applicable law.

52. While some support was expressed for that suggestion, it was mentioned that that might overcomplicate the introductory portion and that the Model Law as well as the Guide to Enactment dealt with the issues of conflict-of-law quite comprehensively. It was also mentioned that typical examples to be covered in the draft Practice Guide would not necessarily have a cross-border aspect and that it might be better to address issues arising from cross-border transactions separately in the portion dealing with contractual and transactional issues.

53. After discussion, it was generally felt that the introductory portion of the draft Practice Guide could draw the attention of the readers that there might be issues relating to the applicable law in cross-border transactions and that the portion dealing with contractual and transactional issues could have a stand-alone section illustrating some examples of how the conflict-of-law provisions in the Model Law would operate. It was also widely felt that there would be merit in including cross-references to that stand-alone section to draw the attention of the users to potential difficulties that might arise with respect to cross-border transactions.

Other aspects to be included

54. It was also mentioned that the introductory portion could include the following aspects: (a) illustration of the commercial reasonable standard, and (b) economic analysis that secured transaction reform resulted in increased accessibility of credit.

Key terms

55. There was general support that the draft Practice Guide should include a glossary of key terms used therein, which would build on the definitions already provided in the Model Law and other UNCITRAL texts. It was also felt that the list could be further expanded to the extent necessary to provide additional clarification, including through examples.

Interaction of the Model Law with other laws of the enacting State

56. It was generally felt that issues relating to the interaction of the Model Law with other laws of the enacting State were adequately addressed in the Guide to Enactment and other UNCITRAL texts and need not be replicated in the draft Practice Guide, which was intended to provide practical guidance to users of the Model Law. However, it was also felt that the draft Practice Guide should briefly draw the attention of those users that a secured transaction law implementing the Model Law did not operate in vacuum and that other laws (for example, consumer laws, insolvency laws, contract law and civil procedure law) might be applicable. In that context, it was said that international instruments in force in those jurisdictions might also be applicable and therefore should be mentioned.

57. It was observed that the draft Practice Guide need not reiterate the Guide to Enactment advising legislators to ensure that other laws of that State were amended for their laws as a whole to function in a coordinated manner.

58. It was also agreed that the content and placement of an introductory paragraph on regulatory issues would be considered at a later stage.

C. Contractual and transactional issues (A/CN.9/WG.VI/WP.75, paras. 30–58)

59. It was generally felt that the portion of the draft Practice Guide dealing with contractual and transactions issues (the "Chapter") could begin with the fundamentals of secured finance under the Model Law, providing a general explanation of the importance of security in movable assets, the requirements for creating a security right and key steps for secured finance transactions. It was generally felt that the Chapter should touch upon different types of transactions possible under the Model Law.

60. With regard to the organization of the material, it was suggested that the Chapter could begin with an example of a simple secured transaction (which the users would be familiar with), provide explanations based on that example, and further build on those explanations to describe more complex transactions. However, diverging views were expressed on such organization as well as on the transaction to be used as an example. It was mentioned that while one type of a transaction might be simpler from a legal perspective, that might not necessarily be so from a transactional/practical perspective.

61. While it was mentioned that there would be benefit in explaining the benefits of creating a security right over certain categories of assets and future assets, it was noted that the introductory portion of the draft Practice Guide would include examples of transactions made possible under the Model Law, albeit in a more general fashion.

62. After discussion, it was generally felt that the Chapter could touch upon the following types of secured transactions:

- A loan secured by an asset currently owned by the grantor
- A loan to finance the purchase of an asset with the security right being taken over that asset (thus, dealing with an acquisition security right)
- A loan secured by all of grantor's assets
- A revolving loan secured by grantor's inventory/receivables
- A sale based on retention-of-title terms
- A loan secured by intellectual property
- A loan secured by negotiable documents
- Lease finance for an item of capital equipment
- Factoring and other purchases of receivables.

63. In that context, it was cautioned that the Chapter should not oversimplify the types of transactions, as the users of the draft Practice Guide would have a certain level of experience with those transactions. Concerns were also expressed that providing too many examples, particularly of transactions involving different types of assets, might confuse the users in understanding the unitary approach of the Model Law.

64. After discussion, the Working Group reached the working assumption that the Chapter would be structured to provide a thorough explanation of a transaction involving a loan secured by an asset owned by the grantor. Building on that explanation, the Chapter would further elaborate on other types of transactions mentioned above (including outright transfer of receivables and retention-of-title transactions), highlighting any differences.

65. During the deliberations, it was pointed out that there could be merit in the draft Practice Guide including references to supply chain financing arrangements and value chain arrangements, which would typically involve a number of different types of transactions mentioned in paragraph 62. It was said that providing such examples would provide the users of the draft Practice Guide a better understanding of how those transactions provided a basis for a broader financing mechanism, which

entailed a multitude of transactions involving a number of businesses, including micro-businesses.

How to create and make effective against third parties a security right

66. It was generally felt that the Chapter could include a section explaining the basic requirements that must be satisfied for a secured creditor to obtain an effective security interest, which could focus on the technical requirements, in particular: (a) that the grantor has rights in the asset or the power to encumber it; and (b) that the secured creditor (in most cases) has entered into a written security agreement with the grantor. That section could further explain how possessory pledges operated under the Model Law. It was also widely felt that the Chapter could include a section describing how a security right could be made effective against third parties, mainly by the secured creditor registering a notice in the registry.

Key preliminary steps for secured finance transactions

Due diligence on the customer

67. With regard to the draft Practice Guide addressing due diligence on the customer (the borrower or debtor), a concern was expressed that those issues related to general lending practice and would not fit in a Practice Guide on secured lending (see paras. 23–24 above). Noting that the topic was closely related to the behaviour of, and business decisions by, lenders, it was questioned whether the draft Practice Guide could provide any guidance.

68. However, it was stated that there was a particular need to emphasize the need for due diligence on customers in the context of secured lending practices. This was particularly highlighted with respect to lending to micro-businesses, where there was an incentive on the lender not to conduct due diligence (as it could be costly), which frequently led to over-collateralisation. It was also stated that the lender might focus merely on the encumbered asset rather than on the ability of the borrower to repay the loan.

69. After discussion, it was widely felt that the Chapter could provide guidance to lenders on the desirability of due diligence on their customers highlighting that taking collateral would not relieve them of the need to conduct due diligence. It was also suggested that the Chapter could provide a checklist for secured creditors, for example, to identify whether the grantor was an individual or a legal entity, whether there were any recent changes in its identifier and whether there had been any other notices registered against the grantor. With regard to micro-businesses, it was generally felt that the draft Practice Guide could address the dangers of over-collateralization and provide guidance to lenders on the importance of conducting due diligence when lending to micro-businesses.

Due diligence on the asset to be encumbered

70. It was widely felt that the due diligence on the asset to be encumbered was an important aspect to be dealt with in the draft Practice Guide, as they were common to all types of secured transactions. It was felt that emphasis could be placed on the purpose of such due diligence, mainly to reduce the risk of the secured creditor. During the discussion, it was reaffirmed that the purpose of that section would be to provide an explanation of what lenders could do to maximize their benefits in a typical transaction rather than to introduce obligatory requirements.

71. With regard to the verification by the lender that the grantor owned or otherwise had rights in the asset, it was stated that either this section or the section dealing with requirements for the creation of a security right (see para. 66 above) could illustrate that the right of the grantor might not necessarily be a title.

72. It was also mentioned that draft Practice Guide should highlight the fact that a registry as contemplated by the Model Law would provide lenders the ability to determine whether there were any prior security rights registered against the grantor that could apply to the asset.

73. With respect to draft Practice Guide providing guidance that the lender determine whether the asset was adequately insured, it was clarified that that should not inadvertently give the impression that only insured assets qualified as collateral and that only assets that could be insured could be subject of a security right. In that context, the need for the lender to determine whether its security right could extend to the insurance payment was mentioned.

74. During the discussion, it was mentioned that there might be instances where other laws might limit the creation or the enforcement of a security right in an asset of a certain category of grantors (for example, individuals) and that that aspect would need to be taken into account when conducting due diligence on the asset to be encumbered.

Due diligence on any other credit and security support

75. It was generally felt that the Chapter could include a section explaining that secured creditors, in certain instances, also took other forms of credit support, typically from third parties, for example, in the form of guarantees, letters of credit or credit insurance. It was further suggested that that section could indicate that guarantees were frequently taken from individuals (which might be further secured) to support lending to micro-businesses. In essence, that section would provide guidance to secured creditors that similar level of due diligence should be conducted on those third parties providing credit support.

Documenting the terms of finance

76. Recalling its deliberations that the draft Practice Guide should not deal with lending practices in general (see paras. 23–24 above), the Working Group agreed that the Chapter should not address commercial terms of a finance transaction nor include any sample loan agreements.

77. It was noted that certain terms of the financing agreement (including amount of the loan) could be closely interlinked with the value of the encumbered asset and that the Chapter might touch upon those aspects.

78. During the discussion, a question was raised whether the draft Practice Guide should provide any guidance on events of default. Noting that the definition of "default" in article 2(j) of the Model Law included the possibility of the grantor and the secured creditor agreeing on what could constitute a default under the Model Law, it was generally felt that the Practice Guide could include an illustrative list of typical events of default, which could trigger the enforcement of the security right. In that context, it was suggested that the section dealing with enforcement of a security right could also touch upon the relevant aspects possibly through a cross-reference. It was also suggested that the draft Practice Guide could provide guidance to lenders on possible clauses to be included in the security agreement containing events of default specifically relating to the collateral (for example, a breach by the grantor of its obligation to exercise reasonable care to preserve the asset), recognizing however that the nature of such clauses would be very dependent on the type of asset and transaction involved. At the same time, it was observed that the draft Practice Guide should highlight that the autonomy of the parties to agree to such terms might be limited by other laws in some States (for example, laws protecting consumers or other debtors).

Security agreement

79. The Working Group agreed that the Chapter should include a section explaining how parties could prepare their security agreement. It was widely felt that the Chapter could contain: (i) a general section providing such guidance, which could further elaborate why parties might choose to go beyond the minimal requirements in article 6 of the Model Law and (ii) a few sample security agreements in the annex with annotations, which would deal with different types of transactions. With respect to the latter, preference was expressed for including security agreements in their entirety. It was also stated that those examples could include sample provisions often found

within financing agreements that dealt with the security aspect. In that context, the Working Group was informed of the technical difficulties that could arise with regard to the presentation and translation of those sample security agreements or clauses.

Closing the deal

80. It was generally felt that the Chapter should include a section on closing the secured finance transaction, which would normally include registration of a notice, ensuring that the grantor had executed all relevant documents, and the disbursements of funds. In that context, it was mentioned that the draft Practice Guide should, however, not prescribe an order in which such actions were to be taken nor imply that registration of a notice was the only way of making a security right effective against third parties.

81. It was widely felt that the draft Practice Guide should highlight the fact that the Model Law allowed secured creditors to register a notice before the creation of a security right or the conclusion of a security agreement. It was also stated that the draft Practice Guide could mention the importance of a search of the registry after the registration of a notice to ensure that the priority of the security right was retained. In relation, it was stated that draft Practice Guide should also mention the possible need for lenders to search in registries other than the general security rights registry when conducting due diligence of assets to be encumbered (see para. 70 above).

Monitoring collateral

82. The Working Group agreed that the draft Practice Guide should highlight the importance of continual monitoring of collateral after the conclusion of the security agreement, and the disbursement of funds. It was generally felt that the draft Practice Guide could provide some guidance on the topic along with some examples on how the monitoring may differ depending on the transaction or the encumbered asset (for example, intellectual property and agricultural products). In relation, it was stated that the draft Practice Guide should note the desirability of ensuring that monitoring of collateral by the secured creditor would not result in undue interference with the grantor's conduct of business.

83. It was suggested that the draft Practice Guide could provide practical examples on how such monitoring could be performed and also mention the possibility of utilizing third-party service providers for that purpose. It was also mentioned that the draft Practice Guide could explain the need for a lender to consider the eventual cost of monitoring collateral when conducting due diligence of the encumbered asset. In addition, it was also suggested that the section dealing with security agreements (see para. 79 above) could provide guidance to parties that they might wish to include relevant provisions on monitoring in their agreement (for example, scope of and cost related to monitoring).

84. Differing views were expressed on whether the draft Practice Guide should mention the need for the secured creditor to monitor the grantor's ongoing legal and financial status (in addition to the collateral). However, recalling its deliberation to include certain aspects relating to due diligence on customers (see para. 69), it was generally felt that a similar approach should be taken. Particular attention was drawn to micro-businesses, which were more likely to change legal status and because a security right was often created over all their assets.

How to search in the registry

85. It was agreed that the Chapter could include a section explaining how to conduct a search of the registry and how to understand the search results. It was said that the section could include some explanation of the limitations inherent in any search result and further illustrate what steps a searcher could take to obtain additional information. It was also suggested that the section could draw the attention of the users to the conflict-of-laws rules in the Model Law and the potential need to search in registries of other jurisdictions.

How and where to register a notice

86. It was agreed that the draft Practice Guide should provide guidance to registrants on how and where to register a notice to make the security right effective against third parties. It was also said that a section in the Chapter should provide guidance to secured creditors on when and how to terminate or amend their registration (for example, if there were a change of grantor identifier or transfer of the encumbered asset), noting that ongoing monitoring of the grantor and the collateral was important. In that context, it was said that the section would need to reflect the fact that the Model Registry Provisions in the Model Law provided a number of options with regard to the operation of the registry, even though only one of the options would be applicable in any given jurisdiction.

How to enforce a security right

87. It was widely felt that prominence should be given to the section in the Chapter dealing with how a secured creditor could use different enforcement mechanisms in the Model Law. It was also widely felt that there would be merit in providing annotated sample notices that a secured creditor would need to give during the enforcement stage in the annex of the draft Practice Guide.

88. In that context, a number of suggestions were made: (i) that the right of a secured creditor to dispose of an encumbered asset as provided in article 78 of the Model Law should be particularly highlighted; (ii) that the enforcement mechanisms that would apply to different types of collateral (including, all-asset security right) should be illustrated; (iii) that practical problems that might arise during the enforcement phase should be outlined; (iv) that the distribution rule as provided in article 79 of the Model Law could be highlighted in comparison with prior rules; and (v) that the section should explain how the existence of a secondary-market could facilitate out-of-court disposition.

89. In relation to enforcement involving micro-businesses, it was suggested that the section could mention: (i) the difficulties in sending notifications to such businesses due to their frequent change of address and refusal to accept notifications; (ii) possible restrictions in other laws limiting assets that could be enforced; and (iii) the possibility of parties agreeing to use alternative dispute resolution to expedite out-of-court enforcement.

How to collect receivables subject to an outright transfer

90. It was felt that the draft Practice Guide could explain the circumstances that relate to outright transfer of receivables, in particular, that a transferee of receivables under an outright transfer would not be subject to the enforcement rules in the Model Law, as there was no underlying secured obligation. It was felt that the draft Practice Guide could explain how an outright transferee, as well as a secured creditor with a security right in a receivable, could collect payment of the receivable and also include sample templates for relevant notifications and payment instructions.

How to transition prior security rights to the Model Law

91. It was felt that the draft Practice Guide could explain what measures a secured creditor would need to take to preserve the third-party effectiveness and priority of its security right created before the new law implementing the Model Law came into effect. It was suggested that a number of examples should be provided. It was suggested that this section should draw the attention of the users to the operation of the transition provisions in the Model Law and not attempt to delve into the details of the prior law, which would vary depending on the jurisdiction.

D. Regulatory issues (A/CN.9/WG.VI/WP.75, paras. 59–74)

92. The Working Group recalled its earlier discussion on the extent to which the draft Practice Guide would address regulatory issues (see paras. 25–28 above) and

reaffirmed its working assumption (see para. 29 above). Considering the sensitivity of the issues, it was also reiterated that the draft Practice Guide should not address policies underlying relevant regulations nor make any recommendation suggesting changes to those regulations.

93. As a general point, it was explained that capital regulations in many jurisdictions did not fully take into account the key features of the Model Law and how its operation could possibly allow regulated financial institutions to meet the requirements in those regulations, including capital adequacy requirements. As such, it was stated that the draft Practice Guide could explain how different capital requirements could be met through the implementation of the Model Law. For example, it was mentioned that the draft Practice Guide could illustrate how the enforcement mechanisms envisaged in the Model Law permitted a security right to be enforced in an efficient manner, thus allowing the encumbered movable asset to be considered as eligible collateral. In addition, it was also suggested that the draft Practice Guide could highlight the importance of secondary markets for possible disposal of encumbered assets. As a general point, it was stressed that the aim of addressing regulatory issues in the draft Practice Guide should be to incentivise regulated financial institutions to extend credit based on the Model Law.

94. During the deliberations, the need for the draft Practice Guide to clarify the meaning and scope of "regulated" financial institutions was mentioned, as not all institutions engaged in secured lending would be subject to the same capital regulations, also noting that that would largely differ depending on the jurisdiction.

95. It was also mentioned that the draft Practice Guide could discuss over-collateralization, which had a particularly negative impact on micro-businesses. In that context, reference was made to the relevant discussions in the UNCITRAL Legislative Guide on Secured Transactions (paras. 68–69 of Chapter II) and the different approaches taken in jurisdictions. It was suggested that the issues relating to over-collateralization might be better placed in the portion of the draft Practice Guide addressing transactional issues, drawing the attention of the users to the possible unintended consequences. It was also suggested that the Secretariat be asked to include relevant discussion on over-collateralization in the portion of the draft Practice Guide addressing regulatory issues, without any decision being taken by the Working Group as to the desirability of retaining that text in that portion. It was clarified that that would be a matter for consideration by the Working Group when the relevant text was available for review.

96. Throughout the discussion, it was repeatedly stated that the Working Group should take a cautious approach in addressing regulatory issues. It was generally felt that at this stage, the draft Practice Guide should focus on how the operation of the Model Law could relate to certain regulatory requirements.

97. After discussion, it was generally felt that the Working Group would address the above-mentioned issues more closely at its next session when it had an opportunity to consider a first draft of the Practice Guide.

B. Note by the Secretariat on a draft practice guide to the UNCITRAL Model Law on Secured Transactions: annotated list of contents

(A/CN.9/WG.VI/WP.75)

[Original: English]

Contents

I. Introduction

1. At its fiftieth session (Vienna, 3–21 July 2017), the Commission considered two notes by the Secretariat (A/CN.9/913 and A/CN.9/924) reflecting the deliberations and conclusions of the Fourth International Colloquium on Secured Transactions (Vienna, 15–17 March 2017). In addition, the Commission considered a proposal by the Governments of Australia, Canada, Japan and the United Kingdom of Great Britain and Northern Ireland (A/CN.9/926) that the Commission should prepare a practice guide for potential users of the UNCITRAL Model Law on Secured Transactions (the "Model Law") with respect to contractual, transactional and regulatory issues related to secured transactions, as well as financing of micro-businesses.[1]

2. At that session, there was general support for the preparation of a practice guide to the Model Law. It was widely felt that, without guidance on many practical issues, users of secured transactions laws implementing the Model Law (for example, parties to secured and related transactions, third parties affected by those transactions such as other creditors and insolvency administrators, legal advisors to those parties, judges, arbitrators, regulators, law teachers and researchers) would not be able to fully utilize those laws to their benefit. It was agreed that a practice guide could potentially address the following issues: (a) contractual issues (such as the types of secured transactions that would be possible under laws implementing the Model Law); (b) transactional issues (such as the valuation of collateral); (c) regulatory issues (such as the conditions under which movable assets are treated as eligible collateral for regulatory purposes); and (d) issues relating to finance to micro-businesses (such as the enforcement of security interests).[2]

3. After discussion, the Commission decided that a practice guide to the Model Law (the "draft Practice Guide") should be prepared and referred that task to Working Group VI. It was also agreed that the issues addressed in document A/CN.9/926 and the relevant sections of document A/CN.9/913 should form the basis of that work. The Commission further agreed that broad discretion should be accorded to the Working Group in determining the scope, structure and content of the draft Practice Guide.[3]

4. Parts II and III of this note contain an indicative list of issues that the Working Group may wish to consider in embarking on the preparation of the draft Practice Guide.

II. Preliminary considerations

5. The Working Group may wish to discuss and reach a working assumption on a number of preliminary issues before embarking on the preparation of the draft Practice Guide. Among others, the Working Group may wish to consider the intended readers of the draft Practice Guide, its scope, structure and style.

A. Intended audience

6. In view of the general support in the Commission for the draft Practice Guide providing guidance to users of secured transactions laws implementing the Model Law (see para. 2 above), the Working Group may wish to consider the target audience and thus, the purpose of the draft Practice Guide.

7. In this connection, the Working Group may wish to consider whether: (a) the draft Practice Guide in its entirety should be addressed to all potential users equally; or (b) different parts of the draft Practice Guide should be addressed to different

[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 220–221.
[2] Ibid., paras. 222–223.
[3] Ibid., para. 227.

audiences. If the latter approach were taken, the section on contractual and transactional issues could primarily be addressed to secured creditors, grantors, third parties affected by transactions, their respective lawyers, and adjudicators, while the section on regulatory issues could primarily be addressed to regulated secured creditors and regulatory authorities supervising financial institutions.

8. The Working Group may wish to also consider whether the draft Practice Guide should be prepared mainly for users who are familiar with the secured transactions regime contemplated by the Model Law or for users who are unfamiliar with that regime so as to assist them in development of knowledge on the Model Law and the utilization of the Model Law to their benefit.

9. The Working Group may wish to confirm that the draft Practice Guide should provide guidance to users from all legal traditions and regions. In relation, the Working Group may wish to consider whether the draft Practice Guide should include a comparison of the Model Law's unitary, functional and comprehensive concept of security with traditional concepts of security found in different legal systems. Such a comparison could assist users in understanding the objectives of the Model Law and how they are achieved through the implementation of the Model Law.

B. Scope

10. The Commission decided that the draft Practice Guide should address: (a) contractual and transactional issues; (b) regulatory issues; and (c) issues relating to finance to micro-businesses. The Working Group may wish to consider the precise scope of the issues to be addressed in the draft Practice Guide.

11. With respect to contractual and transactional issues, the Working Group may wish to consider whether the draft Practice Guide should cover the wide range of secured transactions or instead focus on some key transactions (for example, those involving core commercial assets, such as equipment, inventory or receivables).

12. As the main aim of the draft Practice Guide would be to provide guidance on secured financing, the Working Group may wish to consider the extent to which the draft Practice Guide should deal with financing in general. For example, the draft Practice Guide could provide some guidance on the fundamentals of good lending practices, while noting that the Model Law would not apply to unsecured lending.

13. With respect to regulatory issues, the Working Group may wish to consider precisely what topics the draft Practice Guide should address. For example, the draft Practice Guide could address the need to ensure coordination between secured transactions laws and the treatment of movable assets under the capital adequacy requirements imposed on regulated financial institutions by the regulatory law of a State enacting the Model Law. One reason for addressing this topic would be that lack of coordination might lead regulated financial institutions to treat transactions secured by movable property as being no better for capital adequacy purposes than unsecured credit. This would make it difficult for the Model Law to achieve its objective of enhancing access to credit. On the other hand, the Working Group may need to consider the extent to which it is appropriate and feasible to address this topic.

C. Structure

14. The Working Group may wish to consider how the information in the draft Practice Guide should be organized. For example, the Working Group may wish to consider:

(a) Whether the draft Practice Guide should be self-contained or contain material from the Model Law, the Guide to Enactment of the Model Law (the "Guide to Enactment") and other relevant texts, and, if so, to what extent;

(b) Whether the draft Practice Guide should include a short introduction to the Model Law and other relevant texts;

(c) How the draft Practice Guide should deal with the different types of transactions, secured creditors (e.g. regulated as opposed to unregulated, lenders as opposed to suppliers of goods on credit) and grantors (e.g. corporations as opposed to individuals, large businesses as opposed to micro, small and medium-sized businesses);

(d) Whether contractual, transactional and regulatory issues should be dealt with separately (as they are addressed to different audiences) or together; and

(e) Whether the discussion of issues affecting finance to micro-businesses should be dealt with separately, or as part of the general discussions of contractual, transactional and regulatory issues.

D. Style

15. The Working Group may wish to consider how the information in the draft Practice Guide should be presented to become a useful and practical tool containing a description of relevant issues and examples. For example, the Working Group may wish to consider:

(a) Whether the draft Practice Guide should use technical legal terms (which would keep the text concise and enable it to be more comprehensive) or be written in plain language to the extent possible (which would be easily readable by non-experts while there may be the risk of oversimplification);

(b) The extent to which the draft Practice Guide could include visual aids, such as text boxes, diagrams and flowcharts, to make the information in the draft Practice Guide more accessible to readers (acknowledging that there may be limitations due to translation into the other official languages of the United Nations and due to the publication rules of the United Nations);

(c) Whether each section of the draft Practice Guide should be self-contained, which may result in some repetition, or include references to other sections, as long as this does not make the text too difficult to follow or inconvenient to read;

(d) The extent to which the draft Practice Guide should refer to the relevant text of the Guide to Enactment and other UNCITRAL instruments on security interests to help readers understand the policy underlying the provisions of the Model Law;

(e) The extent to which the draft Practice Guide should refer to relevant texts of other international organizations;

(f) Whether the contents of the draft Practice Guide should be set out in the main body of the text or when appropriate, more detailed information could be included in the annex to the draft Practice Guide;

(g) The appropriate length of the draft Practice Guide (references could be made to the Guide to Enactment, the UNCITRAL Notes on Organizing Arbitral Proceedings and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation); and

(h) Whether the draft Practice Guide, like the Model Law and the Guide to Enactment, should be prepared as a publication (including electronically) or as an online resource, subject to obtaining a mandate and identifying available resources.

III. Annotated list of contents

16. The following sets out a possible list of contents of the draft Practice Guide for consideration by the Working Group, which would be subject to the discussions and working assumptions reached by the Working Group on preliminary issues mentioned above.

A. Introduction

1. Benefits of the Model Law

17. This draft Practice Guide could explain the key benefits of the Model Law. The following paragraphs list some of the issues that could be addressed.

(a) Comprehensive scope of the Model Law

18. This section could explain that: (a) the generic concept of "security right" in the Model Law (the unitary approach) results in simplification of secured transactions law as it avoids the use of several concepts; (b) the functional approach of the Model Law ensures that all transactions that serve security purposes are covered; and (c) the comprehensive approach of the Model Law results in the secured transactions law being applicable to all types of grantors, secured creditors, encumbered assets and secured obligations.

19. This section could offer examples of certain types of transactions that are made possible under the Model Law, such as financing the purchase of equipment, revolving lines of credit secured by inventory and/or receivables of a business, term loans secured by grantor's assets generally or by its specific assets, leasing or factoring. In this connection, the Working Group may wish to consider which aspects of the Model Law should be emphasized.

20. This section could summarize the consequences of the extension of the scope of the Model Law to outright transfers of receivables. In many legal systems, the requirement of publicity for outright transfers of receivables would be a legal novelty. Therefore, it could be useful to explain how the requirement of registration and the application of the priority rules in the Model Law to outright transfers of receivables could protect all creditors.

(b) Party autonomy

21. This section could discuss the importance of party autonomy as recognized by the Model Law, in that it gives parties the ability to tailor their transactions to suit their specific circumstances. The limitations of party autonomy could also be highlighted.

(c) Comprehensive and coherent set of third-party effectiveness and priority rules

22. This section could summarize the main rules of the Model Law for determining the effectiveness of a security right against third parties, including competing secured creditors, transferees and lessees, judgment creditors and the administrator in the grantor's insolvency. The section could further illustrate the rules of the Model Law determining the order of priority between a security right and the rights of competing claimants.

(d) Efficient enforcement of security rights

23. This section could summarize the enforcement mechanism in the Model Law, explaining that secured creditors are given the option of enforcing its security right through court proceedings or out of court. It could also point out that the Model Law permits the grantor and the secured creditor to agree on different enforcement mechanisms, provided that their agreement does not prejudice the rights of third parties or the mandatory rights and obligations of the grantor, the secured creditor and other parties with rights in the encumbered asset under the enforcement chapter of the Model Law.

24. The section could further point out that an effective security right under the Model Law would remain effective in the grantor's insolvency, even though enforcement may be subject to a stay, or some other procedure that is prescribed by local insolvency law, which could delay or otherwise affect the enforcement process. The Working Group may wish to consider whether it would be helpful to include

relevant references to UNCITRAL instruments on insolvency law and to explain how they and the Model Law work together on these aspects.

(e) Transparency of security rights: the registry as the cornerstone of the Model Law

25. This section could explain that for a security right to be effective against third parties under the Model Law, the secured creditor should, in principle, register a notice relating to its security right with the secured transactions registry. This section could also explain that notice registration provides a form of publicity of the possible existence of the security right, which reduces the risk of deception of third parties. It could explain how the search feature of the registry can be a powerful tool to enable a creditor to determine, before it extends credit, the priority that its security right will have as against competing claimants.

26. This section could explain the following key features of the registry system:

(a) Notice registration rather than document registration;

(b) Advance registration prior to the creation of a security right;

(c) Registration for third-party effectiveness purposes rather than creation of a security right;

(d) Registration and searching by the name or other identifier of the grantor; and

(e) Electronic registry for both registration and searching.

2. Key terms

27. This section could explain the key terms used in the Model Law, such as security right, security agreement, secured creditor, grantor and movable asset. The Working Group may wish to consider:

(a) Whether the list of terms should be expanded;

(b) The placement of this section in the draft Practice Guide; and

(c) Whether specialized terms should be explained in the context in which they are raised in the draft Practice Guide.

3. Interaction of the Model Law with other laws of the enacting State

28. This section could explain how the Model Law is intended to interact with other laws of the enacting State (such as its consumer protection or insolvency laws). The draft Practice Guide could reiterate the Guide to Enactment reminding legislators enacting the Model Law to ensure that other laws of that State are amended to the extent necessary for their laws as a whole to be consistent and function in a coordinated manner.

29. This section could also explain, for the benefit of regulators and regulated financial institutions, that the Model Law can affect capital adequacy calculations (see section C below for details). On the other hand, these matters and the different ways in which they may play out in the domestic context may raise too many complexities to lend themselves to adequate and satisfactory treatment in the draft Practice Guide.

B. Contractual and transactional issues

1. Secured finance under the Model Law: the fundamentals

30. This section could provide a general explanation of the importance of security in movable assets and the requirements for creating a security right. It could explain the key steps that creditors should take when engaging in a secured transaction. It could further explain the key stages in a simple secured transaction and why that is an effective and useful form of financing. Building on the explanations given for a simple type of transaction, the section could go on to describe more complex

transactions, illustrating what else needs to be done or what needs to be done differently. The section could explain why each type of transaction is an effective and useful form of financing.

31. An example of a simple transaction could be a loan to fund the purchase of a car, a tractor or an item of machinery, with the security right being taken over that asset. While it is also a very common transaction, using this as an example has a disadvantage, as it engages a more complex priority rule (the rule for acquisition security rights) than transactions that rely simply on the "first-to-register" principle. For that reason, the Working Group may wish to consider whether transactions where the grantor owns the asset provided as collateral and is not seeking financing for its acquisition should be more appropriate examples to begin with.

32. The Working Group may wish to consider whether issues relating to the financing of micro-businesses need to be addressed in this section and if so, how.

(a) How to create and make effective against third parties a security right

33. This section could explain the basic requirements that must be satisfied for a secured creditor to obtain an effective security interest. This could focus on the technical requirements for the creation of a security right, in particular: (a) that the grantor has rights in the asset or the power to encumber it; and (b) that the secured creditor (in most cases) has entered into a written security agreement with the grantor. This section could further explain how the writing requirement could be met in electronic form.

34. Possessory pledges are a traditional way of creating a security right in a tangible asset. This section could explain how possessory pledges operate under the Model Law without the need to register a notice in the registry.

35. This section could also focus on making the security right effective against third parties, mainly by the secured creditor registering a notice in the registry. The Working Group may wish to consider whether the draft Practice Guide should also address more complex situations, for example, a party using a control agreement to make a security right in a bank account effective against third parties.

(b) Key preliminary steps for secured finance transactions

36. This section could describe the key steps that should be part of any secured finance transactions under the Model Law, regardless of the identity of the parties, the nature of the funding or the type of encumbered asset.

Due diligence on the customer

37. The Working Group may wish to consider whether any discussion of due diligence on the customer (the borrower or debtor) should begin with an acknowledgment that a lender should never make a loan to a customer if it expects that the customer will not be able to repay the loan and therefore, the lender will have to enforce its security right to be repaid. This discussion could emphasize that security rights should only be taken as a backstop, and a lender should always take steps to satisfy itself that its customer is both able and willing to repay the loan when due, without the lender needing to enforce its security right.

38. This section could then go on to describe steps that a lender could take to satisfy itself of this. Such descriptions could be detailed or simply point out key measures to be taken by the lender. In this connection, the Working Group may wish to consider that lenders will not be able to benefit fully from legislation implementing the Model Law if they do not have the skills to make wise lending decisions. On the other hand, it may be worth considering that the purpose of the draft Practice Guide is to explain how to utilize the Model Law and not to provide a training tool for general lending skills.

Due diligence on the asset to be encumbered

39. This section could list the steps that a lender should take to ensure that the asset being encumbered is suitable as collateral. Attention could be drawn to certain types of assets, especially those that are not generally accepted as collateral in many jurisdictions, such as inventory and receivables. The draft Practice Guide could mention the following steps that a lender should take:

(a) Verifying that the grantor owns or otherwise has rights in the asset;

(b) Valuing the asset (with guidance on how to value different types of assets);

(c) Assessing the availability and adequacy of a market on which it could sell the asset if it were to enforce its security right (with guidance on how a lender could dispose the collateral on such a market);

(d) Determining whether the asset is adequately insured;

(e) Investigating whether third parties may have competing interests (such as statutory preferential claims for unpaid taxes);

(f) Investigating whether the asset is located on a third party's premises, or held by a third party, in a way that might allow that third-party to assert a statutory preferential claim in the asset for amounts owing to it (for example, unpaid rent or service fees), and, if so, whether the lender could obtain a waiver or a subordination agreement from that third party; and

(g) Searching the registry to determine whether there are any prior security rights registered against the grantor that could apply to the asset (with guidance on what the lender could do if there are such registrations).

40. This section could point out that lenders often engage appraisers and other third parties to assist in the due diligence process.

Due diligence on any other credit and security support

41. This section could explain that secured creditors, in certain instances, also take other forms of credit support. These will often come from third parties, in the form of guarantees, letters of credit or credit insurance. This section could go on to explain that, in principle, the secured creditor should undertake the same level of due diligence on these third parties as it takes in relation to the debtor and the grantor, if different.

Documenting the terms of the finance

42. This section could explain that a lender should typically ask its customer to sign a document that sets out the commercial terms of the finance transaction. Depending on the circumstances, the document could address issues, such as:

(a) The obligation of the lender to complete the financing subject to the conditions set out in the document;

(b) The obligation of the borrower to cover the lender's costs of conducting due diligence, whether or not the transaction goes ahead;

(c) The terms of the finance, such as the amount of the loan, the duration, the interest rate and how often interest is to be paid, the repayment schedule, any financial undertakings, and the circumstances in which the loan may need to be repaid early (often referred to as events of default);

(d) What asset is to be provided as security and by whom; and

(e) The fees of the lender.

43. Depending on the jurisdiction and the type of transaction, this information could be contained in a formal credit agreement or something simpler, such as a proposal letter by the lender. Such information may also be contained in several documents and this section could outline different ways in which the information might be documented in practice.

44. Rather than setting out too much detail in the text of the draft Practice Guide, a template of such documents could be set out in its annex. Templates for different types of transactions could be provided. Such templates could then be annotated explaining the relevance of their provisions and options, which would assist lenders in working out how to apply them to their own needs and circumstances.

Security agreement

45. This section could explain how a lender and a borrower could prepare their security agreement. The Working Group may wish to consider whether the draft Practice Guide should include an annotated sample security agreement and if so, whether samples of different types of transactions should be provided.

Closing the deal

46. This section could explain the steps that are normally involved in closing a secured finance transaction, such as:

(a) Registering a notice in the registry (and any follow-up to confirm that the notice has been registered and that no other relevant notice has been registered);

(b) Ensuring that the grantor has executed all the relevant documents; and

(c) Disbursing funds.

Monitoring collateral

47. This section could emphasize the importance of the lender paying attention to the customer even after funding has been provided. This could include steps such as monitoring the grantor's ongoing legal and financial status as well as the location, condition and value of the encumbered asset, including whether the grantor continues to own it.

2. Types of secured transactions under the Model Law

(a) Loan secured by an asset to be purchased with that loan

48. This section could provide an illustration of a loan that is made to purchase an asset with security being taken over that asset. This section could discuss how the rules of the Model Law apply to this type of transaction and offer an annotated template of a loan agreement and a security agreement. In doing so, the Working Group may wish to consider the extent to which the discussions in section B.1.b on key steps for secured finance transactions would need to be repeated to highlight the specific aspects of such transaction (this would also apply to other transactions mentioned below).

(b) Loan secured by all of the grantor’s movable assets

49. This section could provide an illustration of a loan to a business, secured against all its present and future assets. The loan could be a term loan or a revolving line of credit.

(c) Revolving loan secured by the grantor’s inventory and receivables

50. This section could provide an illustration of where the borrower requests a loan to purchase raw materials for manufacturing and repays the loans as the manufactured goods (inventory) are sold, receivables are generated and collected. Thus, borrowings and repayments are frequent (although not necessarily regular) and the amount of credit is constantly fluctuating. Because the revolving loan structure matches borrowings to the borrower’s cash conversion cycle, this type of loan structure is, from an economic standpoint, highly efficient and beneficial to the borrower. It also helps the borrower to avoid borrowing more than it actually needs, thereby minimizing financial costs.

(d) Other types of transactions

51. If the Working Group decides that the draft Practice Guide should illustrate other types of transactions, it could include, for example:

(a) Inventory finance provided by a supplier (which in many jurisdictions is structured as a sale of goods on retention-of-title terms);

(b) Lease finance for an item of capital equipment;

(c) Factoring and other purchases of receivables;

(d) The use of intellectual property as encumbered asset (in itself or as part of a transaction that involves a loan secured by all of the grantor's movable assets or as part of equipment or inventory finance where the equipment or inventory includes an intellectual property right); and

(e) The use of negotiable documents as encumbered asset (including, perhaps, an explanation of how the Model Law interacts with the Geneva Uniform Law for Bills of Exchange and Promissory Notes, where applicable).

3. How to search in the registry

52. This section could explain how to conduct a search of the registry (possibly with reference to the sections on due diligence) and how to understand the search results. This section could include some explanation of the limitations inherent in any search result (i.e. that it will not necessarily indicate that the grantor owns its inventory or receivables and not provide the searcher sufficient information to make a risk assessment without conducting further off-record inquiries). This section could further explain what other steps a searcher can take to obtain more information, if it discovers a potentially relevant result in its search.

4. How and where to register a notice

53. This section could explain how a secured creditor can make its security right effective against third parties by registering a notice in the registry. This section could also explain how and when a secured creditor may wish or need to amend or terminate its registration, illustrating that the Model Law provides two options for the retention of notices in the registry record (see article 30 of the Model Registry Provisions).

54. By explaining the key provisions in chapter VIII of the Model Law (Conflict of laws), this section could explain in which jurisdiction a secured creditor would need to register a notice.

5. How to enforce a security right

55. This section could explain how a secured creditor can use different enforcement mechanisms provided in chapter VIII of the Model Law (Enforcement of a security right) and how they would apply to different types of collateral (including all-asset securities). This could include guidance on identifying markets on which the secured creditor could dispose of the collateral.

56. The draft Practice Guide could also provide annotated templates of various notices that the secured creditor would need to give during the enforcement stage (e.g. under article 78, para. 4), when appropriate.

6. How to collect receivables subject to an outright transfer

57. This section could explain that a transferee of receivables under an outright transfer is not subject to the enforcement rules in the Model Law, because there is no secured obligation to recover. It could explain how such a transferee can collect the receivable. The draft Practice Guide could possibly include templates for relevant notifications and payment instructions.

7. How to transition prior security rights to the Model Law

58. This section could explain what measures a secured creditor would need to take to preserve the third-party effectiveness and priority of its security right created before a new law implementing the Model Law comes into effect, whether or not it was treated as a security right under the prior law.

C. Regulatory issues

1. Introduction

59. The following sets forth some of the issues that the Working Group may wish to consider including in the draft Practice Guide as touching upon the regulatory dimension of secured transactions law. For example, this section could explain how national regulatory authorities could support the implementation of the Model Law, in line with international capital regulation. This section could also explore the practicalities of establishing secondary markets for different types of assets, to make it easier for secured creditors to dispose of encumbered assets on default, and thus enable secured creditors to value the encumbered assets with more accuracy. In general, this section could briefly explain the regulatory environment that would be favourable to transactions covered by legislation implementing the Model Law, thus supporting the overall economic objective of that legislation.

60. As mentioned above (see para. 7 above), the primary audience of this section could be national regulatory authorities and regulated financial institutions subject to capital requirements. It could also target donor and reform-oriented agencies which assist States with the implementation of a modern secured transactions regime, but face challenges devising adequate solutions to stimulate secured lending by regulated financial institutions because of the lack of proper coordination between the secured transactions law and capital requirements.

2. Secured transactions law and capital requirements

61. This section could briefly explain why coordination between capital requirements and secured transactions law is necessary. If they are not properly coordinated, regulated financial institutions that must abide by capital adequacy standards are likely to treat loans secured by movable assets in the same manner as unsecured loans. As a result, such financial institutions are discouraged from extending credit with movable assets as security. Particularly, assets commonly utilized in the types of transactions that the Model Law seeks to promote, such as inventory, farm products and equipment, are generally disregarded or undervalued as eligible collateral under capital requirements.

62. Noting that the capital requirements laws often adopt different terminology, the Working Group may wish to consider the extent to which the draft Practice Guide could use terminology more familiar to regulatory authorities (for example, physical collateral instead of tangible asset). In that context, this section could identify and explain the key terms used in capital requirements law, such as collateralized transaction, technique for credit risk mitigation or eligible collateral, and their relationship to the concepts and terms underlying the Model Law.

3. Movable assets rights as eligible collateral under the Basel Accords

63. On the assumption that a State has adopted or intends to implement both the Model Law and the Basel Accords issued by the Basel Committee on Banking Supervision, this section could discuss ways in which transactions secured with movable assets could reduce credit risk in line with the capital requirements with which regulated financial institutions must comply. In line with the Basel Accords, the draft Practice Guide could discuss ways of ensuring that the risk-weightings attributed to transactions secured with movable assets reflect the actual level of risk taken by regulated financial institutions.

64. By introducing key concepts, this section could explain the main mechanisms for movable assets to count as eligible collateral under the Basel Accords. An example of one such explanation is offered below.

65. Under the Basel Accords, for each loan, regulated financial institutions must calculate a capital charge that is a part of the overall regulatory capital. Capital charges are calculated through a risk-based approach. Risk weights are used to determine capital charges. Different risk weights are attributed different classes of claims, which are inserted into the formula used to calculate capital requirements. As a result, the higher the risk weights are, the higher capital charges will be.

66. Under the Basel Accords, there are three methodologies that regulated financial institutions may adopt to calculate credit risk and determine the core component of capital charges. They are: (a) the standardized approach; (b) the foundation internal rating-based approach; and (c) the advanced internal rating-based approach. Under the standardized approach, risk weights are predetermined and applied to different classes of exposures. The two internal rating-based approach variants allow regulated financial institutions to adopt, upon approval from the relevant national authorities, their own statistical estimations to calculate risk-weighted capital charges.

67. Under any methodology, secured transactions belong to the category of credit-risk mitigation techniques and represent funded credit protections. When credit protections are employed, the resulting risk-weighted charge can be lower than those that are imposed for an otherwise identical transaction that does not employ credit protection.

68. For financial institutions that follow the standardized approach, tangible assets (referred to as "physical collateral") and receivables are not included in the list of recognized eligible collateral. This means that financial institutions may still take those assets as collateral, but that this will not translate into lower capital charges.

69. The advanced internal rating-based approach is more amenable to movable assets. Therefore, a regulatory and legal environment that facilitates the use of movable property as collateral should encourage financial institutions to adopt the advanced internal rating-based approach, in line with sound risk management.

4. Enhancing coordination: regulatory strategy

70. This section could discuss how national regulatory authorities can ensure that the criteria established by the Basel Accords are more easily met by regulated financial institutions. The main points that this section could address are listed below.

(a) Regulatory interventions

71. This section could include recommendations for measures that national regulatory authorities may consider implementing to facilitate loans secured by assets that form the typical borrowing base of small and medium-size enterprises.

(b) Promoting legal certainty

72. This section could discuss commonalities in which the Model Law and the Basel Accords promote legal certainty with respect to movable assets as eligible collateral, as well as differences, for example, with respect to the requirement of the latter for a specific description of collateral in a security agreement.

(c) Emphasizing the importance of the establishment of secondary markets

73. This section could explain the importance of sufficiently liquid secondary markets for the disposal of encumbered assets whether before or after default. With regard to the latter, while secured transactions law may provide for expeditious remedies, the lack of a readily available secondary market could make a lender reluctant to take the asset as collateral. The transparent price discovery is an important requirement for security over that collateral both to determine a loan to value ratio, as well as to reduce capital charges. This section could explore the use of various technologies to establish platforms and other virtual markets. This section could then

go on to indicate how national regulatory authorities could promote the creation of transparent secondary markets where collateral can be disposed of.

(d) Data acquisition and capacity-building

74. This section could indicate how national regulatory authorities could incentivize financial institutions to generate more data and develop sound internal approaches to enhance the eligibility of movable assets as providing an effective technique for credit risk mitigation.

D. Financing of micro-businesses

1. Introduction

75. The Working Group may wish to consider whether the issues relating to financing of micro-businesses should be dealt together with contractual, transactional and regulatory issues or separately as outlined below.

76. The Working Group may also wish to take into account the work of Working Group I and in particular document A/CN.9/WG.I/WP.107 on reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs).

2. Common features of micro-businesses

77. This section could discuss some common features of micro-businesses and issues relating to their financing. Micro-businesses are usually either individual entrepreneurs or small family businesses, and loans are usually of low value, whether term loans or revolving facilities.

3. Types of microfinance transactions

78. This section could discuss the various types of transactions that are particularly suitable for micro-businesses (unsecured or secured by proprietary security rights or personal guarantees). Other possible transactions include inventory and receivables financing.

79. This section could also discuss personal guarantees, which are often given by family, friends or mutualized organizations of micro-businesses, and raise issues of protection of the guarantor (such as problems raised by household insolvency and the coordination of insolvency proceedings). In this connection, one of the questions that the Working Group may wish to address is the interaction between personal guarantees and secured lending.

4. Issues specific to micro-businesses in implementation of the Model Law

80. This section could discuss issues specific to micro-businesses in relation to the implementation of the Model Law. The following outlines some examples.

(a) Notifications

81. One example would be with regard to notifications to be sent to the grantor under the Model Law (e.g. Registry Provisions, article 15, paragraph 2, and Model Law, article 77, paragraph 2 (b), article 78, paragraph 4 and article 80, paragraph 2 (a)) and the address to which such notifications should be sent. When the grantor is a registered business, it will usually have an official address to which notifications can be sent and the secured creditor can be reasonably sure that the grantor will receive it or will not be able to deny that it had received it. When the grantor is an individual, particularly a sole trader, its address may change frequently and the secured creditor will not necessarily know about this change. The same applies to email addresses of individuals, where electronic notifications are permitted.

(b) Enforcement

82. Another example would be with regard to the enforcement of a security right in an asset offered as collateral by a micro-business or where an individual gives a guarantee. For example, it may be necessary to consider the protection of personal assets on enforcement. In addition, the out-of-court remedies provided in the Model Law may be too complicated and costly for very low-value loans. In relation to enforcement of security rights securing very small loans, a simplified out-of-court procedure may be needed with some built-in protection for the debtor. To facilitate enforcement, a small-claims court model with limited access to appeal or the use of alternative dispute resolution (whether physical or online) could be envisaged.

5. Regulatory capacity issues

83. This section could discuss how inequality of bargaining power in microfinance transactions can lead to unfair terms in loan and security agreements. High default interest rates, unfair termination clauses and other unfair terms could be discussed along with ways to address them.

84. The regulation of bank behaviour in relation to financing of micro-businesses could also be discussed. For example, it could be noted that the small size of loans reduces incentives on lenders to do a proper risk assessment, which often results in over-collateralization and deficient monitoring and reaction in the case of distress or default.

C. Report of the Working Group on Security Interests on the work of its thirty-third session (New York, 30 April–4 May 2018)

(A/CN.9/938)

[Original: English]

I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a draft practice guide to the UNCITRAL Model Law on Secured Transactions ("Practice Guide"), pursuant to a decision taken by the Commission at its fiftieth session (Vienna, 3–21 July 2017).[1] At that session, there was support in the Commission to provide guidance to users (such as parties to transactions, judges, arbitrators, regulators, insolvency administrators and academics) of the UNCITRAL Model Law on Secured Transactions ("Model Law") to maximize the benefits of secured transactions laws.[2]

2. The Commission agreed that broad discretion should be accorded to the Working Group in determining the scope, structure and content of the draft Practice Guide, but it was felt that the draft Practice Guide could address the following: (a) contractual issues (such as the types of secured transaction that were possible under the Model Law); (b) transactional issues (such as the valuation of collateral); (c) regulatory issues (such as the conditions under which movable assets were treated as eligible collateral for regulatory purposes); and (d) issues relating to finance to micro-businesses (such issues relating to the enforcement of security interests).[3]

3. At its thirty-second session (Vienna, 11–15 December 2017), the Working Group commenced its work on the draft Practice Guide based on a note by the Secretariat entitled Draft Practice Guide to the UNCITRAL Model Law on Secured Transactions: Annotated List of Contents (A/CN.9/WG.VI/WP.75) and requested the Secretariat to prepare a first draft of the Practice Guide, reflecting the deliberations and decisions of the Working Group (A/CN.9/932, para. 9).

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its thirty-third session in New York from 30 April–4 May 2018. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Belarus, Bulgaria, Canada, China, Czechia, Ecuador, France, Germany, Greece, India, Indonesia, Italy, Japan, Kuwait, Libya, Mexico, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

5. The session was attended by observers from the following States: Algeria, Angola, Cambodia, Cyprus, Cuba, Democratic Republic of the Congo, Dominican Republic, Equatorial Guinea, Iraq, Jamaica, Portugal, Qatar, Senegal, Saudi Arabia and Sudan.

6. The session was attended by an observer from the Holy See.

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

(a) *United Nations system*: World Bank;

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[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 227 and 449.

[2] Ibid., para. 222.

[3] Ibid., paras. 227 and 449.

(b) *Intergovernmental organizations*: European Investment Bank (EIB);

(c) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Centro de Estudios de Derecho, Economía y Política (CEDEP), Commercial Finance Association (CFA), Factors Chain International and the EU Federation for Factoring and Commercial Finance Industry (FCI and EUF), International Insolvency Institute (III), Law Association for Asia and the Pacific (LAWASIA) and National Law Centre for Inter-American Free Trade (NLCIFT).

The Working Group elected the following officers:

Chairperson: Mr. Bruce WHITTAKER (Australia)

Rapporteur: Ms. Pavlína RUCKI (Czechia)

8. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.76 (Annotated Provisional Agenda) and A/CN.9/WG.VI/WP.77 (Draft Practice Guide to the UNCITRAL Model Law on Secured Transactions).

9. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Draft Practice Guide to the UNCITRAL Model Law on Secured Transactions.
5. Future work and other business
6. Adoption of the report.

III. Deliberations and decisions

10. The Working Group engaged in discussions based on a note by the Secretariat entitled "Draft Practice Guide to the UNCITRAL Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.77). The deliberations and decisions of the Working Group are set forth below in chapter IV. At the close of the session, the Working Group requested the Secretariat to revise the draft Practice Guide to reflect the deliberations and decisions of the Working Group.

IV. Draft Practice Guide to the UNCITRAL Model Law on Secured Transactions

A. General remarks

11. At the outset of its deliberations, the Working Group recalled that at its last session it had agreed upon a number of working assumptions pertaining to the structure and intended audience of the draft Practice Guide as well as its scope and style. It was noted the first draft of the Practice Guide as contained in document A/CN.9./WG.VI/WP.77 had been prepared in line with those working assumptions.

Structure

12. It was generally agreed that the draft Practice Guide should retain its current structure consisting of an introductory chapter, a chapter on contractual and transactional issues, and a chapter dealing with regulatory aspects.

13. With regard to the introductory chapter, views were expressed that it could be shortened to provide a summary of the draft Practice Guide and with an aim to further promote the adoption of the Model Law (for further discussion, see para. 85 below). It was also pointed out that some parts of Chapter I as currently drafted could be

incorporated into Chapter II to provide more detailed information. In that context, the Working Group agreed to discuss the length and substance of each chapter as it continued its deliberations on the draft Practice Guide. In addition, suggestions to include visual aids in the draft Practice Guide were made.

Intended audience

14. Recalling its discussion on the intended audience (see paras. 12–18 of A/CN.9/932), the Working Group reaffirmed that the draft Practice Guide should provide useful guidance to a wide range of readers that might not necessarily be familiar with secured transactions as contemplated by the Model Law. It was also reaffirmed that intended audiences for Chapters I and II and for Chapter III (prudential regulatory authorities and regulated financial institutions) were different.

15. During the discussion, it was pointed out that the consideration of the primary target audience of the draft Practice Guide would be useful to determine: (i) the substance of the draft Practice Guide; and (ii) its tone or style, depending on the level of experience and sophistication that a potential reader would have with regard to secured transactions in general and the Model Law.

16. It was widely felt that the draft Practice Guide should be addressed to those who might not be familiar with or have less experience with the application of the Model Law.

17. After discussion, it was felt that the draft Practice Guide could provide guidance to a wide range of readers, including parties to secured transactions, third-parties that might be impacted by such transactions (for example, potential buyers of the encumbered assets, other creditors of the grantor and insolvency administrators), judges and other public officials that would be interpreting or implementing the Model Law, as well as relevant regulatory authorities. It was also widely felt that the primary target audience of the draft Practice Guide should be lenders and others providers of secured credit (including sellers on retention-of-title terms and financial lessors) based on the Model Law and that the draft Practice Guide should highlight the types of transactions that they could engage in. It was therefore agreed that the draft Practice Guide should be drafted with such potential secured creditors in mind, while at the same time addressing points of practical importance to other readers in the relevant parts of the draft Practice Guide.

Other issues

18. During the discussion, a suggestion was made that the draft Practice Guide should refer to the "Model Law" rather than the "Law". The Secretariat was requested to review the document and to make appropriate adjustments.

B. How to engage in secured transactions: guidance on contractual and transactional issues (A/CN.9/WG.VI/WP.77, paras. 68–281)

19. The Working Group agreed to first consider the contents of Chapter II of the draft Practice Guide, as it was felt that its deliberations on issues dealt with in Chapter II would have an impact on the contents and level of detail to be provided in Chapter I.

20. It was noted that while the scenario presented in paragraph 69 was intended to provide an example of a simple secured transaction that would apply throughout the draft Practice Guide, readers might find it difficult to refer to that scenario in later portions of Chapter II. It was therefore suggested that scenarios should be reproduced when applicable and presented in boxes for the benefit of the readers. It was also suggested that the draft Practice Guide should indicate the nature of the parties involved in those secured transactions (for example, Manufacturer or Borrower X; Bank or Financier Y) in the scenarios to avoid any confusion.

21. With regard to the scenario in paragraph 69, it was suggested that more complicated examples should be provided at the outset of the draft Practice Guide to

illustrate different opportunities provided by the Model Law. However, it was also suggested that a simple transaction would be more useful to illustrate the fundamental steps required in the Model Law, in other words, how to create a security right and make it effective against third parties. The fact that some of those requirements might be novel in certain jurisdictions was highlighted. It was also noted that more complex types of examples could be developed based on the scenario in paragraph 69.

1. Secured transactions under the Law: The fundamentals (A/CN.9/WG.VI/WP.77, paras. 70–89)

22. The Working Group decided to consider the scenario in paragraph 69 within the context of Chapter II.A.

How to create a security right

23. It was felt that paragraphs 70 to 74 could be abbreviated to focus on practical aspects required to create a security right. For example, it was noted that the issues addressed in paragraphs 72 to 74 could be included in the scenario or be mentioned more briefly.

24. In response, it was said that the draft Practice Guide would need to address those issues (the possibility that the grantor may not necessarily have ownership, that a party other than the debtor may grant a security right and the creation of a security right over a future asset), which might be novel in jurisdictions adopting the Model Law. It was further mentioned that those aspects were currently mentioned in general terms in Chapter I.

25. Subject to its further discussion on Chapter I, the Working Group agreed that paragraphs 70 to 74 should be revised to briefly outline how parties could create a security right under the scenario in paragraph 69.

How to make a security right effective against third parties

26. Similar to its approach taken above, the Working Group agreed that paragraphs 75 to 89 should avoid a lengthy discussion on the legal aspects and focus instead on the steps to be taken by parties to achieve third-party effectiveness with reference to the scenario in paragraph 69, namely, that a security right can be made effective against third parties by registering a notice, that registration of a notice can take place at any time, and that taking possession of the asset was not appropriate for that scenario. The Working Group agreed to further consider the issues after its consideration of Chapter I.

2. Different types of financing facilitated by the Model Law (A/CN.9/WG.VI/WP.77, paras. 90–128)

General aspects

27. With respect to Chapter II.B, the following suggestions were made:

(a) Financing based on all assets of the grantors should be included as a type of financing facilitated by the Model Law and further explained;

(b) Sophisticated transactions like securitization, value chain arrangements, and supply chain financing should not be dealt with in the Practice Guide or should only be mentioned briefly;

(c) Issues arising from agriculture value chains could be briefly mentioned in Chapter II.C;

(d) Focus should be on new transactions that were made possible with the enactment of the Model Law as well as improvements brought forth by such enactments;

(e) There was a need for the Practice Guide to provide some examples of secured transactions involving certain types of assets, such as bank accounts and financial instruments, while noting the comprehensive scope of the Model Law;

(f) The use of intermediated securities as collateral should be mentioned because, although excluded from the scope of the Model Law, they constituted an important type of collateral. In that context, it was further suggested that the use of non-intermediated securities, which fell within the scope of the Model Law, should be illustrated in detail; and

(g) Including examples of consumer financing should be considered, although the main focus of the Practice Guide should continue to be to provide guidance to businesses.

28. After discussion, the Working Group agreed that:

(a) In providing illustrations of transactions, emphasis should be given to their security aspects and the application of the Model Law to such transactions, rather than to their financing aspects;

(b) Examples should be presented at the outset of each transaction for the benefit of the readers;

(c) The list to be provided should not be presented as an exhaustive list of transactions possible under the Model Law;

(d) An illustration of secured transactions involving all assets of the grantor should be included as a separate section after the section dealing with acquisition financing;

(e) Sophisticated financing techniques (for example, securitization, project financing, value chain arrangements, and supply chain financing) should be mentioned as possible transactions but not explained in detail;

(f) The use of intermediated securities as collateral, though excluded from the scope of the Model Law, could be mentioned to draw the attention of the readers to the fact that intermediated securities were commonly used for security purposes and thus constituted an important type of collateral;

(g) In contrast, illustrations should be provided for how financing using non-intermediated securities as collateral (including in the context of corporate groups) was facilitated by the Model Law; and

(h) Acknowledging that the focus of the Practice Guide was secured lending to businesses, financing to individuals for personal, family and household purposes could be mentioned as an example under the section dealing with acquisition financing.

Acquisition financing

29. With respect to acquisition financing, it was agreed that:

(a) A number of different examples of acquisition financing should be introduced at the outset, which would include a sale on retention-of-title terms, acquisition financing of intellectual property, as well as those involving different types of lenders;

(b) The non-unitary approach as discussed in the UNCITRAL Legislative Guide on Secured Transactions Guide (as well as the terms “unitary” and “non-unitary”) would not be dealt with in the Practice Guide; instead, examples would highlight that the approach of the Model Law made it possible to achieve substantially the same outcomes as might have been available in prior law; and

(c) The notion of super-priority should be described briefly with a few simple examples on how to obtain such super-priority.

Inventory and receivable revolving loan financing

30. With respect to inventory and receivable revolving loan financing, it was agreed that:

(a) As this type of secured transaction may be novel in a number of jurisdictions, more detailed information could be provided on the requirements for, and the consequences of, those transactions;

(b) While technical terms may be introduced and used when appropriate, use of terms like "borrowing base", which might not be known in many jurisdictions, should be avoided and instead be described in general terms; and

(c) In the example provided in paragraph 110, references should be made that: (i) it would be common to also create a security right in bank accounts; and (ii) a control agreement would not always be needed as the deposit-taking bank would in many cases be the lender itself.

Factoring

31. With respect to factoring, it was agreed that the section should deal broadly with financing based on outright transfers of receivables, of which factoring was one common example. It was further agreed that, with regard to factoring on recourse and non-recourse bases, the section should explain why and how the Model Law would apply to both instances, as currently described in paragraphs 23 and 24 of document A/CN.9/WG.VI/WP.77.

Securitization

32. In accordance with its previous decision (see para. 28(e) above), the section on securitization should be deleted.

Term loan financing

33. Considering that the Working Group decided to include in Chapter II.B transactions encumbering all assets of the grantor (see para. 28(d) above), it was agreed that there was no need to retain the section on term loan financing. In support, it was stated that term loan financing did not raise any issues unique to secured transactions that merited specific attention in the draft Practice Guide.

Sale and leaseback transactions

34. It was agreed that sale and leaseback transactions should not be presented as a distinct type of transaction in Chapter II.B and that the draft Practice Guide should simply provide an explanation as to how those transactions would fit into the scheme of the Model Law, which provided a functional approach. It was suggested that certain aspects of those transactions could be mentioned in the section dealing with acquisition financing (see para. 98 of document A/CN.9/WG.VI/WP.77).

Financing practices involving negotiable documents and instruments

35. With regard to financing practices involving negotiable documents and instruments, it was agreed that the section should be revised to focus on secured lending based on negotiable documents and to provide more practical guidance (for example, on the possibility of achieving third-party effectiveness through possession of the negotiable document). It was further agreed that the draft Practice Guide would note the possibility of using negotiable instruments for security purposes along with other types of assets. In that context, it was suggested that the rights of a secured creditor in possession of a negotiable instrument in States party to the Geneva Uniform Law and the Bills and Notes Convention could be addressed in Chapter I.E.

Financing related to intellectual property

36. With regard to financing involving intellectual property, it was agreed that:

(a) The section should be re-organized to highlight the benefit that the Model Law introduced with regard to the financing involving intellectual property;

(b) The section should not present the types of transaction involving intellectual property as falling into two broad categories, but rather provide a typical

example of such transaction which could include different types of intellectual property (for example, patents and copyrights); and

(c) The section should also touch upon the fact that intellectual property might be included in the pool of assets when a security right was granted over all assets of the grantor and in that context, possibly explain that a security right over a tangible asset with which an intellectual property might be associated would not extend to the intellectual property, unless agreed by the parties.

37. With respect to the suggestion that the section should highlight the interaction of the Model Law with the law relating to intellectual property as found in article 1(3)(b) of the Model Law, it was noted that the draft Practice Guide included a general discussion on the interaction of the Model Law with other laws of a State in Chapter I.E. Therefore it was suggested that this section should describe how article 1(3)(b) of the Model Law could facilitate the use of intellectual property as collateral.

38. As a drafting point, it was suggested that the use of the term "company" should be avoided in the draft Practice Guide, as many grantors might not take such a legal form.

3. Due Diligence – a key preliminary step for secured financing (A/CN.9/WG.VI/WP.77, paras. 129–167)

Introduction

39. With respect to introductory paragraphs 129 to 135, it was felt that they could be simplified while highlighting that the appropriate level of due diligence might vary depending on the type of secured transaction.

40. The Working Group then considered whether and to what extent the draft Practice Guide should address over-collateralization. It was generally felt that the draft Practice Guide should not address different policy approaches to over-collateralization, as the Model Law had not taken a position on the matter and as the notion of over-collateralization was unclear and understood differently in various jurisdictions. It was noted that in some States, a security right encumbering too much collateral could be deemed null or its enforcement jeopardized through the operation of other laws. Therefore, it was suggested that issues relating to over-collateralization should be addressed in Chapter I.E dealing with the interaction of the Model Law with other laws, alerting lenders that their security right could be impacted.

41. It was further noted that there was no provision in the Model Law that restricted over-collateralization, but rather that the Model Law made it possible for a secured creditor to create a security right over a broad range of assets (including all assets of the grantor) in a simple fashion. It was stated that this could result in the lender not properly conducting due diligence. Therefore, it was suggested that the draft Practice Guide should provide ample guidance to lenders that taking a security right in all assets of the grantor should not be a substitute for conducting due diligence. In that context, it was pointed out that the draft Practice Guide should describe ways to ensure that due diligence could be conducted in an effective manner.

42. During the discussion, it was pointed out that while the Model Law allowed a borrower to grant a security right over the remaining value of the collateral to other creditors, it could, in practice, be difficult to do so, which raised concerns about access to credit in certain jurisdictions. In that vein, it was suggested that the matter could be addressed in the chapter dealing with regulatory aspects. In relation, reference was made to article 6(3)(d) of the Model Law, which provided States the option of requiring that the security agreements state the maximum amount for which the security right could be enforced. It was explained that the underlying rationale of that option was to facilitate grantor's access to secured financing from other creditors when the value of the assets encumbered by the prior security right exceeded the maximum amount agreed to by the parties in their security agreement.

43. After discussion, the Working Group agreed that the draft Practice Guide should not include any policy discussion on over-collateralization. It was further agreed that so as to provide practical guidance, Chapter I.E would indicate that as laws or jurisprudence in certain States might penalize lenders for taking excessive collateral for a given loan, lenders should take due caution. It was also agreed that Chapter II.C would instead highlight the importance of lenders to conduct proper due diligence, even when their loan was sufficiently secured by collateral, including when all assets of the grantor were encumbered. It was further agreed that means to conduct cost and time-effective due diligence could be mentioned.

Due diligence on the borrower and other grantors

44. With respect to the section on due diligence on the borrower and other grantors, it was agreed that the focus should be on aspects of due diligence specific to secured lending and not lending in general. It was also widely felt that the section should not give the impression to lenders that due diligence was required under the Model Law (as it might increase transaction costs) but rather that it would be prudent to conduct due diligence to ensure the effectiveness of their security right. It was also agreed that the section should make it clear that the Sample Certificate provided in the annex was not a standard to be followed but merely an example that could be adjusted depending on the type of borrower and other circumstances. The Working Group further agreed that detailed explanation of the different parts of the Sample Certificate could be included as annotations in the annex.

Due diligence on the collateral

45. With regard to the list provided in paragraph 147, it was generally felt that the list sufficiently covered matters to be covered by lenders in undertaking due diligence on the collateral. In line with its deliberations (see paras. 40 and 43 above), the Working Group agreed that the list could include the need for lenders to assess whether there were possibly other laws (or decisions by courts) that could impact the efficacy of the security right they purported to obtain. It was suggested that reference could be made to article 6(3)(d) of the Model Law.

46. With regard to section 3 of the Sample Certificate, it was agreed that the list contained therein should include a wide variety of possible assets and at the same time, highlight common assets that businesses could provide as collateral.

47. With respect to paragraphs 149 to 151, it was agreed that the need for lenders not only to verify the rights that a grantor had in the asset but also to assess the nature and the extent to which such rights would serve as appropriate security should be highlighted. It was further agreed that paragraph 151 could include an example of how lenders would verify the rights of the grantor in intellectual property, both registered and unregistered.

48. With respect to paragraphs 152 to 157, it was agreed that they should illustrate the following points in practical terms:

(a) The need to ascertain the existence of conflicting security rights including with regard to acquisition financing;

(b) Measures to be taken by a potential lender when it identified the existence of competing security rights or other rights in the asset (for example, terminating the transaction, requesting a cancellation notice or a subordination agreement);

(c) That search of the Registry might not always be sufficient as possession and control agreements were other means to achieve third-party effectiveness in the Model Law;

(d) Guidance on how lenders could verify possession of the asset at a given time as well as continuity in possession; and

(e) Measures to be taken when the asset had been acquired by the potential grantor (for example, inquiring whether the asset was acquired in the ordinary course

of business) as well as when the asset might be proceeds and thus subject to a competing security right.

49. With respect to paragraphs 158 and 159, it was agreed that they should be moved closer to paragraphs 148 to 151.

50. With regard to paragraphs 160 and 161, it was agreed that they should highlight that the valuation methods of the collateral would differ depending on the types of asset and also depending on whether the secured creditor would dispose of the asset (for example, inventory) or collect it (for example, receivables). It was agreed that more guidance should be provided to lenders on how to value the assets bearing in mind that the valuation would depend largely on what the lender could recover upon default of the grantor in a disposition of the collateral that might take place under conditions of a forced sale. It was further stated that paragraph 161, which dealt with the administrative aspects of the revolving facility, should be revised to focus on the valuation of the income stream of the borrower in the case of an all asset security right.

51. With regard to paragraph 162, it was agreed that emphasis should be made that a prudent lender should determine whether the collateral was adequately insured, while not giving the impression that the Model Law required collateral to be insured, as insurance might not be readily available. It was further agreed that the discussion on how a security right extended to insurance proceeds under the Model Law and how the secured creditor could make arrangements to exercise such rights could be explained in more detail. It was also suggested that the paragraphs could note the possibility of creating a security right over insurance proceeds as original collateral. It was further agreed that paragraph 163 could be deleted.

52. With regard to paragraphs 164 to 167, it was agreed that there was a need to distinguish and explain why a lender would need information as to the place of central administration of the borrower, the location of the collateral, and the name and address of the depositary bank. It was further agreed that paragraphs 165 and 166 should be deleted or placed in Chapter II.G dealing with the enforcement of a security right.

53. At the end of its discussion on Chapter II.C, the Working Group agreed that the draft Practice Guide should contain a separate section illustrating the importance of continued monitoring as part of due diligence before and after closing the deal. In conjunction, it was stated that that section could particularly highlight aspects that lenders would need to take into account when engaging in secured transactions with micro-businesses, as relevant information might not be publicly available and such businesses were more likely to change identifiers.

4. Searching the registry (A/CN.9/WG.VI/WP.77, paras. 168–175)

Why and when to search?

54. It was felt that paragraphs 168 and 169 were primarily focused on the perspective of a lender. In that context, it was agreed that they should also address the need as well as reasons for third parties (such as buyers, the grantor's judgment creditors and insolvency representatives) to conduct a search of the Registry.

55. With regard to paragraph 169, it was noted that the circumstances might differ depending on which option in article 38 of the Model Law a State enacted. In that sense, it was agreed that the paragraph should be clarified.

How to search?

56. With respect to close match registry systems, it was noted that a searcher would first verify whether the search result revealed notices pertaining to the potential grantor and then verify whether the collateral mentioned in those notices were relevant. It was agreed that paragraph 172 including the last sentence should be revised to clarify those points.

57. With respect to paragraph 173, it was agreed that the draft Practice Guide should advise the secured creditor to register an amendment notice where the name of the grantor changed after the registration of a notice. It was also agreed that the draft Practice Guide should address circumstances where the encumbered asset had been transferred.

Searches in other registries

58. It was agreed that the draft Practice Guide should list examples of other registries where the lender would typically have to conduct a search. It was also agreed to modify paragraph 174 to reflect the point that a potential lender would need to conduct a search of all relevant registries whether or not the assets fell within the scope of the Model Law if they were to be included in the security agreement.

5. Preparing the security agreement (A/CN.9/WG.VI/WP.77, paras. 176–187)

59. With respect to paragraphs 176 to 187, it was agreed that:

(a) Those paragraphs should be restructured to focus on compliance with legal requirements under the Model Law on one hand and on best practices from a practical perspective on the other;

(b) The requirement that the written security agreement be signed by the grantor should be mentioned;

(c) The Sample Agreement as provided in the annex should be introduced earlier in the section to allow for references to be made;

(d) Consistent with the decision on the Sample Certificate (see para. 44 above), the Sample Agreement should be presented as an example, which would need to be adjusted depending on the type of transaction; and

(e) The description of how the principle of party autonomy operated in the Model Law in paragraph 186 should be improved.

60. Considering the functional approach taken in the Model Law, it was noted that retention-of-title or financial lease agreements would also need to be in writing to constitute a valid security agreement under the Model Law.

6. Registration of a notice in the Registry (A/CN.9/WG.VI/WP.77, paras. 188–230)

How and where to register and who should register?

61. It was agreed that paragraphs 188 to 192 should be restructured to address separately the questions of who should register, where to register and how to register. It was agreed that the "notice-based" registry system should be briefly outlined in that context as it might be novel to some readers. With regard to the question of where to register, it was agreed that the draft Practice Guide would note to lenders that they might need to register in a registry other than the general security rights registry and in certain circumstances, in a registry of another State. In relation, it was mentioned that reference could be made to the list of registries that would be provided in Chapter II.D (see para. 58 above).

Information to be included in an initial notice

62. With regard to paragraphs 195 to 205, it was agreed that they should briefly list the information required in an initial notice without providing too much explanation. In that context, it was agreed that attention should also be drawn to information that a registrant might prefer not to include in notices (for example, security agreements, invoices or documents with proprietary or confidential information), as they would be made public through the Registry. It was agreed that the example in paragraph 204 should be retained as it provided useful guidance.

Registration of an amendment notice

63. With regard to paragraph 211, it was agreed that the paragraph should explain that the new secured creditor (which was assigned a security right) would have an interest in registering an amendment notice, as it would want to avoid the previous secured creditor (which assigned its security right) inadvertently registering an amendment or cancellation notice.

Proceeds

64. With regard to paragraphs 214 to 216, it was agreed that they should be retained in Chapter II.F, possibly incorporating certain aspects mentioned in paragraphs 87 to 89 of document A/CN.9/WG.VI/WP.77. It was agreed that the revised paragraphs should distinguish more clearly when an amendment notice needed to be registered with regard to proceeds and when it was not necessary, using examples of different types of proceeds.

65. With regard to paragraph 217, it was suggested that the second sentence should be further clarified. With regard to paragraph 219, it was suggested that the last sentence should highlight that the secured creditor would need to ensure that it was informed of any expiry of registrations.

66. With regard to the three options provided in article 26 of the Model Registry Provisions dealing with post-registration transfer of the encumbered asset, it was agreed that the draft Practice Guide should further elaborate on what the secured creditor would need to do under each option. The Working Group agreed that the placement of such text would be determined at a later stage.

What are the obligations of the secured creditor with regard to registration

67. It was suggested that the second sentence of paragraph 220 be re-drafted to state that a grantor's written authorization could be obtained in a simple manner and not provide an implication that such requirement would impede the efficiency of the registration process. It was suggested that paragraph 221 should include cross-references to paragraphs 222 and 223, as they described safeguard measures for grantors in the circumstance described in paragraph 221.

68. It was agreed that the draft Practice Guide could include sample forms for authorizing registration of a notice and for requesting the registration of an amendment or cancellation notice in the annex.

Registration inadvertently amended or cancelled

69. With respect to paragraph 230, it was agreed that the draft Practice Guide could describe how a secured creditor would need to address registration inadvertently amended or cancelled in accordance with the different options provided in article 21 of the Model Registry Provision. The Working Group agreed that the placement of such text would be determined at a later stage.

7. Priority competitions

70. After discussion, the Working Group agreed to include a separate section on priority competitions in Chapter II, which would consolidate relevant parts from Chapters I and II. Considering the wide range of priority competitions that could arise, it was agreed that some typical examples would be provided illustrating how the provisions of the Model Law would resolve such competitions.

8. How to enforce a security right (A/CN.9/WG.VI/WP.77, paras. 231–263)

Notion of default and enforcement

71. It was stated that default did not necessarily trigger the enforcement of a security right by a creditor. Therefore, it was agreed that the section should begin with a generic description of what would generally constitute default (including the insolvency of the debtor or grantor, and commencement of enforcement by a

lower-ranking secured creditor) and further explain options available to secured creditors (including the assignment of the security right). It was further agreed that some discussion on issues that arose in the context of enforcement of security rights against micro-businesses could be mentioned.

72. The Working Group agreed that the introductory paragraphs of the section on enforcement would state that enforcement may differ depending on the type of assets and that corresponding examples would be provided.

Terminating and taking over the enforcement process

73. It was agreed that the paragraphs dealing with termination of and taking over enforcement process could be placed at the end of the section on enforcement. It was further agreed that paragraphs 234 and 235 should more accurately reflect the rule in article 75 of the Model Law, which referred to "affected persons".

Obtaining possession of the collateral

74. With respect to paragraphs 242 and 243, it was agreed that judicial and extrajudicial means of obtaining possession should be presented in a neutral fashion.

75. In response to concerns raised about the appropriateness of paragraph 245 in the draft Practice Guide (based on the idea that seizing several or all assets of the grantor might be a sensible business decision), it was agreed that the enforcement section would instead include a paragraph highlighting that the general standards of conduct in article 4 of the Model Law also applied to enforcement of a security right and that secured creditors were thus expected to exercise their rights in good faith and in a commercially reasonable manner during enforcement.

Disposition of the collateral

76. It was agreed that more practical advice should be given with regard to steps to be taken by the secured creditor in disposing the encumbered asset (including ways to identify or, in certain cases, create secondary markets). It was mentioned that the first sentence of paragraph 246 could be re-phrased to better reflect the expectation of the secured creditor and that the paragraph as a whole should mention that a secured creditor could also dispose of receivables and other intangible assets.

Leasing or acquisition of the collateral and collection of payment

77. It was generally felt that the section on enforcement should set out the different options available to a secured creditor separately and in a neutral fashion, explaining why the secured creditor might wish to dispose of, lease, license or acquire the encumbered asset. As discussed (see para. 72 above), it was agreed that the draft Practice Guide should set out the different enforcement options available for certain assets, for example, that a secured creditor might wish to dispose of receivables in certain cases or collect payment in other cases. With regard to paragraph 257, it was agreed that the operation of article 80(4) and (5) of the Model Law should be described in more detail.

78. The Working Group agreed to include sample templates of payment instructions in the annex.

Distribution of proceeds and rights of the buyer or other transferee of the collateral

79. It was agreed that paragraphs 260 to 264 should be presented together. It was agreed that those paragraphs would explain that disposition could be done judicially or extrajudicially and further explain how the distribution of proceeds as well as the rights of the buyer or other transferees would differ in each circumstance.

9. Transition (A/CN.9/WG.VI/WP.77, paras. 265–267)

80. It was widely felt that the section on transition should be further elaborated to provide more practical guidance to parties when a new secured transaction law had been enacted based on the Model Law. It was noted that transactions that were

primarily impacted by the transition provisions of the Model Law were those that were entered into before the effective date of the new law.

81. It was agreed that more examples in addition to the one provided in paragraph 267 should be provided also drawing upon the experience of States that had gone through such transition. It was also agreed that the draft Practice Guide should touch upon issues relating to the enforcement of a prior security right.

82. It was further agreed that paragraph 266 should be clarified that while the third-party effectiveness of a prior security right might be preserved, priority of that security right as against the rights of competing claimants would need to be determined in accordance with article 106 of the Model Law.

10. Cross-border transactions (A/CN.9/WG.VI/WP.77, paras. 53–58 and 268–281)

83. The Working Group agreed that issues that arose from cross-border transactions should be dealt with collectively in the draft Practice Guide and thus decided to consolidate Chapter I.F into Chapter II.I. It was noted that cross-border secured transactions often raised very complex questions, particularly due to the diversity of the circumstances and of the laws that could be applicable (including laws of other States that might not have enacted the Model Law or not have included the conflict-of-laws provisions). In that context, it was agreed that the section should not aim to provide comprehensive guidance but rather a general overview of the relevant issues through examples.

84. It was agreed that the section should first explain and emphasize why lenders would need to determine the law(s) that would be applicable to the creation, third-party effectiveness (including in which State to register), priority and enforcement of a security right as well as in the case of the grantor's insolvency. It was stated that the key message to be delivered was that lenders would need to take into account laws of other jurisdictions when they engaged in secured transactions that might have a cross-border element.

C. Introduction (A/CN.9/WG.VI/WP.77, paras. 1–67)

85. After completing its consideration of Chapter II (see paras. 19–84 above), the Working Group then considered Chapter I, which provided an introduction to the draft Practice Guide. It was agreed that:

(a) Paragraphs 1 to 8 should be retained in Chapter I;

(b) Paragraphs 9 and 10 should be placed elsewhere in the draft Practice Guide and paragraph 10 revised to briefly mention the United Nations Convention on the Assignment of Receivables in International Trade;

(c) Paragraphs 11 to 16, though shortened, should be retained in Chapter I and also highlight that the Model Law provided for the creation of a security right over all assets of the grantor;

(d) Paragraph 11 should include current statistical data, if available, or examples of reforms taken by States to illustrate that the enactment of the Model Law had a positive impact on access to credit;

(e) Paragraphs 17 to 18 should be retained in Chapter I to briefly outline the nature of a security right under the Model Law including that a secured creditor would have priority over unsecured creditors;

(f) Paragraphs 19 to 24 should be retained in the draft Practice Guide as they provided useful guidance, but placed elsewhere;

(g) The draft Practice Guide should use terminology used in the Model Law to the extent possible;

(h) Paragraph 25 should be retained in Chapter I, giving particular emphasis to transactions that might not have been possible prior to the enactment of the Model Law;

(i) Paragraphs 26 to 29 should be placed in the new section dealing with priority (see para. 10 above) and paragraph 27 should accurately reflect article 29 of the Model Law with regard to priority competition between security rights that were made effective against third parties by registration of a notice, which was determined by the order of registration;

(j) Paragraphs 30 and 31 should be retained in Chapter I;

(k) Paragraphs 32 to 42 should simply set out the benefits and key features of the Registry, with detailed explanations placed elsewhere in the draft Practice Guide;

(l) The Glossary in paragraph 45 should be further developed and placed in the annex; in relation, the definitions should not simply repeat those found in the Model Law but be more descriptive and include examples, where appropriate;

(m) With regard to paragraphs 46 to 52, a short paragraph drawing the attention of the readers to the interaction of the Model Law with other laws of States should be retained in Chapter I, with the remaining paragraphs further elaborated and placed elsewhere in the draft Practice Guide;

(n) In accordance with the decision (see para. 83 above), paragraphs 53 to 58 would be consolidated with Chapter II.I; and

(o) With regard to paragraphs 59 to 67, Chapter I would include a few paragraphs on the specific features of, and typical transactions engaged in by, very small businesses and on the advantages that the Model Law provided for secured lending to such businesses; in relation, relevant transactional aspects relating to very small businesses would be dealt with in the respective sections of Chapter II.

D. The interaction between the Model Law and the prudential regulatory framework (A/CN.9/WG.VI/WP.77, paras. 282–304)

86. With regard to Chapter III in general, some doubts were expressed about its target audience. However, there was continued support for the inclusion of Chapter III in the draft Practice Guide, and that it be addressed primarily to financial institutions, as a way to ensure that the Model Law achieved its objective of increasing access to credit using movable assets as collateral and to ensure that financial institutions were informed of relevant considerations.

87. After discussion, it was agreed that Chapter III would be retained in the draft Practice Guide, be brief to the extent possible, explain the approaches in a neutral fashion, and be explanatory to set out the issues to be considered. The Working Group took note of a number of suggestions with regard to the drafting as well as the substance of Chapter III and requested the Secretariat to revise the Chapter accordingly for consideration at its next session.

E. Annex of the draft Practice Guide

88. With regard to the Sample Agreement and Sample Certificate provided in the annex of the draft Practice Guide, it was agreed that considering that they were supposed to provide examples rather than model templates, they could be simplified and presented in a neutral manner to accommodate various legal traditions. A number of suggestions received support and the Secretariat was requested to prepare additional samples (see paras. 68 and 78 above), within the resources permitting, for consideration by the Working Group at its next session.

V. Future work and other issues

89. The Working Group agreed to recommend to the Commission that its next session scheduled in Vienna be held from 17 to 21 December 2018 instead of the currently proposed dates of 26 to 30 November 2018.

90. Noting that the Working Group would likely be in a position to submit the draft Practice Guide for adoption by the Commission at its fifty-second session in 2019, the Working Group engaged in a discussion on possible future work for consideration by the Commission.

91. It was recalled that the Commission, at its fiftieth session, had retained in its future work agenda the topics of warehouse receipts, intellectual property licensing, and alternative dispute resolution for further discussion without assigning any priority to them (A/72/17, para. 229).

92. At this session, the Working Group took note of a proposal from the Governments of the United States of America and Mexico that work should be undertaken to prepare a substantive text on warehouse receipts, which would provide a modern and predictable legal framework. The desirability and feasibility of undertaking such work were highlighted and it was further suggested that such work should be undertaken in cooperation with other international and regional organizations that have been involved on the topic.

93. After discussion, the Working Group agreed to recommend to the Commission that it be mandated to undertake work as set out in the annex to this report.

94. The Working Group took note of an additional proposal that the Commission might wish to consider work on digital architectures in respect of secured transactions (including distributed ledgers, blockchain, smart contracts, and internet of things). It was felt that such work, which would build on and supplement the work of the Commission in the area of security interests, could further facilitate access to credit based on modern digital technology. It was suggested that the work on digital architectures could be conducted concurrently with the work on warehouse receipts. In response, it was mentioned that additional information might need to be provided to the Commission for it to fully consider the topic as possible future work.

95. After discussion, the Working Group also agreed to recommend to the Commission that work on digital architectures in respect of secured transactions be placed on its future work agenda, taking into account any additional information that might be provided for its consideration of the topic.

Annex

Proposal for Working Group VI to work on preparing a substantive text on warehouse receipts

I. Introduction

At the Fourth UNCITRAL International Colloquium on Secured Transactions (15–17 March 2017), experts recommended developing a modern general framework for the issuance, transfer and cancelation of warehouse receipts including: the duties and rights of issuers as well as holders of warehouse receipts; the mechanics of transferring warehouse receipts and the nature of rights that may be acquired by transferees under negotiable and non-negotiable documents; enforcement; clear rules addressing allocation of losses in case of a shortage; as well as rules concerning third party effectiveness of security rights in warehouse receipts, especially electronic warehouse receipts.[4]

Colloquium experts discussed both the desirability and feasibility of developing a legislative text on warehouse receipts in UNCITRAL. Colloquium experts pointed out that while the elaboration of rules and guides to promote access to credit and facilitate international trade has been on UNCITRAL's agenda for decades, no consideration has yet been given to modernizing and harmonizing the law relating to warehouse receipts. A legal instrument on warehouse receipts would allow many businesses to benefit from a predictable and modern legal framework that facilitates sales of warehouse receipts, as well as increasing access to credit by facilitating their use as collateral for loans, both of which are increasingly international. Application of this framework would not be limited to agricultural producers, but would equally benefit traders and processors that deal, for instance, with minerals or general inventory. The international trade aspect of this project has become important in recent years due to the development of supply and value chains that rely on adequate storage of commodities whose sales eventually generate receivables. UNCITRAL's work in developing legislative frameworks for negotiable documents in other contexts provides a natural basis for it to engage in developing a legal framework for warehouse receipts. A new UNCITRAL text on warehouse receipts would build on the UNCITRAL Model Law on Secured Transactions, which already contains rules on the third-party effectiveness, priority, enforcement, etc. of security rights in negotiable documents, including warehouse receipts.[5]

The proposal to have UNCITRAL engage in work on warehouse receipts attracted support among colloquium participants. It is, therefore, proposed that UNCITRAL engage in work on warehouse receipts along the lines suggested by colloquium experts. Any work on the subject should be conducted in consultation with other international organizations that have been involved in warehouse receipts projects and supply chain finance, especially Unidroit, the United Nations Conference on Trade and Development (UNCTAD), the World Bank, the Food and Agriculture Organization (FAO), the European Bank for Reconstruction and Development (EBRD), and the Organization of American States (OAS).

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[4] See Note by the Secretariat, Possible future legislative work on security interests and related topics, 20 April 2017, A/CN.9/913, paras. 45–53 (providing a summary of the colloquium results on warehouse receipts). At its 50th Session, the Commission decided that work on warehouse receipts should be retained in its future work program. The United States stated that it intended to present a paper on warehouse receipts for consideration at a future session. See *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 219–20, 225, 229.

[5] Marek Dubovec and Adalberto Elias, *A Proposal for UNCITRAL to develop a Model Law on Warehouse Receipts*, Uniform Law Review, Vol. 22 (2017), at 727–730.

II. Desirability

A modern and harmonized warehouse receipts legal regime contributes directly to economic growth and development. Warehouse receipts have many important commercial uses, including to facilitate sales and distribution of commodities and to allow businesses to access credit. Warehouse receipts benefit producers and traders, whether those engaged in domestic or cross-border transactions, who may rely on the possession or control of a negotiable warehouse receipt to demonstrate ownership and security rights to the goods. Their ability to sell and encumber warehouse receipts is a function of a predictable and certain legal framework. Warehouse receipt financing allows exporters and importers of agricultural commodities or other assets to access credit using warehouse receipts as collateral. Warehouse receipts are key components of supply chain financing when the chain of commerce involves highly merchantable "dry" commodities, goods or metals. Warehouse receipt financing is also important for smaller-size producers and traders who might otherwise struggle to access finance. These small businesses, often operating in emerging markets in Asia, Africa or South America, may be turned down while trying to borrow from banks because they do not otherwise have enough or acceptable collateral.[6]

As the colloquium experts noted, a significant majority of economies, especially in the developing world, lack any warehouse receipts legislation or have severely outdated frameworks.[7] As a result, warehouse receipts are underutilized as a tool for gaining access to credit, whether domestically or in international trade.[8]

UNCTAD reports that the primary barrier to the introduction of warehouse receipts financing is a lack of enabling legislation.[9] A joint study by the FAO and the EBRD has concluded that "a supportive legal framework is a common precondition for confidence in and acceptance of warehouse receipts for producers, credit providers, and market participants."[10] The World Bank reports that "… an effective legal framework for warehousing and documents of title is a crucial component of a healthy agricultural sector and business climate."[11] The International Finance Corporation ("IFC") further reports that warehouse receipts financing provides an important "avenue for banks to increase their penetration of local credit markets."[12]

The World Bank's Enabling the Business of Agriculture finance indicators measure the quality of laws and regulations that promote access to financial services and food

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[6] See Fred Heritage, *What are warehouse receipts and why are they so important?*, Business Advice (June 2017).

[7] Note by UNCITRAL Secretariat, *supra* note 1, para 48; see also Dubovec and Elias, *supra* note 2 at 729–730. The authors further explain the importance of a harmonized legal regime for warehouse receipts: "Even among economies that have adequate warehousing infrastructure and secondary markets, many still lack a modern law on warehouse receipts. The need is most evident in those economies that rely on agriculture to sustain economic growth. In addition, as developing economies mature and their actors get connected to global supply chains, warehouse receipts will play an increasingly important role in cross-border transactions. Coupled with the possibility of trading warehouse receipts internationally, modern secured transactions laws also increase their attractiveness to foreign lenders. The liquidity of warehouse receipts is further enhanced if the economy has established a commodity exchange for the trading and financing of electronic warehouse receipts."

[8] An effective warehouse regime requires both a reliable network of physical infrastructure with modern warehouses and a legal regime for warehouse receipts that inspires confidence among lenders. See Henry Gabriel, *Warehouse Receipts and Securitization in Agricultural Finance*, Uniform Law Review 2012 at 369 (2012).

[9] Note by the UNCTAD Secretariat, United Nations Doc. TD/B/C.1/MEM.2/10 (2010) at 9–10, available at http://unctad.org/en/Docs/cimem2d10_en.pdf.

[10] FAO & EBRD, Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends (2015), available at http://www.fao.org/3/a-i4318e.pdf; the foreword also states, "International experience shows that benefits are maximized when the receipt system is based on a well-designed and enabling legal framework that ensures integrity and transparency."

[11] World Bank, A Guide to Warehouse Receipts Financing Reform: Legislative Reform (2016), at 13 available at http://documents.worldbank.org/curated/en/885791474533448759/A-guide-to-warehouse-receipt-financing-reform-legislative-reform.

[12] IFC, Warehouse Finance and Warehouse Receipts Systems (2013), at 3. The report further highlights (at 2) that "banks in developing countries often remain overly liquid."

security, including a moveable collateral warehouse receipts index. They show that a substantial majority of States lack an adequate legal framework for warehouse receipts.

At a regional level, the OAS reports that "warehouse receipts are not widely used today in Latin America as a source of financing" and that "[o]ne reason appears to be the lack of a modern and harmonized approach to the relevant law."[13] An Asia Pacific Economic Cooperation Forum (APEC) survey demonstrates that warehousing "is still a nascent industry in the region which means large scope for growth" in part because of "the lack of laws on warehouse receipts, i.e. in many jurisdictions, warehouse receipts are not documents of title."[14] The APEC Secretariat has highlighted:

> "the need to improve warehousing capacity in the region through standard setting …, and if possible, the recognition of warehouse receipts as title documents … ."[15]

Both the OAS and APEC have reported that the lack of an adequate legal framework for warehouse receipts may be a contributing factor to a risk of fraud.[16]

Additionally, as has been widely recognized, a system of electronic negotiable warehouse receipts provides a number of advantages over paper based receipts including elimination of the need for physical endorsement, increased transparency, easier determinations of the holder through the registry, and security against fraud and mismanagement. The use of modern technology has the potential to significantly reduce the costs associated with designing an electronic warehouse receipts system that is registry based.[17]

The absence of a model legal framework presents challenges, including for cross-border supply-chain transactions. A number of international organizations, including the World Bank, the EBRD, FAO, and the OAS have examined and proposed mechanisms to address these challenges, such as by facilitating the adoption of warehouse receipts laws for the agriculture sector. But, as the UNCITRAL colloquium experts pointed out, no international or regional organization has adopted a model law on warehouse receipts, resulting in a lack of harmonization and ad hoc approaches.[18]

III. Feasibility

UNCITRAL is well positioned to take the lead and formulate a model legal text on warehouse receipts that builds on the work of these other international agencies. UNCITRAL has substantial experience in developing legal texts on negotiable documents. The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partially by the Sea (Rotterdam Rules) provides rules

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[13] OAS Inter-American Juridical Committee, Electronic Warehouse Receipts for Agricultural Products, *Principles for Electronic Warehouse Receipts for Agricultural Products*, at 1 available at http://www.oas.org/en/sla/iajc/docs/CJI-doc_505-16_rev2.pdf.

[14] APEC Secretariat, Regulatory Issues Affecting Trade and Supply Chain Finance (2015), at 13–14 available at http://mddb.apec.org/Documents/2015/SMEWG/SMEWG40/15_smewg40_007.pdf (reporting survey showing that with regard to the legal and regulatory framework, most of the firms cited lack of central registry for movable collateral which makes their lien priority uncertain [and] lack of laws on warehouse receipts i.e. in many jurisdictions, warehouse receipts are not documents of title." (footnotes omitted)).

[15] Id. at 4. See also APEC Economic Committee, Report by Hong Kong China, Mexico and the United States on Workshop on Supply Chain Finance and Implementation of Secured Transactions in a Cross-Border Context (August 20–21, 2016, APEC doc 2016/SOM3/EC/040) at 4 ("Another problem [causing underutilization of warehouse receipts] is the legal hurdle in the instrument itself, or more particularly, inherent in the legal system pursuant to which the instrument is issued.").

[16] See OAS, *supra* note 10 at 6 (under the dual document warehouse receipt system "there is potential for fraud and misuse."); APEC Secretariat, *supra* note 11 at ii ("Creditors find lack of title document … and fraudulent documents … as major problems").

[17] See Dubovec and Elias, *supra* note 2 at 730; FAO & EBRD, *supra* note 7, at 40; IFC, *supra* note 9, at 29–31; OAS, *supra* note 10 at 6.

[18] Dubovec and Elias, *supra* note 2 at 725–727.

that facilitate the use of transportation documents, particularly bills of lading (the other main type of negotiable document). Additionally, the UNCITRAL Model Law on Electronic Transferable Records enables the use of electronic transferable records that are functionally equivalent to paper-based transferable documents, including warehouse receipts. For the security right aspects of warehouse receipts, the text would build on the principles, recommendations and model provisions enshrined in the UNCITRAL texts on security rights.[19]

IV. Conclusion

In conclusion we support establishing a working group to harmonize and modernize the legal framework on warehouse receipts. An UNCITRAL instrument on warehouse receipts would allow many businesses to benefit from a predictable and modern framework that facilitates sales of warehouse receipts, as well as their use as collateral for loans, whether domestically or in cross-border transactions. UNCITRAL is uniquely positioned to engage in this work.

[19] UNCITRAL Secretariat, *supra* note 1, para. 51.

D. Note by the Secretariat on a draft practice guide to the UNCITRAL Model Law on Secured Transactions

(A/CN.9/WG.VI/WP.77)

[Original: English]

Contents

I. Introduction

A. Purpose of the Practice Guide

What this Practice Guide is about

1. The Practice Guide to the UNCITRAL Model Law on Secured Transactions (the "Practice Guide") provides practical guidance to parties involved in secured transactions (referred to in this Practice Guide broadly as "users" also to include other

relevant parties affected by such transactions) in States that have enacted the UNCITRAL Model Law on Secured Transactions (2016) (the "Model Law").[1]

2. While the Practice Guide builds on the Model Law, it does not attempt to supplement the rules therein or suggest any changes to the provisions of the Model Law.

3. The Practice Guide:

- Explains key features and benefits of the Model Law
- Describes the types of secured transactions that creditors and other businesses can undertake under the Model Law and
- Provides step-by-step explanations on how to engage in the most common and commercially important transactions.

Who this Practice Guide is for

4. The Practice Guide is addressed to those that may not be familiar with the Law and thus explains the operation of the Law in general fashion and in plain language. Chapters I and II provide useful guidance to users, for example, financiers and businesses engaged in secured transactions, whereas Chapter III is intended principally for prudential regulatory authorities and regulated financial institutions. In general, the Practice Guide also provides useful information to other relevant stakeholders, for example, policymakers and legislators in States that are considering the adoption of the Model Law as well as judges and insolvency administrators implementing the provisions of the Law.

How this Practice Guide is organized

5. Chapter I explains what a secured transaction is, describes situations where the Law would apply, illustrates the key features and benefits of the Law, and lists the types of secured transactions that are possible under the Law, in particular those that may not have been available before the enactment of the Law.

6. Chapter II explains in practical terms how to do a number of common and commercially important types of secured transactions under the Law. Chapter II is supplemented by examples of a security agreement, diligent certificate [and …] in the Annex.

7. Chapter III illustrates how the Law interacts with the State's prudential regulatory framework.

What the Practice Guide does not deal with

8. The Practice Guide provides guidance on the fundamentals of good lending practices only to the extent that they involve a security transaction element. The Practice Guide focuses on secured lending and the legal relationships that arise from such transactions. It does not address lending in general, particularly "unsecured" lending, and the relationship that arises between the lender and the debtor. Similar to the Model Law, which addresses secured transactions involving movable assets, the Practice Guide does not address secured transactions that utilize immovable or real property as collateral.

[*Note to the Working Group: The Working Group may wish to consider whether to retain this paragraph in the Practice Guide and if so, whether to elaborate on what Chapter III does not intend to address.*]

[1] Accordingly, the Practice Guide uses the term "Law" to refer generally to legislation governing security rights in a State that has enacted the Model Law (including the Model Registry Provisions therein).

B. Secured transactions and the Law

1. The Model Law and work by UNCITRAL in the area of secured transactions

9. In order to assist States in undertaking secured transactions laws reform, UNCITRAL has prepared a number of relevant instruments including the Model Law. While addressed mainly at policymakers and legislators of States that have not yet adopted the Model Law, these instruments may provide helpful background to readers who want to deepen their understanding of the policies and principles underlying the Model Law.

Legislative Guide on Secured Transactions (2007) ("Secured Transactions Guide")	• Provides guidance with respect to security rights in movable assets, thus enhancing the availability of affordable secured credit • Includes commentary and legislative recommendations to assist States in modernizing their domestic secured transactions law
Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property (2010) ("IP Supplement")	• Provides guidance to facilitate extension of secured credit to intellectual property right holders using such rights as collateral • Includes commentary and recommendations dealing specifically with security rights in intellectual property as well as the law applicable
Guide on the Implementation of a Security Rights Registry (2013) ("Registry Guide")	• Provides commentary and recommendations on the establishment and operation of an efficient and accessible security rights registry, thus increasing transparency and certainty of security rights
UNCITRAL Model Law on Secured Transactions (2016) ("Model Law")	• Provides a comprehensive set of legislative provisions for enactment by States to deal with security interests in all types of movable assets • Includes Model Registry Provisions dealing with the registration of notices in a publicly accessible security rights registry
Guide to the Enactment of the Model Law (2017)("Guide to Enactment")	• Provides guidance to States in their enactment of the Model Law • Explains briefly the thrust of each provision of the Model Law and its relationship with the corresponding recommendations of the Secured Transactions Guide

10. In addition, the United Nations Convention on the Assignment of Receivables in International Trade (the "Assignment Convention") was adopted in 2001 providing uniform rules on the assignment of receivables, thus facilitating increased access to credit through receivables financing.

2. Key benefits of the Law in providing a comprehensive and flexible secured transactions regime

Importance of the Law in relation to access to credit

11. The availability of credit has a significant impact on the economic prosperity of a State. If credit is readily available at a reasonable cost, it promotes the development and growth of businesses in that State, particularly small and medium-sized enterprises (SMEs). A legal system that facilitates secured transactions enables businesses to use their assets as security in a way that can increase their ability to obtain credit at a lower rate. Research shows that in developed economies, borrowers

with collateral obtain 9 times as much credit as those without it. They also benefit from repayment periods 11 times as long and up to 50 per cent lower interest rates.[2]

12. The following lists some key features of the Law in providing businesses the ability to engage in secured transactions that may not have been possible under previous regimes.

Almost any type of movable asset can be used as collateral

13. The Law makes it possible for businesses to provide almost any type of movable asset as collateral (art. 8). Movable property, rather than land or buildings, account for most of the capital stock held by businesses and constitute an especially large share for SMEs. In the developing world, 78 per cent of the capital stock of businesses is typically in movable assets such as machinery, equipment or receivables. Under the Law, it is possible for businesses to give a security right in:

- Inventory and other goods
- Receivables and other rights under contracts
- Bank accounts and
- All types of intellectual property.

Security right without possession

14. In addition, the Law makes it possible to take security over an asset without taking physical possession of it (art. 6(1)). This means, for example, that a business can grant a security right over its asset and continue to use it in its operations, rather than transfer the possession of it over to the secured creditor.

Security rights over future assets

15. The Law also makes it possible for a business to give security over an asset that it does not yet own (for example, future inventory), subject to the security right being automatically attached to that asset as soon as the business acquires rights in it (art. 6(2)).

Parties can structure their arrangements to suit their purposes

16. Another distinctive characteristic of the Law is that it enables parties to structure their relationship between themselves as they wish (art. 3), often referred to as party autonomy or freedom of contract. With only a few exceptions, the Law allows parties to vary by agreement the effect of the Law as between them (see also para. 30 below). One exception is the general standard of conduct, which requires parties to exercise their rights and perform their obligations under the Law in good faith and in a commercially reasonable manner (art. 4). This principle is particularly important with regard to the enforcement of a security right and is further discussed in Chapter II.G (for example, see para. 252 below).

[*Note to the Working Group: The Working Group may wish to note that the possibility to create a security right over grantor's all asset is discussed in Chapter II.E. The Working Group may wish to consider whether it should be highlighted as a novel feature in this Chapter (see para. 25 below)*]

3. The notion of a "security right" under the Law

What is the meant by a "security right"

17. A security right is an interest in an asset that a person (the secured creditor) can exercise to recover money it is owed by another person (the debtor), if the debtor defaults. In essence, a security right assists the secured creditor in protecting itself against the consequences of the debtor's default, because the value of the asset

[2] Information available at http://www.doingbusiness.org/data/exploretopics/getting-credit/why-matters.

provided for security purposes (the collateral or the encumbered assed) functions as a backup if the debtor cannot or does not pay. A person that grants a security right over the collateral (the grantor) is usually the debtor, but this may not necessarily be the case.

18. A wide range of mechanisms have been developed to allow creditors to protect themselves against the risk of debtor's default, a traditional example being the possessory pledge. The Law covers all such mechanisms as they apply to any interest or right in a movable asset that serves a security function. Based on that approach, often referred to as the "functional, integrated and comprehensive" approach, the Law treats all such interests as security rights. In other words, the Law applies to all rights in movable assets that are created by agreement and that secure the payment or performance of an obligation, regardless of the type of transaction or the terminology used.

Security rights based on ownership of the asset

19. There are some types of transactions that produce the same or an equivalent commercial effect (thus serving a security function), although they might not have been considered as secured transactions traditionally. Finance leases or sales of goods on retention-of-title terms are such examples.

20. Under a finance lease of an automobile, the finance company (the lessor) takes ownership of the automobile during the duration of the lease, while the lessee operates the car. Under a retention-of-title sale, the automobile manufacturer (the seller) may retain ownership of the automobile until the buyer repays the full purchase price of the car.

21. From a commercial perspective, title or ownership of the automobile under these transactions serves the same function as a security right. The lessor and the seller are not retaining title to obtain the goods at the end of the transaction. Rather, they retain title as a security mechanism, so they can repossess the asset if the lessee or the buyer defaults. Because these arrangements are functionally equivalent to a security transaction, the Law applies to them as well.

22. In other words, the lessor under a finance lease, or the seller under a retention-of-title sale, is treated as if it only held a security right in the asset (a secured creditor), and the lessee or the buyer is treated as if they were the owner, and as the grantor of the security right. This is an example of the "functional approach" in action. This approach may be novel in many jurisdictions that have yet to adopt the Model Law.

Outright transfers of receivables

23. The Law also applies to outright transfers of receivables by agreement (art. 1(2)), even though an outright transfer of a receivable does not secure the payment or other performance of an obligation. This means that a person who transfers a receivable outright (the transferor) is generally treated as though it had granted a security right over the receivable, and the transferee as though it only holds a security right over the receivable (and thus not as the owner). One of the reasons for this approach is because it is often extremely difficult to tell whether a transfer of a receivable is an outright transfer, or a transfer by way of security. Applying the Law to all transfers of receivables reduces the need to make this at times difficult distinction.

24. A key practical consequence of this approach is that the transferee would need to register a notice in the security right registry to make the transfer effective against third parties. If not, the transferee could be defeated by a third party who takes a competing interest in the receivable. This requirement of publicity of outright transfer of receivables may also be a legal novelty in a number of jurisdictions.

4. Examples of transactions facilitated by the Law

25. It would not be feasible or practical for the Practice Guide to list all the types of transactions that are possible under the Law (see also Chapter II.B). Rather, the Law will allow a security right to be taken over a movable asset for almost any purpose,

and in almost any way. For example, the Law makes it possible for a grantor to engage in transactions that would grant a security right over:

- An asset that the grantor already owns
- An asset that the grantor acquires with the proceeds of the secured loan
- Its inventory, including inventory that the grantor does not yet own but may acquire in the future
- Its receivables, including receivables that the grantor might not yet own but may acquire in the future
- Its rights under one or more contracts or
- All its movable property, both present and future.

5. Comprehensive and coherent set of third-party effectiveness and priority rules

Priority competitions

26. The Law permits the creation of more than one security right over the same asset in order to utilize the full value of the asset. Therefore, there may be instances where there is a competition between more than one security right created by the same grantor in the same asset.

27. The Law contains a comprehensive set of rules to address such situations. The general rule is that priority between competing security rights is determined by the order in which the security right was "made effective against third parties." The Law provides a number of means to make a security right effective against third parties, with the primary method being registering a notice in the security rights registry (art. 18, see section C below).

Buyers, lessees and licensees of the collateral

28. Under the Law, it is possible that the collateral is sold, leased or licensed to a third party. Therefore, the Law also provides rules on whether the party that acquires a right over the collateral is bound by the existing security right (art. 34). As a general rule, a security right made effective against third parties prior to the sale, lease or license of the collateral would not be affected and the buyer or the transferee would acquire the collateral subject to the security right.

29. There are, however, a few exceptions. In particular, if a person purchases a tangible collateral from a grantor in the ordinary course of the grantor's business, then the buyer will normally be able to take the asset free of the security right. For example, a person who buys goods from a retailer can take the goods free of any security right that the retailer might have given over them, thus reflecting normal commercial expectations.

6. Efficient enforcement of security rights

30. The Law provides a rather liberal approach on how a secured creditor could enforce its security right. Under the Law, parties are given maximum flexibility in structuring how a security right could be enforced, provided that their agreement does not prejudice the rights of third parties or the mandatory rights and obligations of the parties under the enforcement provisions of the Law.

31. In exercising its security right after default by the debtor, a secured creditor need not necessarily apply to a court or other authority (art. 73(1)). Such out-of-court or extrajudicial enforcement, which makes it quicker and more efficient for a secured creditor to recover what it is owed, may be viewed as a significant change in a number of jurisdictions. To minimise the risks that could be posed by misuse of such out-of-court enforcement mechanisms, the Law imposes a number of conditions on how a secured creditor could go about exercising its right (see Chapter II.G).

C. The security rights registry

1. Benefits of the Registry and the Registry as the cornerstone of the Law

32. A secured creditor will want to make sure that its security right is effective against third parties, as the security right will otherwise not be of much benefit. In order to do so, it would have to ensure that third parties are informed of its security right over the asset. As mentioned previously, the most usual way to make a security right effective against third parties under the Law is by registering a "notice"[3] in the general security rights registry (the "Registry")[4] (on how to search and register a notice, see respectively Chapter II.D and F).

33. Unlike other secured transactions regimes where the registration of a security right is a requirement for creating a security right, registration of a notice is not a pre-requisite under the Law for creation of a security right, which only requires the agreement of the parties. Registration of a notice makes the security right effective against third parties.

34. The Registry is generally accessible to the public and its content can be searched by anyone (art. 5 of the Model Registry Provisions). Accordingly, registration of a notice in the Registry provides a form of publicity to third parties that the secured party might hold a security right in a grantor's property. This, in turn, reduces the risk that a third party might be misled into believing that the grantor had clear title to the property, as the third party can search the Registry to see whether notices have been registered against the grantor.

2. Key features of the Registry

Fully electronic and accessible online

35. The Registry is fully electronic, meaning that the information in the registered notices is stored in electronic form in a single database. This ensures the reliability and cost-effectiveness of the Registry.

36. The Registry is also accessible electronically, meaning that registrations and searches can be done online or via a direct networking system for registered/bulk users. This allows registrants and searchers to access the Registry both quickly and confidently, and makes the Registry easy to use.

Registration of a "notice" and not relevant documents

37. The registrant (usually the secured creditor or its representative) registers a notice in the Registry by submitting the information required (see paras. 189–190 and 195–205 below). Registration of a notice does not require the written consent of the grantor, nor the registration of relevant documents (for example, the security agreement).

38. This means that there is no need to register or attach underlying documents and furthermore, that such documents would not be scrutinized by the Registry. Instead, what is registered and made public through the Registry is basic information about the security right to which it relates. This makes the registration process both quick and easy.

Registration "at any time" even before entering into the transaction

39. Under the Law, a registrant can register a notice at any time. The registrant may register a notice even before the conclusion of the security agreement. Users should be particularly aware of this feature (referred to as "advance registration"), which may be new in a number of jurisdictions.

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[3] A "notice" is defined as a communication in writing (art. 2 (x)) containing certain information about the security right (arts. 8, 17, 19 of the Model Registry Provisions).

[4] Section C assumes that the Law incorporates the Model Registry Provisions of the Model Law and that the enacting State has fully implemented the recommendations in the Registry Guide as well as the Guide to Enactment with regard to the Registry.

40. As mentioned above (see paras. 26 and 27), the priority among competing security rights is usually determined by order of registration in the Registry. Accordingly, a secured creditor would usually want to register a notice as early as possible. By allowing advance registration, the Law makes it possible for the secured creditor to fix its priority position before it commits itself to the transaction, so that it can be confident of its priority, when it enters into the transaction.

41. A consequence of this feature is that not all security rights registered in the Registry might actually have been created. In other words, registration of a notice does not necessarily mean that the related security right actually exists. In order to determine whether the security right actually exists, the searcher would usually need to contact the grantor and/or the secured creditor as identified in the notice.

Notices are indexed and searchable according to the name or other identifier of the grantor and not the collateral (grantor-based organization of the Registry)

42. Registered notices are indexed by reference to the name or other identifier of the grantor, and not by reference to the collateral, even though the asset is described in the notices. If a person wants to see whether an item of a grantor's property might be subject to an existing security right, it would need to search against the name of the grantor and analyse the search result to assess whether the asset is covered by any of the notices.

D. Glossary

[*Note to the Working Group: The Working Group may wish to consider whether the list of terms below is appropriate, whether the definitions in relation to outright transfer of receivables (currently in square brackets) should be retained and the placement of the glossary in the Practice Guide.*]

43. The Practice Guide uses terminology carefully defined in article 2 of the Model Law. However, it aims to provide additional clarification of those terms, possibly through examples. In particular, if specialized terms are used, they are explained in the context in which they are raised in the Practice Guide.

44. Readers are also advised to take a closer look at the precise wording of the Law in their State and how it is interpreted in the context of their State's laws as a whole, to better understand how it would operate in their State.

45. The following is a list of key terms used in the Practice Guide.

Term	What it means, broadly
Debtor	A person who owes payment or other performance of the secured obligation. While the debtor will usually be the person who gives the security (i.e., the grantor), this won't always be the case.
Default	The failure of a debtor to pay or otherwise perform a secured obligation. It may also include any other event that the grantor and the secured creditor has agreed as constituting default.
Encumbered asset or Collateral	A movable asset that is subject to a security right. The term includes a receivable that is the subject of an outright transfer by agreement.
Equipment	A tangible asset [other than inventory or consumer goods] that is primarily used or intended to be used in the operation of business
Future asset	A movable asset, which does not exist or which the grantor does not have rights in or the power to encumber at the time the security agreement is concluded
Grantor	A person who creates a security right to secure an obligation that it owes, or that is owed by another person. A buyer or other transferee of an encumbered asset that acquires its rights subject to a security

	right. The terms borrower, debtor or buyer are used in the Practice Guide to refer to the grantor. [a transferor under an outright transfer of a receivable by agreement]
Inventory	Tangible assets held for sale or lease in the ordinary course of business, including raw materials and work in process
Movable asset	A tangible or intangible property, which is not immovable property
Possession	Actual possession of a tangible asset by a person or its representative, or by an independent person that acknowledges holding it for that person
Proceeds	Anything that is received in respect of an encumbered asset for example, through its sale or other transfer
Priority	The right of a person in a collateral in preference to the right of a competing claimant
Receivable	A right to payment of a money [excluding a right to payment evidenced by a negotiable instrument, a right to payment of funds credited to a bank account and a right to payment under a non-intermediated security]
Secured creditor	A person who has or has the benefit of a security right. The terms creditor, lender, financier or supplier are also used in the Practice Guide to refer to the secured creditor. [A transferee under an outright transfer of a receivable by agreement]
Security agreement	An agreement between a grantor and a secured party to create a security right, whether or not the parties call it a security agreement [An agreement that provides for the outright transfer of a receivable]
Security right	A property right in a movable asset, created by a security agreement, that secures payment or other performance of a secured obligation [The right of the transferee under an outright transfer of a receivable by agreement] This is regardless of whether the parties call it a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation.

E. Interaction of the Law with other laws including international instruments applicable in that State

46. Readers should be reminded that the Law may not necessarily be an entirely independent legislation and may be part of a set of laws or regulations of that State. It should also be noted that some provisions in the Model Law contain options. Where this is the case, the Practice Guide explains how users could deal with the various options. However, readers will need to first determine which option their State has adopted in their Law.

47. The Law does not operate in a vacuum and is usually part of the general legal framework in a given jurisdiction. In fact, the success of the secured transactions legal framework will depend on the compatibility and consistency between the Law and other laws in that jurisdiction. As such, secured transactions under the Law are necessarily affected by other laws that govern relevant parties as well as credit and

financial transactions. Readers must consider all relevant legislation in order to understand the various possibilities and the consequences.

48. Depending on the jurisdiction, the range of laws that interact with the Law would generally vary. Nonetheless, the following are some examples of laws that users may need to make reference to: contract law, law of obligations, law of guarantees, property law, intellectual property law, negotiable instruments law, immovable property law, consumer protection law, insolvency laws, financial regulations, civil procedure law and others. International treaties and conventions applicable in that State may also need to be taken into account.

[*Note to the Working Group: The Working Group may wish to consider whether the list above is sufficient or the list would need to be further elaborated as below.*]

49. Secured transactions involve contracts, obligations and the use of different types of assets as collateral. Consequently, the design and execution of the transaction must take into consideration contract law and the law of obligations. Often, security rights are created alongside guarantees to enhance the availability of credit, which means that the law of guarantees may also need to be considered. Depending on the type of collateral, other laws may need to be consulted, such as property law, intellectual property law, securities law and negotiable instrument laws.

50. There may be limitation as property of certain individuals may be protected or exempt from enforcement, an element that will need to be considered by lenders when conducting due diligence. Consumer protections laws may also apply to certain group of debtors. Financial regulations will impact how banks approach lending, monitoring of credit and enforcement.

51. Disputes arising from secured transactions as well as the judicial exercise of a security right would usually be subject to relevant civil procedure laws. In the case of insolvency of the debtor, lenders would need to be aware of the extent to which insolvency law recognizes security rights as well as its priority (also avoidance actions). In rare circumstances, criminal and administrative law may also have an impact. For example, certain acts may be subject to criminal or administrative sanctions, and security rights over concession rights may be shaped by the relevant administrative legislation.

International treaties and conventions

52. It may also be necessary to take into account international treaties and conventions applicable in the State that relate to cross-border secured transactions.[5] These international instruments include:

- Convention on International Interests in Mobile Equipment (2001) and its Protocols
- Unidroit Convention on Substantive Rules for Intermediated Securities (2013, Geneva Convention)
- Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (2006, Hague Securities Convention)
- United Nations Convention on the Assignment of Receivables in International Trade (2001, Assignment Convention) and
- United Nations Convention on Contracts for the International Sale of Goods (1980, CISG).

[5] To assist users in considering these texts, UNCITRAL, the Hague Conference on Private International Law, and the International Institute for the Unification of Private Law (Unidroit) have prepared a comparison and analysis of major features of international instruments relating to secured transactions (available at http://www.uncitral.org/uncitral/en/uncitral_texts/security/2011UNCITRAL_HCCH_Unidroit_texts.html).

F. Issues arising from cross-border transaction

[*Note to the Working Group: The Working Group may wish to consider whether to retain this section in Chapter I or to combine with Chapter II.I.*]

53. A transaction that involves connections with more than one State is often referred to as a "cross-border" transaction. In such cross-border transactions, it is necessary to determine which State's law will apply to the creation, third-party effectiveness, priority and enforcement of a security right. The Law provides rules that determine the applicable law in Chapter VIII (Conflict of Laws). The following examples illustrate the operation of some of those rules. Let's assume that State O has enacted the Model Law.

> <Example 1> X is a distributor of computers and administers its business from an office located in State O. X has stores in State O and in State P, where it offers the computers for sale. X wishes to obtain credit from Y and grant a security right in the computers held as inventory in stores located in States O and P.
>
> <Example 2> X sells on credit the computers held as inventory in its stores in States O and P to customers whose billing addresses are in State O, in State P and in other States. X wishes to grant a security right in the receivables generated from those sales to Y.
>
> <Example 3> X maintains bank accounts with a bank in State O and with another bank in State P. X deposits the amounts received from the collection of its receivables in those accounts. X wishes to grant a security right in the funds credited to its bank accounts to Y.

54. In Example 1, the applicable law is that of the State where X's computers are located (art. 85). This means that in order for the Y's security right to be recognized in State O as being valid and effective against third parties, the requirements of the law of State O would need to be met with respect to the computers held for sale at stores in State O, and those of the law of State P with respect to the computers held for sale at stores in State P.

55. In Example 2, the applicable law is that of the State where X has its place of business (arts. 86 and 90). As X has places of business in States O and P, the location of the grantor is the State in which the central administration of X is exercised (that is, the place where the grantor conducts the administration of its business). Therefore, regardless of the fact that the customers of X are located in a number of States, in order for Y's security right in all receivables owing to X to be recognized in State O as valid and effective against third parties, only the requirements of the Law (the law of State O) would need to be met.

56. In Example 3, the Model Law offers two options to enacting States (art. 97). In many circumstances, the choice between options A and B would not matter as both will likely lead to the application of the law of the State where the bank account is maintained. Assuming that law is the applicable law, in order for Y's security right in both bank accounts to be recognized in State O as valid and effective against third parties, the respective requirements of the laws of both State O and State P would need to be met.

57. Under the Law, the location of the secured creditor is not relevant for the determination of the applicable law. Therefore, whether Y in the examples above is based in State O or in another State has no impact on that determination.

58. The Law also includes rules for the determination of the law applicable to the priority and enforcement of a security right (arts. 85, 86, 88 and 97). In the examples, these rules generally lead to the application of the same law as that indicated for the creation and third-party effectiveness of the lender's security right. For cross-border transactions involving assets other than tangible assets, receivables and bank accounts as provided in the examples (notably, tangible assets of a type ordinarily used in more

than one State, intellectual property and non-intermediated securities), the Law provides rules that designate a different applicable law.

G. Secured transactions involving financing to micro-business

The need for particular attention to financing of micro-businesses

59. The Law is designed to improve access to finance and to lower the cost of credit for all kind of businesses. It is particularly well suited for SMEs, which are the most common form of businesses and take up a large portion in most States. However, financing to micro-businesses require particular attention because of certain specific features pertaining to such transactions as well as to such businesses (see generally, "Reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs)" (A/CN.9/WG.I/WP.110) – document currently being prepared by Working Group I).

60. While a common method of financing to micro-businesses is often referred to as micro-finance (unsecured lending usually for a very short period and for a very small amount), the Practice Guide focuses only on secured lending to micro-businesses.

61. The precise size and nature of micro-businesses would be different in each State and would largely depend on the economy and relevant policies of that State. However, micro-businesses can be generally characterized as smaller businesses, which exhibit some or all of the following features:

- Individual entrepreneurs or family businesses, where most often the fate of the entire household is at stake (very little distinction between the business and its owners)
- Require loans of small amounts and for a very short term
- More likely to change legal status, name and address, particularly where they are sole entrepreneurs
- Insufficient or inappropriate property to provide as collateral (most likely fluctuating assets such as inventory and receivables)
- Limited financial information or those of poor quality and
- Weak bargaining position vis a vis lenders.

62. Furthermore, in such transactions:

- The overhead costs of lending may not be covered by the small amounts at stake
- The small size and informality of a micro-business means that lenders are tempted to omit the individual assessment of an application for finance and of the collateral offered by those businesses
- There is a higher possibility to overlook the monitoring of the life-cycle of the credit
- Personal guarantees are usually required by lenders (in addition to security rights) from the company director/shareholder and from family members and
- The close link between the business's finances and the personal finances of the family raises specific issues on enforcement of security rights.

Advantages of the Law for micro-businesses

63. When micro-businesses need general financing (in contrast to financing for the acquisition of specific assets), the lack of available assets for collateral can be a major problem. The Law enhances access to finance for such businesses by enabling any type of collateral to be given, including all asset security rights (see para. 13 above). The Law also enables security to be given over future assets (see para. 15 above) as well as circulating assets such as inventory, receivables and cash. This opens new financing opportunities, since receipt of funds will be linked to future business

activities, rather than to their scarce existing assets. Further, the Registry keeps transaction costs low (an essential feature given the small amounts at stake) enabling lenders to ensure priority over other claims to the collateral, lowering their risk and hence reducing the cost of credit.

Typical issues that arise in secured financing to micro-businesses

64. Due to the specific nature of secured financing to micro-businesses, ways to engage in secured transactions as generally discussed in Chapter II might need to be further tailored. For example, due diligence, monitoring of collateral and enforcement would need to take into account additional aspects.

65. As noted, financing to micro-businesses will usually be of small amounts and thus should be simpler and less costly. This may call for preparation of relevant templates by chambers of commerce, association of financing institutions or even by governmental or non-governmental organizations promoting entrepreneurialism, written in plain and clear language and understandable to micro-businesses.

66. Guarantees are ubiquitous in the financing to micro-businesses. While they enhance the assets available for repayment and reduce the borrower's moral hazard by aligning incentives, the provision of guarantees effectively removes limited liability, and default often causes dramatic financial problems in the households of the individuals involved. Furthermore, the general financial distress of micro-businesses tend to generate societal problems as well as economic ones. In that context, ways to minimize the abuse of personal guarantees and to coordinate the insolvency proceedings of the guarantor and the micro-business may need to be considered.

67. The lack of financial information and the asymmetry of bargaining power may result in lenders not performing adequate due diligence on the borrower, thus imposing terms and conditions unjustified by the level of real risk inherent in the operation of the micro-businesses. The requirement of excessive amounts of collateral in comparison to the amount of the loan (referred to as "over-collateralisation") may be hazardous in many jurisdictions, particularly in developing and middle-income States (see also paras. 136–138 below). Over-collateralisation may severely restrict access to finance to micro-businesses even under the Law, damaging the overall economy as a consequence.

II. How to engage in secured transactions: guidance on contractual and transactional issues

68. This Chapter will explain in practical terms how parties can engage in a number of key secured transactions under the Law. Chapter II is supplemented by samples of a security agreement, diligent certificate [and …] in the Annex.

69. Unless otherwise mentioned, the Practice Guides uses the following Scenario as its basis for explaining how transactions may take place.

<Scenario>

A company manufacturing goods (X) is seeking to obtain a loan from a local bank (Y) for its business operation based on a piece of equipment that X owns in its manufacturing facility in State O.

A. Secured transactions under the Law: The fundamentals

1. How to create a security right (arts. 6–17)

70. Under the Scenario, X and Y would conclude a security agreement to create a security right over the equipment (art. 6(1), for more detail, see Section E below). The security agreement would need to contain minimum required information

identifying the secured creditor and the grantor. It would need to describe the obligation being secured as well as the collateral.[6] The security agreement should be in writing and would usually be signed by both X and Y (art. 6(3)).

71. The Law provides an exception to the writing requirement and that is when Y is in possession of the collateral (art. 6(4)). Considering that X would need to utilize the equipment in its operation, this may not be practical. In that sense, it should be emphasized that the Law gives full effect to non-possessory security rights, which allows grantors to retain possession of the collateral while endowing a security right to the creditor.

72. In order for Y to obtain an effective security interest, X should have rights in the equipment or the power to encumber it (art. 6(2)). In other words, it is not necessary that X has ownership over the equipment. For example, it may have a lease over the equipment.

73. If the equipment is owned by a third person (Z), it is also possible for Z to grant a security right over the equipment to secure the loan that X obtains from Y. The debtor (X) does not always have to be grantor (Z) and vice versa.

74. As mentioned (see para. 15 above), a security right may be created over future assets. For example, X may conclude a security agreement with Y to create a security right over goods that it will manufacture using the equipment or another piece of equipment that it will purchase in the future. In both cases, the security right is not created at the time of the conclusion of the agreement but when the goods are manufactured and when X acquires rights in the new piece of equipment (art. 6(2)).

2. How to make a security right effective against third parties (arts. 18–27)

The distinction between creation and effectiveness against third parties

75. Under the Law, the creation of a security right (and thus effectiveness of the security right against the grantor) is distinguished from its effectiveness against third parties ("third-party effectiveness"). By doing so, it reduces the formalities required to create a security right, while at the same time giving all third parties with a right in that asset an inexpensive and reliable means to determine whether the asset may be subject to a security right. Accordingly, the Law provides a separate set of rules on the making the security right effective against third parties.

76. Quite logically, the creation of a security right is a pre-condition for it to be made effective against third parties. For example, even if Y registers a notice in the Registry without concluding a security agreement, its security right would not be effective against third parties because the security right itself had not been created. There may be instances where the creation and the third-party effectiveness may be achieved at the same time. For example, if Y registered a notice over X's to-be manufactured goods and concluded a security agreement to that end, the creation and the third-party effectiveness would both be obtained when the goods are manufactured.

77. While creation and third-party effectiveness are distinguished under the Law, a secured creditor would generally want to ensure that its security right is made effective against third parties. This is because if a security right has been created but not made effective against third parties, it may not be able to fulfil its function of securing payment or other performance of an obligation due to a competing right over the asset held by a third party. For example, if Y concluded a security agreement with X over the equipment but did not make its security right effective against third parties, it might not be protected in situations where X granted another security right on the same equipment, sold the equipment or became insolvent.

78. The creation of a security right by the conclusion of a security agreement is effective only between X and Y. This means that the security right will not be effective

[6] In States that have enacted article 6(3)(d) of the Model Law, the security agreement would need to state a maximum amount for which the security right can be enforced. This could general facilitate the grantor's access to financing from other creditors when the value of the collateral is greater than the amount indicated in the security agreement (see Guide to Enactment, para. 89).

against another party who acquires a security right or another type of right in the equipment, such as a buyer or an insolvency representative. In that case, the security right is of little use to Y since recourse to the value of the equipment in the event of default can easily be lost.

79. Therefore, the distinct requirements of creation and third-party effectiveness, which are both easily ascertainable under the Law, need to be met for a creditor to obtain all the advantages of its security right. By making its security right effective against third parties, Y can generally ensure that it will be able to have recourse to the entire value of the equipment, subject to any priority competitions.

How to make a security right effective against third parties

80. The Law provides a number of methods for achieving third-party effectiveness, but the primary method is to register a notice in the Registry (art. 18(1), on how to register a notice, see Section F below). Registration is available for all types of assets, while other methods only apply to certain types of assets as outlined below:

- For tangible asset, by the secured creditor taking possession of the asset (art. 18(2), see paras. 83–84 below)
- For funds credited to a bank account, by concluding a control agreement (see para. 85 below) or by the secured creditor becoming the account holder. However, if the secured creditor is the bank where the account is held, no additional step is required (art. 25)
- For goods covered by a negotiable document, by making the security right in the negotiable document effective against third parties, for example, by the secured creditor possessing the document (under certain conditions, see arts. 16 and 26, see paras. 123–124 below)
- For uncertificated non-intermediated securities, by concluding a control agreement or notation in the books of the issuer (art. 27).

When to register a notice – at any time

81. Registration can take place at any time, even before the creation of the security right or the conclusion of the security agreement (art. 4 of the Registry Provisions, see paras. 39–40 above). As priority is determined by the date and time of registration (see para. 27 above), it is generally advantageous to register as early as possible.

82. In the Scenario, Y is likely to first search the Registry to see if X has created any other security right in the equipment. It would then register a notice most likely before the conclusion of the security agreement to preserve its priority and in any event, certainly before advancing any funds to X.

Possession

83. Another method of achieving third-party effectiveness is by the secured creditor taking possession of the collateral, as had been the case in traditional possessory pledge. For example, X could transfer the possession of its equipment to Y, but this would generally limit X's ability to use the equipment in its business operation. Having or taking possession of a tangible encumbered asset has the following consequences under the Law:

- There is no need for a written security agreement (art. 6(4)) and
- There is no need to register a notice to achieve third-party effectiveness (art. 18(2))

84. Where the grantor does not require the collateral for immediate use or sale, possession can be a suitable method of achieving third-party effectiveness. Possession need not be necessarily by the secured creditor but also by a third party taking possession on behalf of the secured creditor. The latter would make more sense commercially, particularly if the secured creditor does not have the necessary storage

facilities. For example, goods manufactured by X may be stored in a warehouse and the warehouse owner may undertake to hold them on behalf of the Y.

Control agreement

85. A control agreement (see art. 2(g)) refers to an agreement in writing involving three parties: (i) the grantor; (ii) the secured creditor; and (iii) when the agreement relates to funds credited to a bank account, the bank (deposit-taking institution) and when it relates to uncertificated non-intermediated securities, the issuer of the securities. A control agreement would provide that the bank or the issuer would follow the instructions of the secured creditor as to what to do with the collateral without requiring any further consent from the grantor.

Changes in methods of achieving third-party effectiveness

86. It is possible to change from one method of achieving third-party effectiveness to another and retain the third-party effectiveness from the date it was first made effective against third parties (art. 21). In practice, this is most likely to occur when the first method used by the secured creditor was to take possession of the collateral. If the secured creditor registers a notice before transferring possession of the collateral (in most cases, back to the grantor), the third-party effectiveness would remain even though the secured creditor may no longer have possession. The third-party effectiveness would have been achieved as of the date that the secured creditor obtained possession of the collateral.

How to make a security right in proceeds effective against third parties

87. Under the Law, a security right in an asset extends to its identifiable proceeds (art. 10).[7] For example, if X sold its equipment, Y's security right would extend to the sale price received by X through the sale. If the equipment was damaged due to a fire, Y's security right would extend to any related insurance claims. In essence, Y's security right would extend to anything in whatever form that is received by the X (see paras. 214–216 below). [*Note to the Working Group: This paragraph, which might be better placed in Section A.1, is placed here in conjunction with the following paragraph to keep them concise.*]

88. As to the third-party effectiveness of the security right, if Y had registered a notice with regard to the security right in the equipment, and if the proceeds received by X are in the form of money, receivables, negotiable instruments or funds in a bank account, Y does not need to do anything more to make its security right in the proceeds effective against third parties (art. 19(1)). However, if the proceeds are another type of asset (for example, if the equipment was exchanged with another piece of equipment), Y would have a short grace period during which it needs to use one of the methods mentioned (see para. 80 above) to make its security right in the other piece of equipment effective against third parties (art. 19(2)).

89. Another convenient way for Y to ensure the third-party effectiveness of its security right over any proceeds would be to describe them as original encumbered assets in the security agreement as well as in the registered notice.

B. Different types of financing facilitated by the Law

90. There are a wide array of financing techniques being used currently and many of them are facilitated by the Law. Prior to the enactment of the Law, some of these transactions may have been characterized as secured transactions, while others may not have. Under the Law, they would all be considered as transactions that serve a security purpose, in other words, creating a security right.

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[7] Proceeds also include proceeds of proceeds, for example, a piece of equipment purchased with money derived from the sale of an encumbered asset (art. 2(bb)).

91. In order to illustrate the range of transactions that the Law could facilitate, some of the financing techniques are described below. It is, however, important to note that these examples represent only a few examples of transaction currently in use and possible under the Law.

1. Acquisition financing

92. Businesses often obtain financing to acquire inventory, equipment or other assets. In the Scenario, X may require additional pieces of equipment to expand its business operation. In that case, financing could be provided by the seller of the equipment. In other cases, the financing could be provided by a lender including Y. The lender may be a bank or other independent third party, but it may also be an affiliate of the seller, a captive finance company owned by the seller to encourage and facilitate sales of its products.

93. Consistent with long-standing practice in many jurisdictions, the seller may retain title to the equipment to secure the payment of the purchase price. These are often referred to as sale on "retention-of-title" terms or retention-of-title transactions. In many other cases, the seller or lender that provides financing is granted a security right in the acquired assets to secure the repayment of the loan.

94. The following are some illustrations of acquisition financing, whereby X wishes to acquire certain inventory and equipment for use in its manufacturing operations.

95. X wishes to purchase paint (raw material, and therefore inventory) from vendor A. Under the purchase agreement, X is required to pay the purchase price for the paint within 30 days of A's invoice to X and X grants a security right in the paint to A to secure the payment of the purchase price.

96. X also wishes to purchase drill presses (equipment) from vendor B. Under the purchase agreement with B, X is required to pay the purchase price for the drill presses within 60 days following their delivery to X's factory. The purchase agreement also provides that, until the purchase price is paid in full, B retains title to the drill presses.

97. X also desires to purchase certain conveyors (equipment) from vendor C. Under the purchase agreement with C, X is required to pay the purchase price for the conveyors when they are installed in X's factory and rendered operational. X obtains a loan from D to finance the purchase and installation of the conveyors from C, which is secured by a security right in the conveyors.

98. Finally, X wishes to lease computer equipment from vendor E. Under the lease agreement with E, X leases the computers for a period of two years, during which X is required to make monthly lease payments. X has the option (but not the obligation) to purchase the computers for a nominal purchase price at the end of the lease term.[8] The lease agreement provides that E would retain title to the computer during the term, but that title will be transferred to X at the end of the term if X exercises the purchase option. This type of lease is often referred to as a "finance or financial lease."[9]

99. In all of the above examples, the acquisitions by X are made possible by means of acquisition financing provided by another entity (seller, lender or financial lessor), which each holds a security right in the acquired assets to secure the obligations owed to it. The Law treats all of these transactions as those that give rise to an "acquisition security right" subject to the same rules.[10] This is referred to as the "unitary approach".

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[8] It may also be possible that the title to the computers may be transferred to X automatically at the end of the lease term.

[9] A financial lease is to be distinguished from what is usually called an "operating lease". Under an operating lease, the leased asset is expected to have a useful life remaining at the end of the lease term and the lessee does not have an option to purchase the leased asset at the end of the lease term for a nominal price, nor is title to the leased asset transferred to the lessee automatically at the end of the lease term.

[10] "Acquisition security right" is defined as "a security right in a tangible asset, or in intellectual property or the rights of a licensee under a licence of intellectual property, which secures an obligation to pay any unpaid portion of the purchase price of an asset, or other credit extended to enable the grantor to acquire rights in the asset to the extent that the credit is used for that purpose" (art. 2(b)).

[*Note to the Working Group: The Working Group may wish to consider whether the Practice Guide should include an illustration of the non-unitary approach as discussed in the Secured Transactions Guide.*]

Super-priority of an acquisition security right (art. 38)

100. The general rule is that priority between competing security rights is determined by the order in which the security right was made effective against third parties. The most important exception to that general rule relates to acquisition security rights.

101. The Law provides that if specified conditions are met, an acquisition security right has priority over a competing non-acquisition security right in the same asset including a security right previously registered which would otherwise have priority under the general rule.[11] In short, it gives advantageous treatment to acquisition finance.

102. Suppose that X had obtained a loan from Y and it had granted a security right over all its present and "future" assets, including any equipment or inventory that X might purchase in the future. Y registered a notice on 23 January 2019 and the security agreement was concluded on 30 January 2019.

103. X purchased the drill presses from B under the terms outlined in paragraph 96 on 30 March 2019. The drill presses were delivered to X's factory on 10 April 2019. Under the general rule, Y would have priority over B, unless B had registered a notice prior to 23 January 2019.

104. However, the Law provides that B has priority over Y, if B has possession of the drill presses (for example, during the period between 30 March 2019 to 10 April 2019). In practice, it is quite unlikely that B would continue to possess the drill presses, as this would deprive X of their use in its operation. B also has priority over Y, if B registers a notice with respect to the drill presses within, for example, 15 days (period specified in the Law) after X took possession of the drill presses on 10 April 2019.

105. With respect to the acquisition of inventory, the Law provides a slightly different rule. Suppose that X purchased 20 cans of paint from A as outlined in paragraph 95 above on 30 March 2019, and they were delivered to X's factory on 10 April 2019. Under the general rule, Y would have priority over A, unless A had registered a notice prior to 23 January 2019.

106. However, the Law provides that A has priority over Y if A is in possession of the 20 cans of paints, which is also highly implausible in practice. However, A can have priority over Y by registering a notice with respect to the paint before they were delivered to X and by informing Y of the sale and A's intention to obtain an acquisition security right in the 20 cans of paint.

2. Inventory and receivable revolving loan financing

107. Businesses generally have to expend capital before they are able to generate and collect revenues. For example, before a manufacturer can commence operations and sell its products, it must equip a plant, purchase raw materials, incur labour costs to convert the raw materials into finished products and sell the finished products to its customers. Only then will it generate receivables and begin to collect payment from its customers. Depending on the type of business, this process may take up to several months. Access to working capital is critical to bridge the period between cash expenditures and revenue collections. Moreover, this need is not limited to the initial start-up period. The need for working capital to address the gaps of time inherent in a business's "cash conversion cycle" (acquiring inventory, processing the inventory, selling the inventory to create receivables, receiving payments on the receivables, and

[11] Readers should be advised that article 38 of the Model Law provides two options for States to consider. They should also be advised that the requirement for the super-priority rule differs depending on the types of assets (equipment, inventory and consumer goods) (see Guide to Enactment, paras. 320–329).

acquiring more inventory to begin the cycle again) typically continues during its entire life.

108. One highly effective method of providing such working capital is a revolving loan facility. Under this type of financing, loans secured by the borrower's existing and future inventory and receivables are made from time to time at the request of the borrower to fund the borrower's working capital needs. The borrower typically requests loans when it needs to purchase raw materials or pay other expenses relating to the manufacturing of goods. The borrower repays the loans as inventory is sold and receivables are generated and collected. Thus, borrowings and repayments tend to be frequent (although not necessarily regular) and the outstanding amount of the credit is constantly fluctuating. The collateral pool of inventory and receivables also fluctuates as inventory is converted into receivables, receivables are collected, and new inventory is purchased. Because the revolving loan structure matches borrowings to the borrower's cash conversion cycle, this type of loan structure is, from an economic standpoint, highly efficient and beneficial to the borrower. It helps the borrower to avoid borrowing more than it actually needs thereby minimizing interest costs.

109. An illustration of this type of financing follows. Suppose that it typically takes four months for X to manufacture, sell and collect the sales price of its products. Y agrees to provide a revolving loan facility to X to finance this operation. Under the loan facility, X may obtain loans from time to time according to a formula. For example, X may borrow up to 50 per cent of the value of its inventory that Y deems acceptable for borrowing (based on various eligibility criteria, such as the type and quality of the inventory) and up to 80 per cent of the value of its receivables that Y deems acceptable (also based upon various eligibility criteria, such as the creditworthiness of the debtors of the receivables[12]).

110. The percentages that Y is willing to loan against the value of eligible inventory and receivables are commonly called the "advance rates". The aggregate value of eligible inventory and receivables at any given time multiplied by the applicable advance rates is commonly called the "borrowing base". X is expected to repay these loans from time to time as it receives payments of receivables from its customers, so that the outstanding loan balance under the loan facility never exceeds the lesser of (i) the committed amount of the loan facility and (ii) borrowing base. The loan facility is secured by a security right in all of X's existing and future inventory and receivables and all proceeds thereof. In this type of financing, it is also common for the Y to obtain a security right in the right to payment of funds credited to the bank account into which customer payments (that is, proceeds of receivables) are deposited, and a control agreement is signed under which the deposit-taking bank agrees to transfer funds credited to the account to Y on a periodic basis.

3. Factoring

111. Factoring is a highly effective form of receivables financing that can trace its roots back many centuries. In general, factoring involves the outright sale or assignment of receivables by the seller (assignor) to the factor (assignee). As discussed (see paras. 23–24 above), the Law (with the exceptions of arts. 72–82) applies to outright transfers even though it is not a security device. This is because it functions in many aspects as a secured transaction.

112. There are a number of different types of factoring arrangement. The factor may pay a portion of the purchase price for the receivables at the time of the purchase ("discount factoring"). It may pay only when the receivables are collected ("collection factoring"). Or it may pay on the average maturity date of all of the receivables ("maturity factoring").

113. Factoring may be on a "recourse" or a "non-recourse" basis. Under a recourse factoring arrangement, the assignee of the receivables has recourse against the

[12] Debtor of the receivables is defined in the Law as a person that owes payment of a receivable, which is subject to a security right (art. 2(i)).

assignor to obtain payment in the event of non-payment by the debtors of the receivables. By contrast, under a non-recourse factoring arrangement, the assignee has no ability to obtain payment from the assignor if the debtors of the receivables fail to pay.[13] Finally, the debtors of the receivables may be notified that their receivables have been the subject of factoring ("notification factoring") or they may not be so notified ("non-notification factoring"). When notice is given to the debtors of the receivables, the notice often is done by requiring the assignor to insert a note, in each invoice that the assignor sends to its customers, that the receivable evidenced by the invoice has been sold to a factor.

114. Although a factoring agreement is fundamentally a financing arrangement under which a business can obtain immediate cash for the receivables it generates, the factor may also perform various other services for the assignor relating to the receivables. These additional services may include approving and evaluating the creditworthiness of the debtors of the receivables, performing bookkeeping duties and engaging in collection efforts with respect to receivables that are not paid when due. These services can provide a useful benefit to businesses that do not have their own credit and collection departments.

115. Here is an illustration of a typical factoring arrangement. X enters into a discount factoring arrangement with factor F, pursuant to which F agrees to purchase receivables that it deems to be creditworthy. F advances to X an amount equal to 90 per cent of the face value of those receivables, holding the remaining 10 per cent as a reserve to cover potential customer claims (such as for defective goods or supplying the wrong goods) that would reduce the value of the receivables. The factoring arrangement is with notification to X's customers and is without recourse to X in the event of non-payment by X's customers.

4. Securitization

116. Another form of financing involving the use of receivables is securitization. Securitization is a sophisticated form of financing under which a company can obtain financing based on the value of its receivables by transferring them to a special purpose vehicle ("SPV") that is wholly owned by the company. The SPV will then issue securities (such as commercial paper) in the capital markets secured by the stream of income expected to be generated by the receivables. This technique is commonly used in situations where a company's receivables consist of credit card receivables, motor vehicle rents or home mortgage loan payments, although the securitization of many other types of receivable is also possible. Securitization transactions are complex financing transactions that are dependent upon both a jurisdiction's securities laws and its secured transaction laws. Where these transactions are sufficiently large, carefully structured and properly monitored, securitization can be a cost-effective form of financing.

117. Securitization is intended to lower the cost of financing because the SPV is structured in a way that significantly reduces the risk of its insolvency by restricting the amount of debt that the SPV can incur and the activities in which it can engage. This structure may significantly reduce the risks that the lender must consider when deciding the economic terms of the securitization facility. In addition, because the source of credit is the capital markets rather than the banking system, securitization often can generate greater amounts of credit at lower cost than normal bank loans.

118. Here is an illustration of a securitization transaction. A SPV is created by a large retail chain to purchase receivables arising from its customers using credit card issued by that retailer and bearing its name. The SPV then issues debt securities, under applicable securities laws, to investors in the capital markets. These debt securities are secured by the income stream flowing from the credit card receivables that have been transferred to the SPV. As payments of receivables are made, the SPV will use the proceeds it receives to make payments on the debt securities.

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[13] Even in non-recourse factoring arrangements, typically there is limited recourse to the assignor for breach of various representations made by the assignor with respect to the receivables.

5. Term loan financing

119. Businesses often need specific financing for large expenditures that are not in the ordinary course of their business. These expenditures may include, for example, the purchase or lease of significant items of equipment, the development of a new product line, or even the acquisition of another business through a purchase of the outstanding shares or the assets of that business. In these situations, businesses generally seek loans that are repayable over a fixed period of time, with principal being repaid in periodic instalments pursuant to an agreed schedule or in a single payment upon the maturity of the loan term.

120. As is the case with many other types of financing, a business that does not have a strong, well-established credit rating will have difficulty obtaining term loan financing unless it is able to grant a security right in its assets in favour of the lender. The amount of the financing available, and its cost to the borrower, will be based in part on the creditor's estimate of the net realizable value of the collateral. In States that have not enacted the Model Law, immovable property may be the only type of asset that is available to, or accepted by, lenders to secure term loan financing. However, many businesses, in particular new ones, do not own any immovable property. As a result, term loan financing is often not available to borrowers that may, nonetheless, have significant assets, such as equipment or the overall value of the entire business. In contrast, the Law facilitates term loan financing secured by movable assets, such as equipment, intellectual property and the overall value of the enterprise as a whole.

121. Here is an illustration of term loan financing. X desires to expand its operations and purchase another company engaged in a similar operation. X obtains a loan from Y to finance the acquisition. The loan is repayable in equal monthly instalments over a period of 10 years and is secured by all existing and future assets of both X and the company being acquired.

6. Sale and leaseback transactions

122. A sale and leaseback transaction is another method by which businesses can obtain credit based upon its existing tangible movable assets (usually equipment) while still retaining possession of, and the right to use, these assets in its business operation. In a sale and leaseback transaction, X will sell its equipment to a third party for a specific amount, which X may then use as working capital or make capital expenditures. Simultaneously with the sale, X will lease the equipment back from the third party for a lease term, and at a rental rate, specified in the lease agreement. Often, the lease would be a "financial lease" as opposed to an "operating lease" (see para. 98 above).

7. Financing practices involving negotiable documents or instruments

123. Negotiable instruments (such as cheques, bills of exchange or promissory notes) and negotiable documents (such as bills of lading or warehouse receipts that embody rights in goods) may also serve as collateral. Such transactions are facilitated by the Law.

124. Here is an example. In connection with the revolving loan facility (see paras. 107–110 above), X asks Y to provide additional credit based on the value of inventory purchased by X from its overseas supplier while that inventory is in the process of being shipped to X's factory. The goods are evidenced by negotiable bills of lading issued by the carrier. Y may agree to provide such additional credit provided that it obtains a first-ranking security right in the bills of lading and agreements are reached with X's freight forwarder and customs broker to administer the bills of lading as agent for Y.

[*Note to the Working Group: The Working Group may wish to confirm that the Practice Guide need not address the rights of a secured creditor in possession of a negotiable instrument or certificated non-intermediated security in States parties to the Genevan Uniform Law and the Bills and Notes Convention (see Guide to Enactment, paras. 141–142).*]

8. Financing related to intellectual property

125. Intellectual property plays an increasingly important role in businesses of all types. For many businesses, its interest in intellectual property, either as an owner or a licensee, may be the company's most important, or only, asset. It is therefore not surprising that intellectual property is playing an increasingly important role as collateral which can be used to access credit. The Law accommodates this trend, enabling businesses to use their intellectual property as collateral in an efficient and cost-effective way that balances the interest of the companies, the secured creditors as well as the owners of the intellectual property. [14]

126. Secured transactions relating to intellectual property can usefully be divided into two broad categories. The first category consists of transactions in which the intellectual property rights of the borrower (as owner, licensor or licensee of the intellectual property) serve as security for credit. For example, suppose that X is a pharmaceutical company that constantly develops new drugs. It wishes to obtain a revolving line of credit from Y secured, in part, by X's portfolio of existing and future drug patents and patent applications. X would provide Y with a list of all of its existing patents and patent applications, as well as their chain of title. Y would evaluate which patents and patent applications it will include in the "borrowing base" and at what value they will be included. Y then obtains a security right in the portfolio of patents and patent applications. When X obtains a new patent, it provides its chain of title and valuation to Y for inclusion in the borrowing base. Y evaluates the information, determines how much additional credit it will extend based on the new patent and adjusts the borrowing base accordingly.

127. The second category involves financing transactions that involve intellectual property in combination with other movable assets, such as equipment, inventory or receivables. In such transactions, the value of the collateral is based, to some extent, upon the intellectual property with which they are associated. This category of transactions usually involves security rights in tangible assets.

128. Suppose that X is a manufacturer of designer jeans and other high-fashion clothing. X wishes to borrow money from Y secured, in part, by X's inventory of finished products. Many of the items manufactured by X bear well-known trademarks licensed from third parties under licence agreements that give X the right to manufacture and sell the products. X provides Y with copies of its licence agreements evidencing X's right to use the trademarks and to grant a security right in the trademarked inventory, as well as its obligations to the trademark owners. Y extends credit to X based on the value of the inventory. In this case, a security right in the inventory of finished jeans does not automatically extend to the trademark used, unless otherwise agreed by the parties (art. 17). Thus, if Y wishes to take a security right in the trademark licence, it has to be described in the security agreement as part of the collateral. (for additional examples, see Intellectual Property Supplement, paras. 35–45).

[*Note to the Working Group: The Working Group may wish to note that financing techniques described in Section B most often involve borrowers that are SMEs but many can be effectively used for financing to micro-businesses. Furthermore, the Working Group may wish consider the extent to which the draft Practice Guide should include a reference to value chain arrangements or supply chain financing arrangements which involve a number of different types of transactions mentioned above.*]

[14] The Law, however, does not apply to security rights in intellectual property in so far as the Law is inconsistent with the law relating to intellectual property as specified in the State (art. 1(3)(b)).

C. Due diligence – a key preliminary step for secured financing

1. Introduction

129. As indicated (see para. 8 above), this Practice Guide is not intended to be a primer on lending in general. It assumes that the readers are well-versed in the principles of extending unsecured loans and the due diligence that prudent lenders typically would conduct with respect to such unsecured transactions. However, when it is contemplated that a proposed loan will be secured by a movable asset, additional due diligence is required.

130. Much of the diligence recommended will be related to the borrower and other grantors of security rights. However, a larger percentage of the diligence recommended will be asset-specific. The diligence required when the collateral consists of receivables is very different than the diligence required when the collateral is inventory, equipment or intellectual property. Each category of asset presents unique issues, and the lenders and other credit providers that are most successful in secured lending are those who become expert in the collateral in which they take security rights.

131. It is also important to recognize that diligence in secured transactions is not merely something to be done at the outset of the transaction. Rather, it is a continuous process that must be conducted, at least to a certain extent, during the entire life of the financing arrangement. For example, in a revolving receivables and inventory financing arrangement (see paras. 107–110 above), periodic evaluations of the receivables and inventory need to be conducted to verify that the information being provided by the borrower, as well as the lender's initial assumptions as to the valuation of collateral, remain accurate.

132. Diligence is not limited to the borrowers, guarantors and the collateral. Legal diligence is also required to determine if there are any applicable laws or regulations that prevent or restrict the providing of credit to those loan parties or limit the creation, priority or enforcement of a security right in particular assets (more generally, see Chap. I.E).

133. A lender often will begin the due diligence process by sending the borrower a diligence checklist or certificate to be completed by the borrower. This certificate provides essential information upon which the lender may base its due diligence process. An example of a diligence certificate (the "Sample Certificate") is provided in Annex II.

134. It is important to remember that diligence should never be conducted in a rote, obligatory fashion. It should be seen as a vital tool, enabling the lender to uncover, and address, the risks inherent in the transaction under consideration. It is also important to recognize that collateral is intended to enhance the likelihood that the lender will be able to recover its loan in the event of default; it is not intended to render the basic principles of extending credit irrelevant, or to relieve lenders from the necessity of conducting due diligence on the borrower or any guarantors.

135. Lenders would typically engage third-party service providers to perform the initial and ongoing diligence required for borrowers and their assets. For example, they may use credit bureaus to assess the credit of the borrower or guarantors, field examiners to inspect and evaluate the borrower's premises, books and records, appraisers to evaluate categories of assets such as receivables, inventory, equipment and intellectual property, industry analysts to explore the strengths and weaknesses of the industry in which the borrower operates and collateral monitoring services to assess the collateral from time to time during the term of the financing arrangement.

The risks of over-collateralisation

136. Under the laws of some States, lenders may be penalized if they take too much collateral for a given loan (referred to generally as "over-collateralisation", see Secured Transactions Guide, Chap. II, paras. 68–69). Under such circumstances, the lender may be obliged to release certain excess collateral to enable the borrower to

use that collateral to obtain additional credit. Where over-collateralisation is more extreme, the enforceability of the lender's security rights may be jeopardized.

137. There is a relationship between over-collateralisation and due diligence. Diligence is costly (though the cost if often passed on to the borrower) and time-consuming. As a result, it can be far more convenient for a lender to take a security right in all of the borrower's assets rather than conduct diligence on certain assets that might persuade the lender to limit its security right to those assets. The lack of diligence might also cause the lender to focus less on the creditworthiness of the borrower and guarantors, relying instead on a security interest over all assets. This is particularly a danger for micro-businesses, which often lack the bargaining power to convince the lender to engage in due diligence.

138. Thus, although the availability of a security right in all of grantor's assets can be a great benefit to lenders and grantors alike, it also has dangers if it is not used responsibly. Its use should be confined to situations in which the lender, after conducting full diligence on the loan parties and their assets, believes that such a security right is essential to the credit transaction at hand, and should not be used as an excuse for failing to conduct proper diligence.

2. Due diligence on the borrower and other grantors

139. As noted above, much of the due diligence required for secured transactions pertains to the borrower and other grantors of security rights. Much of that diligence overlaps with the diligence conducted by a lender in connection with the granting of an unsecured loan. But there are differences as will be discussed below.

140. Section 1 of the Sample Certificate (contained in Annex II) is designed to elicit general information relating to the borrower, including the name of the company as it appears on its current organizational documents. This is not only relevant for the preparation of loan documents, but is critical to assure that searches of the Registry and notices to be registered reflect the correct name of the borrower. The lender must examine a copy of the organizational documents to verify the accuracy of the company's name. Sections 1(g) to (i) are designed to determine whether there are other names that must be searched to reveal any potential conflicting security rights in assets that are to serve as collateral. In conducting searches, prospective lenders are urged to err on the side of conducting searches under more rather than fewer names, in order to minimize the risk that a potential competing claim might remain undiscovered.

141. Section 4 of the Sample Certificate requests copies of material contracts that may be relevant. These include contracts such as loan agreements and guarantees, contracts that evidence other financial obligations, mortgages and other security documents, leases and agreements relating to changes in the company's corporate structure.

142. Section 6 of the Sample Certificate requests information as to litigation, both pending and potential, to which the company is a party, either as a defendant or plaintiff. An analysis of these claims can yield valuable information as to potential financial risks to which the company may be exposed, as well as how the company conducts its business. A lender may also wish to make further inquiries with the bankruptcy and insolvency officials to ensure that insolvency proceedings have not been commenced.

143. Section 7 of the Sample Certificate enquires as to transactions that the company has with its affiliate companies or affiliated individuals. It is important to verify that such transactions are conducted on an arms-length basis, and do not represent a potential source of self-dealing by the company.

144. Section 8 of the Sample Certificate requests information concerning outstanding tax assessments or proceedings against the company. This request is designed to determine whether the company is current in the payment of taxes, and also to identify potential tax liens or other priority claims in favour of taxing authorities that may affect the lender's collateral. In many States, certain claims are given priority even

over prior-registered security rights without the need for registration (art. 36). Examples of common preferential claims are claims by the government or a government agency for unpaid taxes and other assessments and claims by employees for unpaid wages and other benefits. The lender should determine what preferential claims may exist against the borrower.

145. Section 11 of the Sample Certificate requests the identity of the company's officers, directors and managers, in part to enable the lender to conduct background checks on these individuals.

146. Section 12 of the Sample Certificate is designed to elicit miscellaneous information as to indebtedness to be paid out of the proceeds of the loan under consideration, the existence of any third-party consents that may be necessary in connection with the proposed loan, the extent to which the company's business is regulated, and whether the company is non-compliance with applicable laws or regulations.

[*Note to the Working Group: The Working Group may wish to consider whether the information above relating to the Sample Certificate should be retained in this part of the Practice Guide or merged as annotations to the Sample Certificate in the Annex.*]

3. Due diligence on the collateral

147. As noted above, much of the diligence for a secured loan relates to the collateral. This diligence covers matters such as:

- Identifying all of the grantor's assets
- Verifying that the borrower/grantor owns or has rights in the assets
- Ascertaining whether any third parties have conflicting security rights in, or other claims with respect to, the assets
- Verifying the existence of the assets
- Determining the value of the assets
- Determining whether the assets are adequately insured and
- Determining the location of the assets.

Identifying the grantor's assets

148. In many cases, the proposed collateral is readily identifiable. However, when the loan is designed to provide general working capital for the borrower's business, it may be secured by substantially all of the borrower's assets. In this case, it is important for the lender to understand what the borrower's assets are, in order to determine how to obtain an enforceable security right in each asset. Section 3 of the Sample Certificate is designed to elicit this information.

Verifying the grantor's ownership or other rights in the collateral

149. In order for a security right to be created, the grantor must have rights in the asset or the power to encumber it. Thus, it is important for a prospective lender to verify that the grantor meets this requirement with respect to each asset to be included in the collateral.

150. The Registry does not help with this aspect of diligence. Unlike certain specialized registries relating to certain types of assets (such as intellectual property, aircraft or ships), the Registry only contains information as to security rights in movable assets and offer no evidence as to the ownership of the assets. Thus, lenders need to rely on other sources.

151. The method used by lenders to verify the ownership of an asset will vary depending on the type of asset. In the case of receivables, the lender may examine the documents creating the receivable, such as the purchase order from the customer and the invoice to the customer. In the case of inventory or equipment, lenders can examine the purchase orders issued by the borrower to the suppliers of these assets as

well as the invoices from the suppliers. In the case of a bank account, lenders can review the deposit agreement with the depositary bank, as well as bank statements. Many State have intellectual property registries from which it is possible to determine that the borrower is in the chain of title to the intellectual property in question. Otherwise, the lender may examine documents evidencing the borrower's rights to the intellectual property, such as license agreements and patent grants.

Ascertaining the existence of conflicting security rights in, or other claims with respect to, the assets

152. Lenders can easily search the Registry to determine whether any third party claims a security right in the proposed collateral. Thus, it is essential that lenders conduct a search of the Registry with respect to each prospective grantor at the outset of the diligence process.

153. A very useful technique used by lenders is to conduct two separate searches. One at the commencement of the diligence process, and the other after the registration to ensure that the notice is on record and that its priority is preserved. Because the Law allows for advance registration (see paras. 39–40 above), a lender conducting this second search can disburse funds without worrying that third parties will obtain a higher-ranking security right during the period from the date of registration and the disbursement of funds.

154. Where the lender identifies the existence of competing security rights or other rights in the assets, various means can be used to address the problem. In some cases, the obligation evidenced by a competing right may have been paid in full but the related notice simply not cancelled. In such circumstances, the third party can be contacted and asked to register a cancellation notice. If the registered notice is overly broad and describing assets that were not covered by the underlying security agreement, it may be possible to request an amendment notice, releasing the excess assets (see paras. 223–227 below). Where a search reveals the existence of a tax lien, it may be possible to obtain a subordination of the tax lien to the proposed new financing, which tax authorities in some States may be willing to do so as to preserve the borrower as a going concern, or to require that the delinquent taxes be paid out of the proceeds of the new financing. Finally, it may be the case that the search reveals a secured obligation that is to be repaid out of the proceeds of the new loan. In that case, the new lender can assure itself that its loan proceeds will be used for that purpose by obtaining a "pay-off" letter from the existing creditor stating the amount owing and disbursing the required amount directly to that creditor.

155. Under the Law, a buyer of an asset that is not sold in the ordinary course of the seller's business generally acquires the asset subject to any security right encumbering that asset granted by the seller (art. 34). It follows that a prospective lender should make inquiries to determine whether the potential grantor was the original owner of the collateral or acquired it from a previous owner. In the latter case, the secured creditor should conduct an additional search using the name of the prior owner as the search criterion to avoid the risk of a subsequent priority dispute with a secured creditor of a prior owner (see art. 26 of the Registry Provisions).

156. Under the Law, a security right in tangible collateral may be made effective against third parties also by possession (art. 18, see paras. 83–84 above), and priority between security rights made effective by registration and possession is determined by the order in which these steps were taken (art. 29). Consequently, even if a search of the Registry does not disclose any prior-registered security rights, a lender should verify that the grantor is in physical possession of the collateral and remains in possession when the lender registers a notice of its security right.

157. If a search of the Registry discloses that a prior notice has been registered, a lender will generally wish to obtain the agreement of the secured creditor identified in that notice to subordinate its priority before proceeding further with the transaction. A subordination agreement should be obtained even if the grantor has not in fact entered into a security agreement with that secured creditor. This is necessary because the lender (thus, a prospective secured creditor) will generally be subordinated, under

the first-to-register priority rule, if the grantor were to later grant a security right in the relevant assets to the prior-registered secured creditor (art. 29).

Verifying the existence of the assets

158. Although it seems obvious that the lender must verify the existence of the proposed collateral, it is also the case that some of the greatest frauds perpetrated by borrowers against lenders have arisen where the assets did not exist.

159. There are many ways to verify the existence of assets. In the case of receivables, the lender may contact the debtors on the receivables to verify that the goods or services covered by the receivables were in fact received by the customer and that the customer acknowledges that it owes the full amount of the receivable to the borrower. The existence of inventory and equipment can be verified by a physical inspection by the lender. An examination of the documents on file in an intellectual property registry can verify the existence of intellectual property rights. This type of diligence and monitoring should not be confined to the outset of the loan transactions but should be conducted periodically throughout the term of the loan.

Determining the value of the assets

160. An essential element of secured lending is that the lender has a strong understanding of the value of its collateral. However, the manner in which value is determined will vary greatly depending upon the type of asset involved.

161. In the case of a revolving receivables and inventory credit facility (see paras. 107–110 above), the lender typically will only make loans against a borrowing base comprised of receivables and inventory that are deemed to be "eligible" because they meet certain criteria. For example, the eligibility criteria with respect to receivables may relate to (i) the payment history of the debtors on the receivables, (ii) whether the receivables owing by a given debtor represent an uncomfortably high percentage of all of the borrower's receivables and (iii) the creditworthiness of the debtors of the receivables. The eligibility criteria relating to inventory may relate to their state in the borrower's manufacturing process (i.e. raw materials and finished goods are typically more valuable because they are readily marketable than to work-in-process which may not be saleable and therefore may have little or no value).

Determining whether the assets are adequately insured

162. In the event of loss or destruction of the collateral, the proceeds of insurance covering those assets serve as the substitute for the collateral. Thus, it is essential that the lender ensures that tangible movable collateral is adequately insured against loss or destruction by a reputable insurance company with amounts that accurately reflect the value of such collateral, and that the insurance proceeds are payable by the insurer directly to the lender via a loss payable clause.

163. In the case of receivables, it is increasingly common for lenders to require that the borrower obtain trade credit insurance insuring against the insolvency of the debtors of the receivables. The subject of trade credit insurance is quite complex, and lenders must not assume that, simply because the borrower maintains trade credit insurance, the lender will be protected against the risk of insolvency of the debtors of the receivables. Among other things, trade credit insurance policies typically contain elaborate reporting requirements, as well as a credit limit for each debtor and for each State in which debtors are located. The failure of the borrower to comply with these requirements could result in loss or reduction of coverage. Moreover, trade credit insurance is never a substitute for an enforceable security right in the receivables covered by the insurance; rather, it should be viewed as a supplement to the security right.

Determining the location of the collateral

164. Section 2 of the Sample Certificate requests information as to the place of central administration of the borrower as well as the locations where it stores any inventory or equipment.

165. When a company operates on a leased premises, lenders often request that the landlord sign a short agreement under which the landlord agrees, among other things, to waive any claim, under applicable law or the lease agreement, to the inventory, equipment or other property of the company located on the premises and to provide the lender with access to the premises in the event of the company's default under the loan documents. This would allow the lender to remove the asset or to conduct a sale (see Section G below). The willingness of the landlord to enter into such an agreement may differ depending on the jurisdiction; in some States, it may be customary for landlords to do so, while in others it is not.

166. When the company has inventory or equipment at third-party processors or warehouses, the lender should consider the advisability of requesting that the processor or warehouse enter into a separate agreement, often called a "collateral access agreement", under which the third-party agrees to provide the lender with access to the inventory or equipment upon the lender's demand. Often, such an agreement will provide for the payment of the fees owing to the processor or warehouse (which, under the laws of some States, could be a preferential claim on the assets in the possession of the processor or warehouse).

167. Section 3(b) of the Sample Certificate requests information as the borrower's bank accounts. In the case of bank accounts that are to be included in the collateral, the lender must ascertain the names and addresses of the depository banks and the relevant account information.

D. Searching the registry

1. Why and when to search?

168. Under the Law, priority of a security right is usually determined by the order in which the respective notice is registered in the Registry. It follows that once the essential elements of the security agreement has been agreed, a prospective secured creditor (as well as buyers, the grantor's judgment creditors or insolvency representative) should conduct a search of the Registry to determine if another creditor has already registered a security right in the prospective collateral. A second search should be conducted immediately after the registration to verify that no intervening registrations have been made by a competing secured creditor.

169. If its security right covers grantor's future assets, the secured creditor should generally conduct a new search before extending credit based on new assets acquired by the grantor. This is a necessary precaution because a subsequent lender or seller who advances credit to finance grantor's acquisition of the encumbered asset generally has priority over prior registered secured creditors (see paras. 100–106).

2. How to search?

What is the search criterion?

170. Searches of the Registry are to be conducted using the identifier of the grantor, in most cases, its name (arts. 22(a) of the Registry Provisions). As highlighted a number of times, the grantor is usually the person who owes the obligation but may also be a third person (see paras. 17 and 73 above). In that case, the search should be conducted using the name of the grantor and not the name of the debtor. That said, a prudent potential secured creditor will often conduct an additional search against the name of the debtor (including a guarantor of the secured debt) as part of its overall assessment of the debtor's creditworthiness.

How to determine the grantor's name?

171. Searchers are responsible for using the accurate name of the grantor in conducting searches as set out in the Law (art. 9 of the Registry Provisions). Secured creditors must refer such rules to ensure that the search result is reliable. Thus, a prospective lender, before conducting its search, should obtain the relevant official

document from individual grantors or conduct searches of the relevant business or corporate records if the grantor is a business entity.

Exact match vs. close match registry systems

172. In some States, the Registry may seek to assist searchers by providing search results that disclose notices of security rights in which the name of the grantor closely matches the name entered by the searcher (option B in art. 23 of the Registry Provisions). In such case, searchers may wish to verify whether those disclosed notices are relevant to the transaction. In any case, searches according to the accurate name of the grantor is necessary to ensure a reliable search result.

What if the grantor recently changed its name?

173. Where the grantor changes its name after the registration of a notice, the secured creditor would likely register an amendment notice within the brief grace period to reflect the new name of the grantor (art. 25 of the Registry Provisions). Otherwise, its security right will be subordinate to a subsequent secured creditor who registers its security right using the grantor's new name. Thus, a prospective lender should verify that the name of the grantor has not recently changed. If a change of name has occurred and the grace period has not yet expired, the lender should conduct an additional search using the prior name of the grantor to check if there are any competing security rights. A change of name of businesses can generally be determined by searching corporate or business records.

3. Searches in other registries

174. The Registry is the appropriate venue for registering and searching notices relating to security rights in most types of movable assets. However, security rights in some categories of assets may (or may also) be registered in other registries (art. 1(3)(e)). If the assets to be encumbered are those subject to a different registration regime but still fall within the scope of the Law, a prospective secured creditor will need to conduct a search of all relevant registries. [*Note to the Working Group: The Working Group may wish to consider whether the draft Practice Guide should include a list of such registries, which may differ depending on the jurisdiction.*]

175. If the collateral or the potential grantor is not located within the enacting State, a prospective secured creditor may need to conduct a search of the registry in other States (see Section J).

E. Preparing the security agreement (arts. 6(3) and 9)

176. The term "security agreement" designates the agreement under which a security right is created (art. 2(jj)). As the Law adopts a functional approach to the concept of security right (see Chapter I.B.3), the term security agreement includes not only an agreement creating a security right in assets owned by the grantor but also a contract of sale on retention-of-title terms or a financial lease. In addition, as the Law generally subjects an outright transfer of receivables to the same rules or those applicable to a security right, the term security agreement also includes an agreement whereby a person sells or otherwise dispose of receivables.

177. As discussed in Section A, a security agreement must be in writing (art. 6(3)). It may be oral if the secured creditor is in possession of the encumbered asset (art. 6(4)). However, in the latter case, parties will usually want to put their agreement in writing to avoid a dispute as to the exact content of that agreement.

178. Very few requirements are prescribed by the Law for a security agreement to create a valid security right (art. 6(3)). The security agreement must:

- Identify the parties (the secured creditor and the grantor)
- Describe the secured obligation and
- Describe the encumbered assets.

179. The description of the secured obligation and of the encumbered assets must be made "in a manner that reasonably allows for their identification" (art. 9(1)). The Law permits the creation of a security right not only in assets specifically described (for example, a specific car or truck) but also in assets of a generic category (for example, described as all of the inventory of the grantor). It is also possible for a grantor to grant a security right in "all of the grantor's movable assets" and a description in that manner would usually be sufficient (art. 9(2)). The encumbered assets may consist of existing assets or assets to be acquired in the future by the grantor or both. Where the security right secures a line of credit made available by a bank to the grantor for the purposes of financing the business of the grantor, it is typical that the collateral will consist of all present and future movable assets of the grantor.

180. Under the Law, a security right may secure an obligation (present or future) by specifically identifying it or by stating all obligations "owed to the secured creditor at any time" (art. 9 (3)). In the latter case, no further description of the secured obligations is required (the description necessarily identifies the secured obligations because they consist of all present and future obligations owing to the secured creditor).

181. The enacting State may require that the security agreement indicate the maximum amount for which the security right may be enforced (art. 6(3)(d)), if it determines that such an indication would be helpful to facilitate secured lending by subsequent creditors. In that case, potential lenders will be able to ascertain whether the encumbered asset would still have some residual value for them after satisfaction of the claim of a prior-registered secured creditor through a search of the Registry (art. 8(e) of the Registry Provisions).

182. A security agreement will be a very short document (one page) if it includes only the basic requirements of the Law. However, the parties will usually add other provisions dealing with their rights and obligations (including on the monitoring of the encumbered assets and the enforcement powers of the secured creditor upon the occurrence of a default). Lenders would generally prepare the basic template for the security agreement.

183. With respect to the events which may trigger a default, they may be listed in the security agreement itself or the security agreement may refer to another agreement evidencing the secured obligations in which the events of default will be set out. If the agreement creating the security right is also the agreement whereby the secured obligations arise (e.g. a sale with a retention-of-title clause or a financial lease), the events of default will be found in that agreement. Where the security right is granted to secure obligations incurred under another agreement (e.g. a credit agreement for a line of credit or a specific loan), it is sufficient to refer to the credit agreement for the description of events of default. Of course, even where the secured obligations consist of advances under a line of credit or a specific loan, for sake of simplicity, the parties may wish to insert in one single document provisions relating to the credit facility and the creation of the security right.

184. Events of default in an agreement that constitutes both a credit agreement and a security agreement will typically include the following:

- The failure by the grantor to pay when due any amount owing under the secured obligations
- The failure by the grantor to make a payment to another creditor in respect of a monetary obligation that exceeds a certain threshold
- The occurrence of the insolvency of the grantor (with "insolvency" being often defined in detail) or any the encumbered assets being the subject of a seizure or enforcement measures or proceedings by a third party
- Any representation made by the grantor in the agreement or any document delivered to the secured creditor pursuant to the agreement being false or misleading in any material respect and

- Any non-performance in any material respect by the grantor of any of its obligations under the agreement.

185. Where the grantor is not the debtor of the secured obligations, the above events will be drafted to include the debtor whenever applicable. As well, it is usual to provide that certain of these events will constitute an event of default only after the expiry of a grace period.

186. The Law recognizes the principle of party autonomy on the provisions of the security agreement relating to the contractual rights and obligations of the parties, including on what constitutes default (art. 2(j), 3, 52 and 84, see paras. 16 and 30 above). Other laws of the enacting State may however limit the scope of party autonomy (e.g., consumer protection laws or a provision of the law of obligations stating that a default must be material to give rise to acceleration of a term loan).

187. A sample security agreement giving effect to the above-mentioned aspects is contained in Annex I.

F. Registration of a notice in the Registry

[*Note to the Working Group: The Working Group may wish to consider whether the draft Practice Guide should contain a separate section addressing steps that usually needs to take place before closing a secured finance transaction or before disbursement of funds (for example, ensuring that the grantor has executed all relevant documents). The section below focuses on registration of a notice as part of that process.*]

1. How and where to register and who should register?

188. The Law and the Registry Provisions contemplate an efficient, straightforward registration process. To register a notice with respect to a security right in the Registry, all that is needed is a notice giving some basic information (identifying the grantor and the secured creditor and describing the encumbered assets) to be submitted to the Registry (art. 8 of the Registry Provisions). In certain States, additional information may be required, such as the period of effectiveness of the notice and the maximum amount for which the security right can be enforced. Submission of this information is likely to be done online, which is registered and searchable as soon as the notice is registered.

189. Registration of a notice is not designed to protect the grantor and failure to do so would not affect the enforceability of the security right against the grantor. Thus, in practice, registration is usually done by the secured creditor to ensure that its security right is effective against third parties and has priority against other security rights.

190. A secured creditor is free to delegate the task of registering to a third party, for example, its lawyer or a firm that specializes such service (art. 5 of the Registry Provisions). However, the secured creditor is responsible for any errors or omission made by its authorized registrant. Thus, the secured creditor should make sure that it will have recourse against the third party in the event of error (for example, ensuring that the registrant is fully insured against liability for its errors). Even then, the secured creditor should promptly verify that the registration has been made correctly.

191. A registrant need only submit a completed notice to the Registry in the prescribed form, pay any prescribed fees (usually set on a cost-recovery basis), and identify itself in the prescribed manner (art. 5 of the Registry Provisions). The registration is effective as soon as the information in the notice submitted to the registry is publicly searchable (art. 13 of the Registry Provisions).

192. Registrants should refer to any specific guidelines provided by the State or the Registry. These guidelines will usually set out the requirements such as the mode of electronic transmission of information and how to set up and operate a user account (e.g., how to reset passwords for user accounts, what information is needed to set up a user account).

[*Note to the Working Group: A security right in some categories of movable assets may, however, be subject to a different registration regime. The Working Group may wish to consider to what extent this section should refer to the need to register in other registries and if so, which registries should be mentioned.*]

2. When to register an initial notice?

193. As discussed, registration can be made before the security agreement is concluded or the security right is created (see para. 39 above). A secured creditor should consider registering as soon as the general content of the financing arrangement has been agreed to benefit from the general priority against other secured creditors based on the order of registration.

194. Secured creditors are cautioned that advance registration does not necessarily provide protection against other types of competing claimants. For example, if the grantor sells an asset described in the notice before the security agreement is concluded, the security right will not be effective against the buyer. The same is true if insolvency proceedings are commenced by or against the grantor, or if a judgment creditor of the grantor obtains rights, before the agreement is concluded. Thus, secured creditors should not rely on advance registration as a reason to delay conclusion of the security agreement.

3. What information is to be included in an initial notice? (art. 8 of the Registry Provisions)

Name and address of the grantor and the secured creditor

195. The name and address of the grantor should be set out in the initial notice. If the debtor and the grantor are different, a notice that sets out the name of the debtor instead of the grantor would not be effective to make the security right effective against third parties. A secured creditor must ensure that it set outs the correct name of the grantor in the notice (art. 9 of the Registry Provisions). If a search using the correct name does not disclose a registered notice, the registration will be ineffective (art. 24 of the Registry Provisions).

196. The name and address of the secured creditor or its representative must also be set out in the initial notice. The name of a representative of the secured creditors would typically be used where the obligation is owed to a syndicate of multiple lenders. The correct name of the secured creditor or its representative is determined in accordance with the same rules that determine the correct name of the grantor (art. 10 of the Registry Provisions). However, the name of the secured creditor or its representative is not a search criterion. Thus, such errors do not render the registration ineffective unless it seriously misleads a reasonable searcher (art. 24(4) of the Registry Provisions). Nonetheless, secured creditors and its representatives should take care to enter its correct name and address. This will ensure that it receives any communications from third parties based on the information set out in the notice, for example, a notice of enforcement sent by a competing secured creditor (art. 78(4)) or a notice of intention to acquire an acquisition security right sent by a subsequent acquisition secured creditor (art. 38(2), option A).

Description of the encumbered assets

197. The initial notice must also contain a description of the encumbered assets. The inclusion of a description is necessary to enable searchers to determine which of the grantor's assets may be encumbered by a security right. A description is sufficient only if it reasonably allows identification of the collateral (art. 11 of the Registry Provisions).

198. The collateral does not necessarily have to be described specifically. A specific description is needed only if the encumbered asset is a specific item. Even then, it is sufficient if the description enables identification of the relevant asset. For example, a description such as "the grantor's automobile" would be sufficient if the grantor owned only one automobile but not necessarily so if the grantor owned more vehicles. In this case, a prudent registrant would provide additional descriptive details (for

example, the model and model year of the automobile), since it is possible that the grantor might acquire additional automobiles in the future, making it difficult to identify which automobile is referred to in the notice.

199. The secured creditor should avoid describing the assets in a way that might require it to register an amendment notice due to subsequent events. For example, describing assets by their location (for example, "all equipment located at 123 Street, Capital City") should generally be avoided unless the secured creditor is confident that the assets will be remain at that location for the duration of the financing relationship.

200. If the encumbered assets are a generic category of present and future assets, it is sufficient if the description refers to the generic category, for example, "all present and future receivables owing to the grantor" or "all of the grantor's present and after acquired inventory." If the security right is intended to cover "all the grantor's present and future movable assets," a description using those words is likewise sufficient.

201. The parties may contemplate entering into a series of security agreements over time. For example, an initial security agreement covering a specific item of equipment to secure a loan, and a subsequent security agreement covering all the grantor's present and after acquired movable assets to secure a line of credit to be negotiated at a later point. In that case, a single notice is sufficient to cover the security rights created under multiple security agreements between the parties (art. 3 of the Registry Provisions). Thus, in this example, the notice should describe the encumbered assets as "all present and after acquired assets of the grantor." This will avoid the need to register a separate notice for each agreement. It will also ensure that security rights over assets covered by all later agreements generally have priority against subsequent competing secured creditors from the time the notice is registered.

Period of effectiveness of the registration

202. The Law may require that the initial notice indicate the period of effectiveness of the registration. In that case, the registrant should take into account the approach of the enacting State as the Model Law provides three options for determining the period of effectiveness of the registration (art. 14 of the Registry Provisions).

Statement of the maximum amount for which the security right may be enforced

203. The Law may also require that the initial notice indicate the maximum amount for which the security right may be enforced (in addition to it being set out in the security agreement, art. 6(3)(d), see para. 181 above). As noted, this is to enable a grantor to use the residual value of the asset to obtain financing from other creditors.

204. For example, suppose that the equipment owned by X has an estimated market value of $30,000. X creates a security right in that equipment in favour of Y to secure a loan (including interest and other anticipated charges) of $10,000. The security agreement and the relevant notice both indicate that the maximum value for which the security right can be enforced is $10,000. Y is secured as to the equipment only up to $10,000 and may be unsecured for any credit that it extends to X above that amount. Thus, a subsequent creditor will be willing to extend credit in the amount corresponding to the residual value of the equipment ($20,000).

205. This illustrates that a secured creditor must ensure that the maximum amount set out in the security agreement and in the registered notice is sufficient to cover all credit that it intends to be secured by the security right (present and future as well as any anticipated costs of enforcement in the event of default).

4. When should the secured creditor register an amendment notice?

206. A person identified in a registered notice as the secured creditor may modify the information in that notice at any time by submitting an amendment notice (art. 16(1) of the Registry Provisions). The following addresses the most common circumstances in which an amendment notice would be registered.

Correction of errors or omissions

207. The Registry is required to send a copy of the information in a registered notice to the secured creditor without delay after it is registered (art. 15(1) of the Registry Provisions). The secured creditor should immediately inspect the sufficiency and correctness of the information received and register an amendment notice to correct any errors or omissions.

Post-registration change in the name of the grantor

208. A grantor's name may change after a notice is registered, for example, because an individual grantor later applies to have her name legally changed or because a corporate grantor later amalgamates with another company. In those cases, the secured creditor should register an amendment notice disclosing the new name of the grantor during the grace period in order to preserve its priority (art. 25 of the Registry Provisions).

209. Suppose that the grace period for registering an amendment notice to disclose the new name was 60 days. On Day 1, Y registers an initial notice of its security right in X's equipment. On Day 20, the name of X is changed to X1. On Day 30, another creditor acquires a security right in the same equipment from X1 and registers a notice identifying X1 as the grantor. On Day 40, Y registers an amendment notice adding X1 as the grantor of its security right. Assuming that priority between Y and the new creditor is governed by the general first-to-register rule, Y would retain priority as against the new creditor.

210. A secured creditor can still register an amendment notice after the expiry of the prescribed grace period. However, the effectiveness and priority of its security right will not be preserved against buyers and secured creditors who acquired their rights after the grantor changed its name and before the amendment notice was registered. In general, secured creditors should take precautions to protect itself against the priority risk posed by a post-registration change in the grantor's name. For example, the secured creditor could periodically monitor whether a change of name or other change in status has occurred since the initial registration.

Post-registration changes in secured creditor information

211. There may be instance where the secured creditor information changes after the initial notice is registered. This may occur if the secured creditor changed its name or address or both. It may also occur when the initial secured creditor assigned its rights to a new secured creditor. While a change in the secured creditor information in the registered notice does not prejudice the effectiveness of the registration in any way, a secured creditor will generally wish to update the record to disclose any change. This can be done efficiently through a single global amendment notice, which would simultaneously update the relevant information in all notices registered by the secured creditor (art. 18 of the Registry Provisions). This will ensure that the secured creditor receives notices or other communications sent by third parties who relied on the name and address set out in the notice.

Addition of a description of new encumbered assets

212. A secured creditor may initially have registered a notice with regard to a security right in a specific item. If the secured creditor later agrees to extend a new loan to the grantor to be secured by a different item, the security right in that new asset would need to be made effective by registering an amendment notice (see para. 201 for the possible use of a single notice to cover multiple security rights).

213. The security right in the new asset will take effect against third parties only from the time of registration of the amendment notice. Instead, the secured creditor could register a new initial notice covering the new asset. However, the use of an amendment notice is more efficient. This is because the secured creditor will only need to add the new asset to the description of the encumbered assets in its existing registered notice.

Addition of a description of proceeds of encumbered assets

214. As mentioned, a security right automatically extends to identifiable proceeds of the collateral (art. 10, see paras. 87–89 above). Suppose that X and Y concluded a security agreement with regard to X's equipment and Y registered a notice describing the equipment. Subsequently, X sells the equipment and is paid in cash. X then deposits the cash received from the sale of in its bank account. It later uses the funds in the bank account to purchase another equipment.

215. In these cases, the Law provides that Y's security right would extend to the money received, to the funds credited to X's bank account and the newly purchased equipment, as proceeds of the original collateral or proceeds of proceeds. However, this is subject to a number of requirements being met (for example, arts. 10, 19 and 47) and Y cannot be assured of its priority over competing claimants.

216. Therefore, a secured creditor should not passively rely on the proceeds of the collateral for protection. It should constantly monitor the collateral to ensure that it is in a position to take the necessary steps to preserve the third-party effectiveness and priority of its security right in the proceeds, including by registering an amendment notice adding the description of proceeds.

Addition of a buyer of an encumbered asset from the grantor as a new grantor

217. Registration of a notice generally protects the secured creditor against an unauthorized sale of the collateral by the grantor, unless the asset is sold in the ordinary course of the grantor's business (art. 34). The buyer of the collateral would automatically become an additional grantor. However, it would be most likely that only the name of the seller (original grantor) appears in the initial notice. Thus, if a prospective secured creditor who deals with the encumbered asset in the hands of the buyer searches the registry using the name of the buyer, the relevant notice would not be found.

218. The Model Registry Provisions provides three different options to address post-registration transfer of collateral (art. 26 of the Registry Provisions). Regardless of which option is adopted in the Law, a secured creditor should generally monitor the collateral to protect itself against unauthorized disposition of the collateral by the grantor. After all, it may be difficult to locate the asset once it has been disposed of.

[*Note to the Working Group: The Working Group may wish to consider providing the legal consequences under one of the options provided in article 26 of the Model Registry Provisions*.]

Extension of period of effectiveness of a registration

219. The financing relationship between the parties may extend beyond the period of effectiveness of the initial notice (see para. 202 above) and thus, a secured creditor can extend the period of effectiveness (art. 14 of the Registry Provisions). The secured creditor should ensure that it is alerted of any upcoming expiry of its registration with sufficient time to register an amendment notice.

5. What are the obligations of the secured creditor with regard to registration

220. The Law requires the grantor's written authorization for registration to be legally effective (art. 2(1) of the Registry Provisions). However, compliance with this requirement does not necessarily impede the efficiency of the registration process because:

- A secured creditor need not obtain the grantor's authorization before registration and the grantor's subsequent authorization operates retroactively to make the registration effective (art. 2(4) of the Registry Provisions)
- A written security agreement between the parties is automatically deemed to constitute authorization, regardless of whether the agreement was concluded before or after registration (art. 2(5) of the Registry Provisions) and

- The registry may not require the registrant to provide evidence that the grantor has authorized the registration (art. 2(6) of the Registry Provisions).

221. However, such operation may create difficulties for a grantor if a notice is registered but no security agreement is eventually concluded between the parties or if the concluded security agreement covers a narrower range of assets than those described in the registered notice.

Obligation to send a copy of a registered notice

222. To avoid such circumstances, the Registry is required to send the secured creditor a copy of the information in a registered notice without delay after the information is entered in the Registry. The secured creditor must then send that information to the grantor within the period specified in the Law after it receives the information. While failure to do so would not affect the effectiveness of the registration, the secured creditor may become liable to the grantor for a nominal amount specified in the Law and any actual loss or damage suffered by the grantor resulting from its failure (art. 15 of the Registry Provisions).

Registration of an amendment or cancellation notice

223. The secured creditor may be requested to register an amendment notice to correctly reflect the assets subject to the security right or those with regard to which the grantor has given authorization (art. 20(1) of the Registry Provisions).

224. The person identified in a registered notice as the grantor may also request the secured creditor to register a cancellation notice if:

- That person had not given authorization of the initial notice and has informed the secured creditor that it will not do so
- The previous authorization had been withdrawn with no security agreement being concluded or
- The security right has been extinguished [15] (art. 20(3) of the Registry Provisions).

225. Depending on the circumstances, the secured creditor may or may not be able to charge a fee for complying with such requests (art. 20(4) and (5) of the Registry Provisions).

226. In most cases, the secured creditor will voluntarily comply with its obligations to register an amendment or cancellation notice. If it fails to comply after the expiry of the short period specified in the Law, the grantor (or the person identified as grantor) may seek an order for the registration of an amendment or cancellation notice (art. 20(6) of the Registry Provisions). When such an order is issued, the Registry is obligated to register the notice without delay (art. 20(7) of the Registry Provisions).

227. Secured creditors should exercise great care when amending a registration to release certain assets and when cancelling a registration, particularly when the registered notice relates to multiple security rights created under different security agreements (see para. 201 above). A secured creditor should not cancel a registration simply because the obligations secured under one agreement are satisfied. Similarly, a cancellation notice should not be registered because one of the grantors was released.

6. Registrations inadvertently amended or cancelled

228. Only the person identified as the secured creditor in the registered initial notice is authorized to register an amendment or cancellation notice relating to that notice. The only exception is where the initial secured creditor registered an amendment notice to identify a new secured creditor, for example, when it assigned its rights to another creditor. After registration of the amendment notice, only the person

[15] This means that all secured obligations have been discharged and the secured creditor is not committed to extend any further secured credit (art.12).

identified in the amendment notice as the new secured creditor is authorized to register an amendment or cancellation notice (art. 16(1) of the Registry Provisions).

229. Therefore, the registration of an amendment or cancellation notice requires the registrant to satisfy the secure access requirements specified by the Registry (art. 5(2) of the Registry Provisions). To guard against the risk of an inadvertent amendment or cancellation, secured creditors should institute procedures to preserve the confidentiality of their access credentials. A secured creditor would be responsible for an erroneous amendment or cancellation made by a person to whom it disclosed its access credentials to make registration on its behalf.

230. However, there may be instances where despite all precautions, an unauthorized person gains access to the secured creditor's access credentials and registers an amendment or cancellation notice. The effectiveness of such registration would depends on which option set out in article 21 of the Model Registry Provisions are chosen.

[*Note to Working Group: The Working Group may wish to consider whether the draft Practice Guide should include sample forms for authorizing registration of a notice (see para. 220 above) or requesting the registration of an amendment or cancellation notice (see paras. 223 and 224 above) in the Annex.*]

[*Note to Working Group: (1) The Working Group may wish to note that the current draft of the Practice Guide does not include a separate section on priority competitions, as they have been dealt with in different parts of the Practice Guide. The Working Group may wish to consider whether a separate section should be prepared to provide the various possible priority competitions and illustrate how the provisions of the Law would apply. Considering the variety of situations, it might be limited to the illustration to some key examples. (2) At its thirty-second session, the Working Group agreed that the draft Practice Guide should highlight the importance of monitoring collateral after the conclusion of the security agreement and disbursement of funds to preserve the priority of the security right (A/CN.9/932, paras. 82–84). Certain aspects have been dealt with in Sections C to F above, including how diligence would differ depending on the collateral and the need for continued monitoring, including of the grantor/debtor and the Registry. The Working Group may wish to consider whether a separate section is necessary in the Practice Guide to provide guidance on how monitoring is to be conducted and further noting that such monitoring should not result in undue interference with the grantor's conduct of business.*]

G. How to enforce a security right (arts. 72–83)

1. Notion of default and enforcement

231. Default is a defining moment in secured transactions. It is when the secured creditor will be able to assess the usefulness and effectiveness of its security right. Indeed, from the moment the debtor fails to perform the secured obligation, the creditor will seek to determine the market value of the collateral. In most cases, the creditor will have no intention of using or owning the asset. Thus, it is the market value (usually in the form of the selling price), that will allow the creditor to exercise its preferential right and recover payment of the sums due. This crucial phase is referred to as the enforcement phase.

232. In the Scenario, suppose that Y provided X a loan of $100,000, repayable in full after one year. To secure its claim, X grants a security right in its equipment to Y and Y registers a notice in the Registry. At the end of the loan term, X is unable to repay its outstanding obligation. Under such circumstances, Y will likely seek to exercise its security right on the proceeds and obtain repayment of the amount due by selling the equipment. While the sale of collateral is the traditional form of enforcing a security right, other means are provided for in the Law. For example, Y can also lease or license the equipment or propose to acquire it in total or partial satisfaction of the amount due to it.

233. The enforcement phase is also critical because it is the point at which priority competitions will need to be resolved, particularly when distributing the proceeds of the disposition of the collateral.

2. Terminating an enforcement process

234. Upon X's default, Y intends to enforce its security interest in the equipment. However, a friend of X is willing to advance money to repay the loan. Y plans to sell the equipment in a public sale to be held the following day and this has been advertised in local newspapers. In such circumstances, would X be able to terminate the enforcement process?

235. Enforcement is ordinarily a detrimental phase both for the grantor who will likely lose ownership to its collateral and for the secured creditor who, in most cases, would not obtain the full amount that it is owed, as the proceeds of the disposition will often be less than the secured obligation. Therefore, the Law allows any concerned person to terminate the enforcement process by paying what is owed to the secured creditor in full and by reimbursing reasonable enforcement costs that the creditor may have incurred (for example, the cost for advertising in the above example) (art. 75(1)).

236. However, termination is no longer possible once the collateral has been sold or disposed in the enforcement process, or once the secured creditor has entered into an agreement to sell or otherwise dispose of the encumbered asset, whichever may be earlier (art. 75(2)).

3. Taking over the enforcement process

237. Suppose that one month after obtaining the loan from Y, X obtained a new line of credit from Z for an amount of $50,000 repayable in three months. X grants a new security right to Z over the same equipment. Z registers a notice with respect to its security right in the Registry, which is later than Y's registration. On the expiry of the three-month period, X is not able to repay its loan. Y's claim is not yet due.

238. While X is in default with respect to its obligation to Z, it is not so with respect to its obligation to Y. Z's security right does not have priority over Y's security right. In such circumstance, the question arises how and under which conditions Z can commence enforcement without prejudice to the rights of Y, who might not be able to enforce its security right to the extent that X is not yet in default.

239. In order to protect its rights, a creditor whose security right has priority as against that of the enforcing secured creditor is entitled to take over the enforcement procedure at any time before it comes to an end, in other words, before the disposition or acquisition of the collateral (art. 76).

4. Obtaining possession of the collateral

240. Following X's default, Y wishes to enforce its security right in the equipment, which is still located in X's factory. Can Y freely take possession to realize its security right? Unless the secured creditor has chosen to make its security right effective against third parties by taking possession of the collateral, in the case of default, the creditor will usually need to take possession of the collateral held by the grantor for enforcement purposes. This phase is crucial.

241. A secured creditor is usually entitled to obtain possession of the collateral for enforcement purposes unless the asset is in the hands of a person with a superior right to possession (art. 77(1)). This may be the case if the asset is in the possession of a bona fide lessee or licensee of the encumbered asset (art. 34(3) or (5)) or a higher-ranking secured creditor (art. 77(4)).

242. After default, a grantor in possession of the collateral will need to surrender the asset to the secured creditor. However, the grantor may not be so cooperative. In that case, the secured creditor has two options. It can choose to initiate a judicial enforcement by applying to a court or other authority specified in the Law. This approach offers the advantage of being binding so that the seizure can take place

despite any unjustified objection from the grantor in possession. However, it has the disadvantage of being cumbersome, often lengthy and costly.

243. For this reason, the secured creditor may have an interest, particularly when it appears that the grantor would not object, in obtaining possession of the collateral without applying to a court or other authority. However, this can only be done when certain conditions are satisfied (art. 77(2)). In essence, the Law put a limit on such extrajudicial possession process to balance the rights of the grantor and the creditor and to protect the public interest through a peaceful process.

244. Y must first obtain the written consent of X with regard to its extrajudicial possession, which is typically included in the security agreement between X and Y, or subsequently through a separate document. Y would also have to notify the grantor or any other person in possession of the collateral that X was in default and that it intends to take possession of the collateral. The Law may specify how much in advance such notice should be given (see Guide to Enactment, para. 441) as one of the measures to ensure that Y does not abuse its rights. However, in cases where the collateral is perishable or may decline in value rapidly, such a notice is not required (art. 77(3)). Finally and most importantly, the person in possession of the collateral should not object to the secured creditor taking possession. If the person objects, the creditor will have no choice but to initiate a judicial enforcement process.

245. The question arises as to whether, in the case a security right was granted in a generic category of assets, the creditor is entitled to seize all such assets in order to enforce its security right. In principle, this is possible as each asset under that category secures the entirety of the obligation. However, if the creditor knowingly and with intent takes possession of several assets when the value of one of the assets would be sufficient to secure the obligation, it may be contrary to the general standards of conduct provided in the Law.

5. Disposition of the collateral

246. Once the secured creditor is in possession of the collateral, it would seek to determine its value for the purposes of getting paid. In order to do so, the secured creditor can freely choose from different options provided under the Law. For example, after taking possession of the equipment, Y can sell or otherwise dispose of the equipment, lease it or acquire it in total or partial satisfaction of the secured obligation.

247. As a bank, Y would likely not have any intention to acquire the equipment for its use. From Y's perspective, the main objective would be to recover the loan to the extent possible through enforcement. Therefore, it is more likely that Y would want to sell the equipment as quickly as possible and at the highest possible price, to be reimbursed in full or in part based on the proceeds. The question arises as to the form of such sale or disposition.

248. One possibility is to go ahead with the sale by applying to a court or other authority specified in the Law. The method, manner, time, place and other aspects of the sale would be determined by the Law. While such public sale or court-supervised disposition may have its merits (in particular, for immovable property), it is often long, cumbersome and costly and may not be appropriate for sale of movable assets.

249. Therefore, another possibility is for Y to sell the collateral without applying to a court or other authority. In this case, the method, manner, time, place and other aspects of the sale (including whether to dispose of the collateral individually or altogether) would be determined by the secured creditor (art. 78(3)). While this gives much flexibility to the secured creditor, in order to do so, a number of conditions need to be satisfied (art. 78(4)–(8)). This is a procedural safeguard to ensure that any interested person is able to protect its own interests.

250. In essence, the secured creditor is required to notify its intention to proceed with the extrajudicial sale. It must notify the following persons (art. 78(4)):

- Grantor and the debtor

- Any person with a right in the collateral that had informed the secured creditor of that right in writing before the notice was sent to the grantor
- Any other secured creditor that has registered a competing security right in the collateral before the notice was sent to the grantor and
- Any other secured creditor that was in possession of the collateral when the enforcing secured creditor was in possession.

251. The secured creditor must notify the above-mentioned persons at least a certain period in advance of the sale (specified in the Law) and the notice should contain the following information:

- Description of the encumbered asset
- A statement of the amount owed to satisfy the secured obligation (including interest and reasonable cost of enforcement)
- A reminder that that persons with a right in the collateral (including the grantor and debtor) may terminate the sale by paying what is owed to the secured creditor in full as well as reasonable enforcement cost (see paras. 234–236 above) and
- After which date the collateral will be sold and
- Time, place and conditions of the sale.

252. The purpose of requiring such a notice is to enable the grantor or other competing claimants to verify that the sale will take place under commercially reasonable conditions, in accordance with the general standards of conduct (art. 4). If the sale does not take place under commercially reasonable terms, the secured creditor may be liable for damages caused by its breach. However, the grantor and other concerned parties cannot challenge the validity of the sale, unless it is proved that the buyer of the collateral was aware that the sale violated the rights of the grantor or those concerned.

6. Leasing or acquisition of the collateral

253. As indicated (see para. 232 above), Y had provided X a loan amounting to $100,000 and obtained a security right in the equipment, which was valued to be $120,000. Upon default, Y takes possession of the equipment. Unfortunately, the secondary market for this type of equipment is not active and it is not easy finding a buyer.

254. If it appears that the sale of the collateral will be problematic or will not yield the best price, Y may decide to use an alternative method. For example, Y may decide to lease the equipment and collect the rental payments, which will be deducted from the amount due (art. 78). X would retain ownership of the collateral but would be deprived of the right to use it in its business operation. The same procedural safeguards as outlined above (see paras. 250–251) applies to such leasing arrangements by the secured creditor.

255. Y may also offer to acquire the equipment as full or partial satisfaction of the secured obligation. In other words, the secured creditor would become the owner of the equipment whose value would be used to offset the amount of the secured obligation. The advantage of this method is that the secured creditor can enjoy all the rights and powers attached to ownership of the asset and subsequently dispose of it freely. The grantor may also request the secured creditor to choose this enforcement method (art. 80(6)). In any case, this method of enforcement is also subject to similar procedural safeguards (art. 80) as outlined below.

256. For the sake of transparency, the proposal by the secured creditor to acquire the collateral should be in writing and sent to the grantor, debtor and other persons with a right in the collateral (art. 80(2)). The proposal should also contain the following information (art. 80(3)):

- A statement of the amount required to satisfy the secured obligation (including interest and reasonable cost of enforcement) at the time of proposal
- A statement of the amount of the secured obligation that is proposed to be satisfied
- Description of the collateral
- A reminder that that persons with a right in the collateral (including the grantor and debtor) may terminate the sale by paying what is owed to the secured creditor in full as well as reasonable enforcement cost and
- After which date the secured creditor would acquire the collateral.

257. If there is no objection by any person entitled to receive the proposal within the specified period in the Law, the secured creditor would acquire the collateral (the conditions for acquisition is slightly different when it is in full satisfaction of the secured obligation and when it is in partial satisfaction, art. 80(4) and (5)). If an objection is raised, the secured creditor would have to select another method of enforcement.

7. Collection of payment

258. Suppose X also granted Y a security right over all receivables owed to it by one of its customers. Where the collateral is a receivable, a negotiable instrument or a right to payment of funds in a bank account, sale or disposition may not be an efficient method of enforcement. This is why, after default, the secured creditor is permitted to enforce its security right by collecting directly payment from the debtor of the receivable, obligor under the negotiable instrument or the deposit-taking institution (art. 82). In the example above, Y may collect payment from X's customer. However, it should be noted that the right of the secured creditor to collect payment is generally subject to the provisions in the Law on rights and obligations of third-party obligors (arts. 61–71).

259. While the Law generally applies to outright transfers of receivables (see paras. 23–24 above), the provisions on enforcement (arts. 72–81) are not applicable as there is no underlying secured obligation. In an outright transfer of a receivable, the transferee is entitled to collect the receivable at any time after payment becomes due (art. 83).

[*Note to the Working Group: The Working Group may wish to consider whether sample templates of payment instructions should be included in the Annex to the draft Practice Guide.*]

8. Distribution of proceeds

260. Suppose that after default, Y was able to sell the equipment for an amount of $120,000 to G. Y was owed $100,000 and had spent $2,000 on expenses related to the sale. Z has a lower-ranking security right in the equipment to secure a loan to X of $50,000 (see para. 237 above).

261. If the collateral was sold through a judicial disposition, the distribution of proceeds would be determined by the Law and in accordance with the provisions on priority. In the case above, as the equipment was sold by Y, Y is responsible for distributing the proceeds. Enforcement of a security right should not be a source of enrichment and thus a secured creditor must apply the proceeds to what it is owed after deducting the reasonable cost of enforcement. Afterwards, it must pay any surplus to any subordinate competing claimant that had notified the secured creditor of its claim and the claim amount. If any balance is remaining, it should remit the balance to the grantor (art. 79(2)).

262. Accordingly, Y would deduct $2,000 of cost and apply $100,000 as amount owed to it. This would generally extinguish the security right as full satisfaction of the secured obligation (unless there were outstanding commitments by Y to extend credit). Y would then disburse $18,000 to Z, whereas it is owed $50,000.

9. Rights of the buyer or other transferee of the collateral

263. In the example (para. 260 above), the buyer of the collateral (G) would take the asset free of any security right, except those that have priority as against the security right of the enforcing secured creditor (Y) (art. 81(3)). In other words, any other competing claimants whose rights have a lower priority than that of Y (for example, Z) can no longer exercise any right on the equipment that was sold. This provides a safeguard for buyers and other transferees who take part in the enforcement process.

264. However, suppose that Z had conducted the sale of the equipment to G at the price of $120,000. In that case, F would not take the asset free, as it would continue to be subject to the security right of Y. This suggests that it will be very rare to see a lower-ranking secured creditor take the initiative of selling collateral, as a buyer is unlikely to accept the risk of taking over an asset that is still subject to another security right.

[*Note to the Working Group: The Working Group may wish to consider what other aspects should be illustrated in this section, including practical problems that arise in the enforcement process. This may relate to limitations on enforcement found in other laws or abusive behaviour of relevant parties, for example, frequent change of name and/or address, and refusal to receive notices or proposals required under the Law.*]

H. What parties need to do during the transition from prior law to the Law (arts. 101–107)

265. The Law provides for fair and efficient transition rules from the prior law (the law formerly governing rights that fall within the scope of the Law). In general, the Law provides that the Law applies to all security rights, including prior security rights, as long as they fall within its scope. “Prior security rights” are rights created by an agreement before the Law entered into force, which are security rights within the meaning of this Law (art. 2(kk)) and to which the Law would have applied had it been in force when the right was created (art. 102).

266. As a general point, secured creditors should be aware that the third-party effectiveness and priority of prior security rights is preserved for a certain period of time after the Law enters into force. In order to extend the third-party effectiveness and priority beyond that period, the secured creditor must take the steps to make the security right effective against third parties in accordance with one of the methods provided for in the Law. This has the effect of making that security right effective against third parties from the time it was made effective against third parties under the prior law. The secured creditor could thus retain its priority.

267. For example, suppose that a financier had created security rights over a number of automobiles and had made its security right effective against third parties under the prior law by noting it as the co-owner of the automobiles, both in the Motor Vehicles Registry records and registration documents issued by that registry. With the enactment of the Law, such notations are no longer recognized as a method of third-party effectiveness. Since most financing of automobiles is extended for a long period of time, the secured creditor should take the steps necessary to extend the third-party effectiveness and priority of the security right beyond the transitional period provided for in the Law. An easy way would be to register a notice in the Registry with regard to all such security rights.

I. Addressing cross-border transactions: a three-step analysis (arts. 84–100)

268. In a cross-border transaction (see Chap. I.F), it is crucial for the secured creditor to determine the law(s) that will apply to the third-party effectiveness and priority of its security right. In most cases, this will require a three-step analysis as described

below. However, it should be cautioned that the analysis below is not necessarily comprehensive and only addresses third-party effectiveness and priority in the grantor's insolvency jurisdiction.

First Step

269. The creditor should identify the jurisdiction where it wants its security right to be recognized and to benefit from a priority ranking. The primary jurisdiction would be the jurisdiction where insolvency proceedings relating to the grantor are most likely to take place. This will typically be where grantor has its place of business and if the grantor has places of business in several jurisdictions, the jurisdiction in which the central administration of the grantor's business is exercised.[16]

Second Step

270. The creditor should then identify the law that the insolvency court will apply to determine if the security right was effective, was made effective against third parties and has priority. The conflict-of-laws provisions of the insolvency jurisdiction will indicate the substantive law that the insolvency court will apply to determine if the security right will be considered effective and enjoy priority in the insolvency jurisdiction.

271. If the insolvency jurisdiction has enacted the Model Law, articles 84 to 100 would be used to determine the law applicable. Yet, those provisions may provide that the applicable substantive law is the law of the insolvency jurisdiction or the law of another jurisdiction.

Third Step

272. The creditor should identify the steps to be taken under the applicable substantive law for its security right to be effective and to enjoy priority.

273. If the applicable substantive law is that of a State having enacted the Model Law, effectiveness against third-parties may be achieved by registration in the security rights registry established by the enacting State. In many circumstances, search of the registry will permit the secured creditor to know if its security right has priority.

274. If the applicable substantive law is that of a State which has not adopted the Model Law, registration might not be an available method for achieving effectiveness against third parties. For example, the substantive law of that State may instead require notification of the security right to the debtors of the receivables for a security right to be made effective against third parties.

Examples

275. In the examples below, suppose that the State O has enacted the Model Law in its entirety.

Trade receivables

276. If a grantor located in State O granted a security right in trade receivables owed by customers in several other States, the insolvency jurisdiction would be State O (under the assumption that State O is where the central administration of the grantor' business is exercised). The substantive law that applies to third-party effectiveness and priority of the security right would be law of State O (where the grantor is located), in accordance with article 86 of the Law.

277. The third-party effectiveness requirements and priority rules under the Law would be applicable. Registration of a notice in the Registry would make the security right effective against third parties. The secured creditor will have priority if no other

[16] The UNCITRAL Model Law on Cross-Border Insolvency and the EU Insolvency Regulation each use the concept of COMI (centre of main interests) to determine in which State main insolvency proceedings should be opened. The State where the insolvent debtor regularly conducts the administration of its interests is considered to be its COMI.

security right has been previously registered with respect to the receivables covered by the creditor's security right. The location of debtors of the receivables being in States other than State O is not relevant.

Inventory

278. If a grantor located in State O granted a security right in its inventory in a warehouse located in State P, the insolvency jurisdiction would be State O. The substantive law that applies to third-party effectiveness and priority of the security right would be law of State P (where the inventory is located), in accordance with article 85(1) of the Law (assuming that the inventory does not include tangible assets of a type ordinarily used in more than one State for which art. 85(3) would apply).

279. The third-party effectiveness requirements and priority rules would be determined under the applicable substantive law in State P. If the law of State P does not recognize non-possessory security rights, the creditor may not be unable to obtain a valid security right in the inventory.

Mobile goods

280. If a grantor located in State O granted a security right in a truck used to carry goods between States O and P, the insolvency jurisdiction, similar to above, would be State O. The substantive law that applies to third-party effectiveness and priority of the security right would be law of State P (where the grantor is located), in accordance with article 85(3) of the Law as the truck was ordinarily used in more than one State.

281. The third-party effectiveness requirements and priority rules under the Law would be applicable. In the example, even if the truck were used only in State P, the substantive law of State O would still apply to the third-party effectiveness and priority of the security right in the truck in State O.

III. The interaction between the Law and the prudential regulatory framework

[*Note to the Working Group: The following provides a brief outline of what the chapter on regulatory issues could look like in the Practice Guide. The Working Group may wish to consider whether the Practice Guide should further elaborate on a number of issues discussed. Furthermore, the Working Group may wish to consider how the material should be presented in the Practice Guide, taking into account the difference in audience and thus in style with the remaining chapters.*]

A. Introduction

282. Unlike the rest of the Practice Guide, this Chapter is addressed specifically to national financial authorities exercising prudential regulatory powers and supervisory functions ("regulatory authorities") as well as those financial institutions that are subject to prudential regulations and supervision ("regulated financial institutions"). Typically, banks and other financial institutions that receive repayable funds, or deposits, from the public to extend loans would fall under this category.

283. The purpose of this Chapter is to assist enacting States as well as regulated financial institutions in fully benefiting from the Law and to emphasize the need for closer coordination between the Law and the national prudential regulatory framework. This should be understood in the broader context of interaction of the Law with various domestic laws required to ensure its proper operation as discussed in Chapter I. E. Core policy choices underlying the prudential regulatory framework, whether national or international, are not addressed in this Chapter.

284. Prudential regulation, a key component of a State' prudential regulatory framework, is based on financial regulations that require financial institutions to control their exposure to various risks and to hold adequate capital. In other words, prudential regulations address the ability of regulated financial institutions to absorb

losses, having in view both the soundness of the individual institutions as well as the stability of the financial system as a whole.

285. Prudential regulations prescribe certain measures to financial institutions, in particular to hold adequate capital as defined by capital requirements. Capital requirements or capital adequacy define the minimum level of capital (referred to as regulatory capital) regulated financial institutions are required to maintain at any point in time. Regulatory capital is typically composed of liquid instruments, such as shareholders' equity, that are capable of absorbing unexpected losses.

286. As expected losses represent a cost related to the credit transaction, they are covered by financial institutions through a variety of techniques. Capital requirements may also address expected losses and, in particular, may contain specific requirements whereby financial institutions must set aside reserves, or allowances, against impaired, defaulted and uncollectible obligations. [*Note to the Working Group: The Working Group may wish to consider whether the Practice Guide should elaborate further on provisioning for expected losses.*]

287. Capital requirements are commonly expressed as a capital adequacy ratio, a percentage of the assets weighted to their risk. In other words, the amount of capital is not fixed, but is relative to both the overall business volume of the regulated financial institution and the risks associated with its business. In practice, for every financing transaction, such as the extension of a loan, regulated financial institutions calculate a capital charge, which represents a portion of regulatory capital and reflects how risky the transaction is. Loans that present a high level of risk are subject to higher capital charges than those considered less risky. For financial institutions, this means that the riskier the exposure, the higher the amount of regulatory capital required. National statutory or regulatory laws defining capital requirements not only determine the risk weights of different classes of assets but also provide for capital adequacy ratios and procedures to calculate capital charges.

288. International efforts have been made to ensure that prudential regulation of financial institutions is harmonized and applied consistently across jurisdictions through uniform supervisory practice. The Basel Committee on Banking Supervision (BCBS) is one of the organization entrusted with that task, among others, establishing internationally recognised standards on capital requirements that are contained in the Basel Capital Accords.

289. As mentioned previously, this Chapter aims at ensuring that regulated financial institutions benefit from the Law, while at the same time being compliant with the relevant prudential regulatory framework concerning capital requirements. In many States, before the enactment of the Law and thus the secured transactions regime envisaged by the Model Law, there may not have been sufficient legal certainty for regulated financial institutions to take into account the value of movable assets when calculating regulatory capital. The Law coupled with the Registry provides the necessary legal certainty, predictability and transparency thus facilitating compliance with capital requirements. Through further coordination with prudential regulation, it would be possible for regulated financial institutions to take into account security rights in movable assets when determining capital charges. To this end, this Chapter focuses on aspects relevant for assessing credit risk exposures when obligations are secured by movable assets.

B. Key terminology

290. Terminology used by national regulatory authorities and regulated financial institutions may differ from those used in the Law. The following are some examples.

[*Note to the Working Group: The Working Group may wish to note that Chapter III refers to a number of terminology not used in the Model Law and thus may wish to consider whether they should also be included in the list below. The Working Group may also wish to consider whether the list below, if found appropriate, should be combined with the glossary found in Chapter I. D.*]

Collateralized transactions	One of the techniques that regulated financial institutions may adopt to mitigate credit risk. They encompass any consensual arrangement whereby the exposure to credit risk is covered, fully or partially, by a right in an encumbered asset (including a security right under the Law)
Credit risk mitigation	Various techniques, such as collateralised transactions, rights of set-off and guarantees, used by regulated financial institutions to reduce their exposure to credit risk. When specific requisites are met, the use of credit risk mitigation techniques could result in lower capital charges.
Eligible collateral	Assets that are encumbered by a security right and are recognised, under applicable capital requirements, to reduce capital charges
Eligible financial receivables	Receivables that are recognised, under applicable capital requirements, to reduce capital charges. They are typically short-term claims that arise from the sale of goods or provision of services, including debts owed by buyers, suppliers, governmental authorities, or other unaffiliated parties.
Physical collateral	Tangible movable assets such as machinery, raw materials and motor vehicles, with the exception of commodities and aircraft (which typically belong to different categories of exposures)

C. Enhancing coordination between the Law and prudential regulation

291. The primary objective of the Law is to increase access to credit at a reasonable cost, through the establishment of a modern secured transaction regime facilitating, among others, the creation and enforcement of security rights in movable assets. Under the Law, financial institutions may acquire a security right to reduce their exposure to credit risk, which should incentivise them to increase the availability of credit. The Law does so by covering a wide range of assets (for example, motor vehicles and trade receivables, see para. 12 above) and permitting parties to tailor their arrangement to fit their needs and expectations (see para. 15 above).

292. To a certain extent, capital requirements, in pursuing prudential regulation, may discourage regulated financial institutions to extend credit base on security rights over movable assets. Although prudential regulation generally treats collateral favourably, capital requirements take a conservative approach towards certain movable assets that may not necessarily qualify as eligible collateral. This calls for coordination between secured transactions law and capital requirements, in the absence of which regulated financial institutions may simply treat transactions secured by movable assets as unsecured credit, limiting the economic benefits foreseen by the Law.

General prerequisites

293. In order for a collateralised transaction to be recognised as an eligible credit risk mitigation and thus result in lower capital charges, some essential requisites need to be met. In particular, following internationally recognised capital requirements, legal certainty over security rights and their efficient enforceability after default of the debtor are essential prerequisites.

294. With respect to collateralised transactions, financial institutions are usually required to demonstrate that the following two pre-conditions are met. First, a security right must have first priority aside from statutory and preferential claims. The Law, in Chapter V, provides a comprehensive and coherent set of priority rules

(Chap. I.B.5). Therefore, it is possible for regulated financial institutions to clearly identify the priority of their security right. Second, a security right must be enforceable in a timely manner. The Law, in Chapter VII, provides rules to facilitate efficient and expeditious enforcement of a security right (including expeditious proceeding or relief as provided under art. 74, see generally Chap. II.G). In short, the Law provides a mechanism whereby regulated financial institutions could meet the general prerequisites enumerated in national and international capital requirements for the calculation of capital charges.

295. Financial institutions are also required to develop sound internal procedures, to control, monitor and report any risk associated with the collateral, including those that could potentially compromise the effectiveness of the credit risk mitigation. Moreover, they are usually required to establish internal procedures to ensure expeditious enforcement of security rights. To this end, it is important for financial institutions to become familiar with the relevant provisions of the Law, particularly on the steps necessary to enforce their security rights. They should also adopt policies to ensure that the priority of their security rights is not undermined, for instance, by the inadvertent lapse of the effectiveness of a registration of a notice.

296. If a collateralised transaction involves connections with more than one State and thus may be governed by foreign law, financial institutions would need to ensure that their security rights are adequately protected (mainly their priority and enforceability) under that law. The provisions in Chapter VIII (Conflict of laws) of the Law provide clarity on the applicable law to achieve the necessary certainty.

Capital requirements

297. There are various methodologies to assess credit risk and to calculate corresponding capital charges. Under the standard method (standardized approach), risk weights are set forth in national statutory or regulatory laws, which also set out encumbered assets that are eligible to reduce capital charges. Typically, and as provided in international standards, the list of eligible collateral includes only highly liquid assets, such as funds held in deposit accounts with the lending financial institution,[17] gold and intermediated securities.[18] Accordingly, movable assets that usually compose the borrowing base of businesses (such as receivables, inventory, agricultural products, and equipment) are not eligible collateral under the standard method. Therefore, they cannot be taken into account when capital charges for unexpected losses are calculated.

298. Capital requirements may allow for the use of other methodologies as well. Assets most commonly owned by businesses can only be considered as eligible collateral when regulated financial institutions have been authorised to use more sophisticated methodologies, often referred to as internal models. If authorised by regulatory authorities, financial institutions may deploy their own estimates to calculate risk exposures and, thus, determine capital charges. Financial institutions determine different risk components, such as the probability of default, losses expected upon default and the exposure if such a default occurs.

299. The authorisation process is generally set forth in national statutory or regulatory laws. In line with recognised international standards, authorisation requires a thorough supervisory examination of the risk-management practices of the financial institution in general as well as scrutiny of internal estimations and data used to calculate capital charges. Regulatory authorities may establish additional requisites to foster the soundness and the reliability of the models. Typically, regulatory authorities may authorise or reject a request for authorisation to use internal models for any class of exposures and may also withdraw any previous authorisation.

300. In order to incentivise inclusive and responsible lending secured by movable assets as envisaged by the Law, adoption of sophisticated methodologies based on accurate risk assessment is of primary importance. For many financial institutions

[17] A different regulatory treatment might apply when the account is held by another financial institution.

[18] Security rights in intermediated securities are not covered by the Law (art. 1(3)(c)).

operating in jurisdictions where movable assets are not eligible collateral under the standard model, adoption of internal models may provide the only option to measure the exact level of credit risk resulting from loans to businesses based on movable assets. While the Law provides the framework for the eventual recognition of movable assets as eligible collateral, regulated financial institutions need to be well versed in its application and meet the requirements for obtaining authorisation to use internal models. To this end, they are required to implement sound internal procedures to assess and manage credit risk and to gather sufficient date on collateralized transactions. Once the use of internal models has been authorized, financial institutions would need to further demonstrate that requirements for considering movable assets as eligible collateral are met. Typically, different requirements apply to physical collateral and receivables.

301. For physical collateral to be considered as eligible collateral, financial institutions need to demonstrate the existence of liquid markets to dispose of encumbered assets in a timely manner. Transparent and publicly available prices should also be available to allow for an accurate estimate of the value to be realised in case of default.

[*Note to the Working Group: Capital requirements typically provide for a series of requisites on the valuation of physical collateral. For instance, capital requirements often indicate that financial institutions need to establish examination procedures for internal and auditing purposes. It is usually required to determine the volatility of the value of the collateral in consideration of market trends and in relation to the deterioration or obsolescence of the collateral. In particular, international capital requirements may require that the loan agreement include a detailed description of the physical collateral and the right of the financial institution to examine and revalue the collateral whenever deemed necessary (see, for example, para. 296 of Basel III available at https://www.bis.org/bcbs/publ/d424.pdf). In case of inventories and equipment, periodic revaluation process must include physical inspection of the collateral. These aspects would need to be taken into account for proper coordination with the Law. The Working Group may wish to consider to what extent such aspects need to be reflected in the Practice Guide.*]

302. For receivables to be considered as eligible collateral, financial institutions are typically required to have the right to collect or transfer the receivables without any consent of the debtor of the receivable. Such mechanisms are provided for in the Law with regard to collection and transfer of receivables (see for example, arts. 58, 59, 82 and 83). Furthermore, financial institutions are often required to establish lending policies determining which receivables may be included in the borrowing base and those that will not be taken into account when setting the amount of available credit.

[*Note to the Working Group: Similar to physical collateral, there may be other requirements relating primarily to the credit collection policies and risk assessment of the financial institutions. The Working Group may wish to consider to what extent the Practice Guide should elaborate on such requirements.]*

303. While coordination efforts between the Law and prudential regulation may result in reduced capital charges, that should not be the sole purpose of coordination. Rather, the purpose of such coordination is to promote sound risk management that is based on a thorough assessment of risks related to collateralized transactions rather than on speculative suspicion towards certain classes of assets.

304. In conclusion, the economic benefits of the Law may be enhanced when national prudential regulatory frameworks, in compliance with international standards, contemplate the possibility for regulated financial institutions to use methodologies based on internal models. With the adoption of internal models, financial institutions will be required to deploy sophisticated risk management tools scrutinised by regulatory authorities and will thus be acquiring expertise on prudent lending and on the legal framework established by the Law. The assessment of credit risk will be based on accurate data and its management will be conducted through reliable models measuring the effects of various classes of encumbered assets on expected and unexpected losses. The information gathered would be shared, for authorization

purposes, with regulatory authorities that, in turn, would acquire a better understanding of secured lending as provided in the Law. Furthermore, data on the timeframe to enforce security rights on various types of movable assets as well as the value recovered from the disposal of those assets may contribute to the development of new secondary markets or may inject further transparency into existing ones.

Annex I

Sample security agreement

SECURITY AGREEMENT

Between

MODERN TECHNOLOGIES INC., a corporation constituted under the Corporations Act of State Y, having its registered office at 111 Innovation Avenue, Springfield, State Y and its place of central administration at 222 Gold Avenue, Diamond City, State X, (the "**Grantor**")

And

BANK OF THE WEALTH, a bank constituted under the laws of Z, having a branch at 555 Bank Street, Diamond City, State Z (the "**Creditor**")

Recitals

A. The Creditor has agreed to make available to the Grantor revolving credit facilities pursuant to a credit agreement dated [30 April 2018].[19]

B. The execution of this agreement is a condition to the extension of credit by the Creditor to the Grantor under that credit agreement.

1. Definitions

In this agreement:

(a) "Credit Agreement" means the credit agreement referred to in Recital A, as same may be amended, supplemented or restated from time to time;

(b) "Encumbered Assets" has the meaning given to that term in Section 02.1 below;

(c) "Event of Default" means (i) any event that constitutes an "event of default" under the Credit Agreement, and (ii) any failure by the Grantor to comply with any of its obligations under this agreement;

(d) "Obligations" means all present and future obligations of the Grantor to the Creditor under or contemplated by the Credit Agreement and this agreement;

(e) Each of the following terms has the meaning given to it in the Law: "bank account", "control agreement", "debtor of the receivable", "equipment", "inventory", "proceeds" and "product".

2. Grant of the security right and secured obligations

2.1 Grant of the security right

The Grantor grants to the Creditor a security right in all of the Grantor's present and future movable assets (the "Encumbered Assets")[20] [within each of the following categories:

(a) Inventory;

(b) Receivables;

(c) Equipment;

(d) Funds credited to a bank account;[21]

(e) Documents of title[22] (whether negotiable or not), including without limitation bills of lading and warehouse receipts;

(f) Negotiable instruments,[23] including without limitation bills of exchange, cheques and promissory notes;

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[19] The term "credit agreement" is used as a generic term to describe the agreement under which credit may be extended by the Creditor. Other terms may indeed be used (e.g. loan agreement or promissory note) depending on the nature of the credit transaction and/or local practices.

[20] The Law recognize that a security right may be granted in all present and future movable assets of the grantor (or of a generic category) and that the description of the encumbered assets in the security agreement may be made in the same manner (arts. 6, 8 and 9).

[21] The term, while not defined in the Law, are recognized as a distinct category of assets (see arts. 15, 25, 46, 69 and 97).

[22] The Law recognizes negotiable documents as a distinct category of tangible movable asset (see art. 2(ll)).

[23] The Law recognizes negotiable instruments as a distinct category of tangible movable asset (see art. 2(ll)).

(g) Intellectual property and rights under licenses;

(h) To the extent not listed above, all proceeds and products of all of the foregoing.]

2.2 Secured Obligations

The security right hereby granted secures all Obligations.[24]

3. Representations and warranties[25]

The Grantor represents and warrants to the Creditor that:

3.1 Location of certain Encumbered Assets

(a) The inventory and the equipment of the Grantor are and will be held or used by the Grantor at all times in State X and State Y and, unless the Grantor notifies the Creditor of a change, at the addresses listed in the Annex to this agreement;

(b) The billing addresses of the debtors of the receivables owed or to be owed to the Grantor are and will be at all times in State X and State Y [, unless the Grantor notifies the Creditor of a change by a notice specifying the other State(s) in which debtors of these receivable have billing addressees];

(c) The bank accounts of the Grantor are and will be held at all times at branches of banks in State X and State Y, and, unless the Grantor notifies the Creditor of a change, at the addresses listed in the Annex to this agreement. The account agreements relating to these bank accounts are and will be governed by the law of the State in which the applicable branch is located and do not and will not refer to another law for matters relevant to this agreement.[26]

3.2 Location and name of the Grantor

(a) The registered office and the place of central administration of the Grantor are and will be located at all times in the States specified on the first page of this agreement;

(b) The Grantor's exact name and State of [constitution] are as specified on the first page of this agreement. The Grantor will not change its State of [constitution] without the prior written consent of the Creditor and will not change its name without giving to Creditor a 30 day prior notice of the change.

4. Authorizations relating to the Encumbered Assets

4.1 Registrations

The Grantor authorizes the Creditor to register any notice and take any other action necessary or useful to make the Creditor's security right effective against third parties.[27]

4.2 Inspection and copies

(a) The Creditor may inspect the Encumbered Assets and the documents or records evidencing same (and for such purposes enter into the Grantor's premises), upon giving prior reasonable notice to the Grantor;

(b) At the request of the Creditor, the Grantor will furnish to the Creditor copies of the invoices, contracts and other documents evidencing its receivables.

4.3 Dealings with Encumbered Assets

(a) Until the Creditor notifies the Grantor that an Event of Default has occurred, the Grantor may sell, lease or otherwise dispose of its inventory and documents of title, collect its receivables and negotiable instruments and dispose of worn-out or obsolete equipment, in each case, in the ordinary course of its business;

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[24] Article 9 of the Law recognizes that the secured obligations may be described by referring to the agreement under which they arise.

[25] This security agreement only includes representations on facts that permit a secured creditor to identify the State(s) whose law(s) will apply to the creation, effectiveness against third parties and priority of a security right. Among other things, the information contained in this Section will permit the secured creditor to determine where a registration needs to be made.

[26] This is to ensure the identification of the applicable law under article 97 of the Law.

[27] This authorization is required under article 2 of the Model Registry Provisions.

(b) The Grantor will not grant any security right in the Encumbered Assets and, except as permitted by paragraph (a), will not sell, lease or otherwise dispose of the Encumbered Assets;[28]

(c) The Creditor may at any time notify the debtors of the Grantor's receivables of the existence of its security right. However, a notification given prior to the occurrence of an Event of Default will authorize the debtors to make their payments to the Grantor until otherwise instructed by the Creditor following the occurrence of an Event of Default.[29]

5. Covenants relating to the Encumbered Assets

5.1 Movable assets

The Grantor undertakes that the Encumbered Assets will remain movable assets at all times and will not be attached to immovable property.

5.2 Effectiveness of the security right

The Grantor will take all actions and execute all documents as are reasonably required by the Creditor for the Creditor's security right to be at all times enforceable and effective and enjoy priority against third parties in all States where the Encumbered Assets may be located or where the security right may be enforced.

5.3 Bank accounts

The Grantor will take all steps required for the Creditor's security right to be made effective against parties through a control agreement with respect to all funds credited to a bank account held with a bank other than the Creditor.[30]

5.4 Reimbursement of expenses

The Grantor will reimburse the Creditor upon demand for all costs, fees and other expenses incurred by the Creditor in the exercise of its rights under this agreement (including without limitation in the enforcement of its security right), with interest at annual rate of **%.

6. Enforcement[31]

6.1 Rights after an Event of Default[32]

After the occurrence of an Event of Default and to the extent same is continuing:

(a) the Creditor may enforce its security right and exercise all rights of a secured creditor under the Model Law and any other applicable law;

(b) the Creditor may also, subject to any mandatory provision of applicable law;

(i) take possession, use, operate, administer and sell, lease or otherwise dispose of any of the Encumbered Assets, in each case, on terms and conditions it deems appropriate;

(ii) collect the Grantor's receivables and negotiable instruments, compromise or transact with the obligors of these receivables and instruments, and grant discharges to them; and

(iii) take all other actions necessary or useful for the purpose of realizing on the Encumbered Assets, including without limitation completing the manufacture of inventory and purchasing raw materials.

6.2 Access to the Grantor's premises

The Grantor grants to the Creditor the right to enter into and use the premises where the Encumbered Assets are located for the purposes of the exercise of the Creditor's enforcement rights.[33]

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[28] This prohibition is a contractual obligation and is not binding upon third parties. For example, a third party who purchases an encumbered asset may acquire it free of the security right in certain circumstances (see art. 34).

[29] See art. 63(2).

[30] This method is provided in article 25(b) of the Model Law. If the bank accounts are with the Creditor, then the Creditor will benefit from automatic third-party effectiveness (see article 25(a)).

[31] Enforcement is dealt with in Chapter VII of the Model Law. Section 6 uses the term "rights", instead of remedies, because the latter term is not used in the Model Law.

[32] Under this Section, the secured creditor may take possession and sell encumbered assets without court intervention (arts. 77 and 78).

[33] This is a personal obligation of the Grantor and may not necessarily be enforceable against the owner of premises leased to the Grantor without the consent of the owner.

6.3 Manner of enforcement

The enforcement rights provided in this Section may be exercised on all of the Encumbered Assets taken as a whole or separately in respect of any part of them.

7. General Provisions

7.1 Additional and continuing security

The security right created by this agreement is in addition to (and not in substitution for) any other security held by the Creditor and is a continuing security that will subsist notwithstanding the payment from time to time, in whole or in part, of any of the Obligations.

7.2 Collections

Any sum collected by the Creditor from the Encumbered Assets prior to all the Obligations becoming due may be held by the Creditor as Encumbered Assets.

7.3 Other recourses

The exercise by the Creditor of any right will not preclude the Creditor from exercising any other right provided in this agreement or by law, and all the rights of the Creditor are cumulative and not alternative. The Creditor may enforce its security right without being required to exercise any recourse against any person liable for the payment of the Obligations or to realize on any other security.

7.4 Inconsistency with the Credit Agreement

In the event of any conflict or inconsistency between the provisions of this agreement and the provisions of the Credit Agreement, the provisions of the Credit Agreement will prevail.

8. Governing Law

This agreement will be governed by and construed in accordance with the laws of State X. The provisions of this agreement must also be interpreted in order to give effect to the intent of the parties that the Creditor's security right be valid and effective in all jurisdictions where the Encumbered Assets may be located and where the rights of the Creditor may have to be enforced.

9. Notices

Any notice by a party to the other must be in writing and given in accordance with the notice provisions of the Credit Agreement.

Counterparts and signatures

This agreement may be executed in any number of counterparts and by each party in separate counterparts and any full set of these separate counterparts will constitute an original copy of this agreement. Delivery of an executed counterpart of a signature page to this agreement by electronic mail will be as effective as delivery of a manually executed counterpart of this agreement.

SIGNED by the parties as of DD/MM/YYYY.

MODERN TECHNOLOGIES INC.	BANK OF THE WEALTH
_____	_____

Annex II

Sample diligence certificate[34]

To: ABC Bank

The undersigned, the [_____] of _____ (the "Company") hereby represents and warrants to you as follows:

1. GENERAL INFORMATION RELATING TO THE COMPANY

(a) The name of the Company as it appears in its current organizational documents is: [_____];

(b) The tax identification number of the Company is: [ ];

(c) The jurisdiction of formation of the Company is: [_____];

(d) The organizational identification number of the Company is: [ ];

(e) The Company transacts business in the following jurisdictions (list jurisdictions other than jurisdiction of formation): [_____];

(f) The Company is duly qualified to transact business as a foreign entity in the following jurisdictions (list jurisdictions other than jurisdiction of formation): [_____];

(g) The following is a list of all other names (including fictitious names, trade names or similar names) currently used by the Company or used within the past five years: [ ];

(h) The following are the names of all entities which have been merged into the Company during the past five years: [ ];

(i) The following are the names and addresses of all entities from whom the Company has acquired any personal property in a transaction not in the ordinary course of business during the past five years, together with the date of such acquisition and the type of personal property acquired:

Name	Address	Date of Acquisition	Type of Property

(j) Attached are copies of all organizational documents of the Company, along with copies of any agreements, certificates or other instruments evidencing equity securities (other than common stock), including warrants, option agreements, partnership agreements, limited liability company agreements and similar instruments and agreements.

2. LOCATIONS OF THE COMPANY

(a) The place of central administration of the Company is presently located at the following address: [*List of Complete Street and Mailing Address*];

(b) The following are all of the locations (including third-party processors or warehouses) where the Company maintains or stores any inventory, equipment or other property: [*List of Complete Street and Mailing Address*].

3. SPECIAL TYPES OF COLLATERAL

(a) If the Company owns any of the following kinds of assets, please attach a schedule describing each such asset:

Registered copyrights or copyright applications	Yes ☐	No ☐
Unregistered copyrights	Yes ☐	No ☐
Registered patents and patent applications	Yes ☐	No ☐
Registered trademarks or trademark applications (including any service marks, collective marks and certification marks)	Yes ☐	No ☐
Licenses to use trademarks, patents and copyrights of others	Yes ☐	No ☐
Stocks, bonds or other securities	Yes ☐	No ☐
Promissory notes or other instruments evidencing indebtedness owing to the Company	Yes ☐	No ☐
Leases of equipment or security agreements naming the Company as the secured creditor	Yes ☐	No ☐
Motor Vehicles	Yes ☐	No ☐

[34] This form should be duly modified to request all of the same information for each co-borrower or guarantor of the loans.

(b) The following are all banks or savings institutions at which the Company maintains a deposit account, securities account or commodity account:

Bank Name	Account Number	Branch Address

(c) Does the Company, or is it contemplated that the Company will, regularly receive letters of credit from customers or other third parties to secure payments of sums owed to the Company? The following is a list of all letters of credit naming the Company as beneficiary thereunder:

LC Number	Name of LC Issuer	LC Applicant

4. MATERIAL CONTRACTS

(a) Attached are copies of all loan or other financing agreements, inter-creditor agreements and guaranties to which the Company is a party, together with a schedule of all outstanding obligations thereunder or in respect thereof;
(b) Attached are copies of all mortgages, deeds of trust, pledges and security agreements to which the Company is a party;
(c) Attached are copies of all leases of real property to which the Company is a party;
(d) Attached are all agreements regarding mergers and acquisitions that have been entered into within the last two years, whether or not consummated, to which the Company is a party;
(e) Attached are all material contracts not otherwise covered above to which the Company is a party to or in which the Company has an interest;
(f) Attached is a form customer contract.

5. ENCUMBRANCES

The property of each Loan Party is subject to the following liens or encumbrances:

Name of Holder of Lien/Encumbrance	Description of Property Encumbered

6. LITIGATION

(a) Attached is a complete list of pending and threatened litigation or claims involving amounts claimed against the Company in an indefinite amount or in excess of $50,000 in each case, including all administrative, governmental or regulatory investigations or proceedings;
(b) Attached is a complete list of all claims which the Company has against others (other than claims on accounts receivable), which the Company is asserting or intends to assert, and in which the potential recovery exceeds $50,000 in each case.

7. AFFILIATE TRANSACTIONS

Attached are copies of any agreements, including any tax-sharing agreements, loan agreements and notes, between the Company and of its affiliates.

8. TAXES & INVESTIGATIONS

(a) The following tax assessments are currently outstanding and unpaid against the Company:

Assessing Authority	Amount and Description

(b) The following is a description of any pending or threatened audits or disputes with any taxing authority involving the Company: _____;
(c) Attached are copies of the first page of the Company's tax filings for the prior five (5) years.

9. EMPLOYEE BENEFIT PLANS

Attached is a list of each employee pension benefit plan, revenue or profit-sharing plan, multiemployer plan or other pension or employee benefit plan maintained by between the Company.

10. INSURANCE

Attached is a list of all insurance policies maintained by between the Company, indicating the insurer, the policy number, the type of coverage and the limits of coverage.

11. OFFICERS, DIRECTORS AND MANAGERS OF THE LOAN PARTIES

The following are the names and titles of the officers of the Company:

Office/Title	Name of Officer

12. MISCELLANEOUS

(a) Indebtedness: Attached is a list of any current indebtedness of the Company that is to be paid off at the closing of the loans, including each creditor's name, a contact person, and the contact person's phone and fax numbers, and the approximate amount of such indebtedness. Also attached are copies of the documentation for the Company's existing indebtedness for borrowed money and letters of credit that will remain in place after the closing of the loans;

(b) Necessary Consents: Attached is a list of any consents or approvals that will be required in connection with the closing of the loans;

(c) Regulatory/Licensing Matters: Please describe any regulatory/licensing compliance required of the Company due to the specific nature of its business;

(d) Noncompliance: Please provide copies of any notices received by the Company for noncompliance with applicable law or regulation, including environmental and safety statutes and regulations.

13. LEGAL COUNSEL

The following attorney will represent the Company in connection with the loan documents:

Attorney	Law Firm	Telephone	Email

The Company agrees to advise you of any change or modification to any of the foregoing information or any supplemental information provided on the exhibits or attachments hereto and, until such notice is received by you, you shall be entitled to rely on the information contained herein and on the supplemental information provided on such exhibits and attachments and presume that all such information is true, correct and complete.

Date: DD/MM/YYYY__
[Company Name]
By:
Name:
Title:
Email:
Phone:

VII. PUBLIC-PRIVATE PARTNERSHIPS (PPPs)

A. Note by the Secretariat on public-private partnerships (PPPs): proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

(A/CN.9/939 and Add.1–3)

[Original: English]

Contents

I. Introduction

1. UNCITRAL developed its texts on privately financed infrastructure projects in two stages. The first stage started in 1997 and finished in 2001 with the publication of the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects*[1] (hereafter the "*PFIP Legislative Guide*"). The second stage, which followed immediately, was completed in 2003 with the Commission adopting the *UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects*.[2] (hereafter the "*PFIP Model Provisions*").

2. When adopting the model legislative provisions, at its thirty-sixth session (Vienna, 30 June–11 July 2003), the Commission asked the Secretariat "in due course" and subject to availability of resources to consolidate both texts "into one single publication and, in doing so, to retain the legislative recommendations contained in the *PFIP Legislative Guide* as a basis of the development of the *PFIP Model Provisions*."[3]

3. In 2003, the Commission also started working on an update of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services. The Commission completed that work with the adoption of the Guide to Enactment of the Revised Model Law in 2012. The revised Model Law includes a new procurement method for the procurement of complex items and services ("Request for Proposals with Dialogue"), which is inspired by (but not identical with) the selection provisions in the *PFIP Legislative Guide*.

4. At its twenty-first session (New York, 16–20 April 2012), Working Group I (Procurement) agreed that work "on harmonizing the provisions governing the procurement-related aspects of the UNCITRAL instruments on privately financed infrastructure projects (PFIPs) with the Model Law was necessary."[4] The Working Group further suggested that UNCITRAL might:

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[1] United Nations publication, Sales No. E.01.V.4.

[2] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 12–171 (see *Yearbook of the United Nations Commission on International Trade Law 2002*, part one). The *PFIP Model Provisions* appeared as United Nations publication, Sales No. E.01.V.4 (both publications also available at http://www.uncitral.org/uncitral/en/uncitral_texts.html).

[3] Ibid., para. 171.

[4] A/CN.9/745, para. 39.

(a) Consolidate the UNCITRAL PFIPs instruments;

(b) Identify other topics that need to be addressed in those instruments (such as natural resource concessions, which were sometimes granted as reimbursement or compensation for private infrastructure development, oversight, promoting domestic dispute resolution measures rather than using international dispute resolution bodies as the first port of call, and defining the public interest for the purposes of such transactions);

(c) Broaden the scope of the instruments by covering forms of public-private partnerships not currently covered;

(d) Prepare a model law in that area (noting that the PFIP Legislative Guide contained discussions on a number of important issues that were not reflected in the recommendations of that Guide or in any of the PFIP model legislative provision).

5. The Commission considered these proposals at its forty-fifth session (New York, 25 June–6 July 2012), but did not endorse them, requesting instead the Secretariat to convene a colloquium to discuss the issues further.[5] After considering the outcome of the 2013 colloquium, at its forty-sixth session (Vienna, 8–26 July 2013) the Commission took the view that "further preparatory work on the topic would be required so as to set a precise scope for any mandate to be given for development in a working group".[6]

6. The Secretariat continued to report annually to the Commission on the progress of its consultations with various stakeholders. At its forty-eighth and forty-ninth sessions in 2015 and 2016, recognizing the key importance of PPPs to infrastructure and development, the Commission decided that the Secretariat should consider updating where necessary all or parts of the *Legislative Guide*, and involve experts in the process.[7] At its fiftieth session in 2017, the Commission confirmed that the Secretariat (with the assistance of experts) should continue to update and consolidate the *PFIP Legislative Guide*, the accompanying Legislative Recommendations (2000) and the PFIP Model Legislative Provisions (2003),[8] and should report further to the Commission at its fifty-first session in 2018.[9] The Secretariat has since organized and convened the Third International Colloquium on Public-Private Partnerships (Vienna, 23–24 October 2017).[10]

7. Section II below summarizes the main conclusions arrived at during the last colloquium, and in the course of the consultations held by the Secretariat in the last five years. Section III of this Note sets out, for the Commission's consideration, the proposals of the Secretariat on both the scope and nature of the proposed amendments to the *PFIP Legislative Guide*, as well as the process for implementing them.

II. Outcome of consultations conducted by the Secretariat

8. In order to assess the likely extent of necessary updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, the Secretariat has held consultations with experts in policy, law reform and practice in PPPs on the

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[5] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 120 (see *Yearbook of the United Nations Commission on International Trade Law 2012*, part one).

[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 327–331.

[7] A/70/17, para. 362; A/71/17, paras. 359, 360 and 362.

[8] The UNCITRAL Legislative Guide, with Legislative Recommendations, and Model Legislative Provisions are available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

[9] A/72/17, para. 448.

[10] The documents presented at the colloquium and a summary report of the discussions are available in the English language in the colloquium website (http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2017.html).

provisions of the *PFIP Legislative Guide* and the *PFIP Model Provisions*.[11] The experts also took note of the conclusions from two colloquiums considering the PFIPs texts held in May 2013 and March 2014 (both of which had recommended revisions to the PFIPs texts),[12] and the Commission's consideration thereof.[13]

9. The consultations starting in September 2016 were conducted through written exchanges, virtual meetings and two in-person meetings, one held in Washington, D.C., on 5–7 December 2016 (contemporaneously with the Global Forum on Law, Justice and Development, which considered various aspects of PPPs),[14] and one held in Vienna on 6–7 March 2017.

10. The main conclusion of the experts is that most of the recommendations of the PFIPs texts reflect good policy and practices, and remain relevant. However, limited revisions to update the PFIPs texts are considered necessary, in order to take into account developments in practice since the existing Legislative Guide was issued in 2000. First, the term "public-private partnerships" has become the term generally used to describe the arrangements considered in the PFIPs texts, and should be used to replace "privately-financed infrastructure projects". In addition, referring to PPPs would avoid confusion with the "Private Financing Initiative" in the United Kingdom of Great Britain and Northern Ireland and also allow the importance of service delivery through PPPs to be placed on a par with the infrastructure development that precedes service delivery.

11. Second, objectives and requirements of the United Nations Convention against Corruption[15] should be fully reflected in the PFIPs texts, given the extent of ratification of that text.[16] The requirements, contained in articles 9(1) and 9(2) on public procurement and public financial management respectively, are that systems should be based on principles of transparency, competition and objectivity in decision-taking. It is recommended that the PFIPs texts should be expanded as regards good governance throughout the life cycle of PPPs, and recent developments should be considered, for example those encouraging greater transparency in PPPs through open contracting and open data as well as transparency in procurement procedures.

12. The experts also agreed that an earlier instruction from the Commission to the Secretariat to consolidate the PFIPs texts should be implemented as part of the updating process. The PFIPs texts, as and when updated, should therefore present commentary, legislative guidance, legislative recommendations and model legislative provisions, as appropriate, on each aspect of PPPs covered. Legislative recommendations should form the central scoping provisions (and could be integrated in laws governing PPPs at the national level), but commentary on issues of implementation and use would be necessary to ensure that the legal framework functions as intended, and so should be included (reflecting the approach of the existing PFIPs texts). Thus, updated PFIPs texts would take the form of a single Legislative Guide containing all guidance, recommendations and model provisions.

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[11] The UNCITRAL Legislative Guide (with Legislative Recommendations) and its Model Legislative Provisions on PFIP are available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

[12] Report of the UNCITRAL colloquium on PPPs (Vienna, 2–3 May 2013), A/CN.9/779, paras. 73–85, available at www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html; and Possible future work in Public-Private Partnerships (PPPs) Report of the UNCITRAL colloquium on PPPs, A/CN.9/821, available at http://www.uncitral.org/uncitral/commission/sessions/47th.html.

[13] See A/68/17, paras. 329–331; A/69/17, paras. 255–260.

[14] See http://www.globalforumljd.org/events/2016/law-justice-and-development-2016-law-climate-change-and-development.

[15] Available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

[16] See https://www.unodc.org/documents/treaties/UNCAC/Status-Map/UNCAC_Status_Map_Current.pdf.

13. The above considerations have been essentially confirmed at the Third International Colloquium on Public-Private Partnerships, held in Vienna on 23–24 October 2017.[17]

III. Proposed updates to the UNCITRAL Legislative Guide

14. In light of the considerations and preliminary conclusions set out in paras. 8–13, and after an assessment of the comments received and materials compiled over the years, the Secretariat invites the Commission to consider amending the *PFIP Legislative Guide* in the manner proposed below.

(a) Consolidating the Legislative Recommendations and the Model Provisions

15. The Secretariat proposes to consolidate the *PFIP Model Provisions* and the Legislative Recommendations contained in the *PFIP Legislative Guide*. In doing so, the Secretariat invites the Commission to revisit the decision originally made in 2003 and to retain only the *PFIP Model Provisions*. The Secretariat believes that 15 years after the adoption of the *PFIP Model Provisions*, the practical value of the Legislative Recommendations as *travaux préparatoires* is relatively limited, and the existence of two sets of guiding materials drafted in similar, but not identical language, appears confusing. Alternatively, the Commission may wish to retain those 13 Legislative Recommendations that appear in part one of the publication containing the *PFIP Model Provisions*, but for which no corresponding model legislative provision was drafted. However, the Secretariat has doubts as to the usefulness of retaining those legislative recommendations, considering their level of generality and the fact that their content is already stated either in the notes in the *PFIP Legislative Guide* or in footnotes to the *PFIP Model Provisions*.

16. With a view to facilitating the consideration of this matter by the Commission, the annex to this Note contains a comparative table of existing Legislative Recommendations and Model Legislative Provisions, which summarizes the deliberations of the Working Group, at its fourth session (Vienna, 24–28 September 2001), in respect of each one of them.

(b) Title and terminology

17. The Secretariat proposes to change the title of the *PFIP Legislative Guide* to "*UNCITRAL Legislative* Guide *on Public-Private Partnerships*" and to substitute the term *Public-Private Partnerships* (or "PPPs") for *Privately Financed Infrastructure Projects* (or PFIP) throughout the text.

18. At the same time, the description of the scope and subject matter of the Guide, in particular – but not only – in the Introduction, should be amended to reflect the broader range of projects that are structured as PPPs. In particular, this means making it clearer that the Guide covers not only transactions that involve the construction and operation of infrastructure facilities used by the project company to provide a service directly to the public under a concession issued by the Government, but also the construction, refurbishment, or expansion of facilities which the private partner maintains and operates, but which the contracting authority or other entity uses for one of its core activities. The experts have felt that the Guide, as currently drafted, does not seem to cover or pay sufficient attention to those cases of so-called "non-concession PPPs".

19. Following the changes mentioned in the preceding paragraph, a few terms currently used in the Guide, in particular the terms "concession" and "concessionaire", will no longer adequately reflect the revised coverage of the Guide. Except where the context requires their use in a narrow meaning, the Secretariat proposes to replace them with the more general terms "PPP project" and "Private Partner", respectively.

[17] See http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2017.html.

(c) Reflecting the underlying principles of the United Nations Convention against Corruption

20. The *PFIP Legislative Guide* preceded the United Nations Convention against Corruption and did not reflect the latter's underlying principles, to which a short mention is made in chapter VII ("Other relevant areas of the law") of the Guide. Given the importance of the Convention, and the extent of its ratification,[18] the Secretariat proposes to amend and expand the discussion of "General guiding principles for a favourable constitutional and legislative framework" in chapter I ("General legislative and institutional framework") of the Guide. In particular, the revised text should elaborate on the requirements contained in articles 9(1) and 9(2) of the Convention to the effect that public procurement and public financial management systems be based on principles of transparency, competition and objectivity in decision-taking.

(d) Expanding the advice on project preparation

21. The Secretariat proposes to expand chapter II ("Project risks and government support") by adding a discussion on the need for a thorough assessment of a project's viability as a PPP, including the tests used to verify its economy and efficiency (so-called "value-for-money" analysis). The Secretariat also proposes to expand Section D ("Administrative coordination") of chapter I ("General legislative and institutional framework") and integrate it into the revised chapter II, which could be renamed "Project planning and preparation"). In doing so, the Secretariat will be mindful of the view expressed by the Commission, when considering future work in the area of public procurement at its forty-fifth session (New York, 25 June–6 July 2012), that procurement planning raised many questions of public law (e.g. the budget law and regulations of a given State) that are outside the purview of UNCITRAL.[19]

(e) Aligning Chapter III ("Selection of the Concessionaire") with the 2012 UNCITRAL Model Law on Public Procurement

22. As indicated above, the *PFIP Legislative Guide* focused on infrastructure projects that included the construction or expansion of facilities that the concessionaire would subsequently operate, but either for use by the public, or to support the provision of goods or services to the public. The paradigm type of project covered by the *PFIP Legislative Guide* was intended to ensure cost recovery primarily from the revenue generated by the facility. Direct payment by the Government was envisaged only as a supplement to or (on exceptional situations) as a substitute for payments by the users or customers of the facility. The prevailing view within the Commission at the time was that selection of the concessionaire for such projects was not technically speaking "public procurement", as the resulting goods or services would not be paid by the Government, but a type of administrative decision for project development to which procurement law did not apply. Consequently, the *PFIP Legislative Guide* could not simply refer the reader to the procurement methods provided in the then UNCITRAL Model Law on Procurement of Goods, Construction and Services. Since those procurement methods were found to be in many respects inadequate for the selection of a concessionaire, there was a need to devise a specific selection procedure for the *PFIP Legislative Guide*.

23. Accordingly, the *PFIP Legislative Guide* did not cover other forms of PPP which involved payments by the Government (such as deferred payment for facilities built and managed by the private sector but occupied by public bodies), even if they were at the time known to exist. The Working Group and the Commission assumed that government procurement and general government contract law would adequately cover those PPPs.

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[18] See https://www.unodc.org/documents/treaties/UNCAC/Status-Map/UNCAC_Status_Map_Current.pdf.

[19] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 109 (see *Yearbook of the United Nations Commission on International Trade Law 2012*, part one).

24. Unlike the 1994 model law, the more recent UNCITRAL Model Law on Public Procurement offers a wider range of procurement methods, including, in particular one method provided in its article 49 ("request for proposals with dialogue") that was developed on the basis of the selection procedures recommended in chapter III ("Selection of the concessionaire") of the *PFIP Legislative Guide*.

25. Aligning the two texts requires a number of purely formal adjustments, such as incorporating as many cross references to the UNCITRAL Model Law on Public Procurement and its Guide to Enactment as possible, or eliminating from the *PFIP Legislative Guide* any unnecessary duplication of material contained in the procurement texts. More importantly, however, aligning the two texts requires a number of substantive decisions, which the Commission will have to make.

26. The first question is whether, as regards the types of PPPs originally covered by the *PFIP Legislative Guide* (i.e. mainly "concession-type PPPs"), the recommended selection method is still generally adequate. Alternatively, if the Commission now finds that method to be inadequate, the Commission should decide whether to simply replace it with a reference to the methods provided in the UNCITRAL Model Law on Public Procurement (in particular the request for proposals with dialogue), or whether to devise an entirely new method.

27. Similarly, as regards the types of PPPs not originally covered (i.e. "non-concession PPPs"), for which the method in chapter III of the *PFIP Legislative Guide* was not conceived, the Commission should consider a number of options. The Commission could, for example, (a) adapt the method of chapter III; (b) adapt the method in article 49 of the UNCITRAL Model Law on Public Procurement; or (c) recommend the use of that method (or any other method of the Model Law) as it currently exists.

28. On the basis of its preliminary assessment, the Secretariat submits that, as regards the types of PPPs referred to in paragraph 26 above, the method of chapter III of the *PFIP Legislative Guide* is still valid, subject to some simplification to avoid unnecessary duplication of the UNCITRAL Model Law on Public Procurement. As regards the types of PPPs referred to in paragraph 27 above, it appears to the Secretariat that, by default, the method in article 49 of the UNCITRAL Model Law on Public Procurement ("request for proposals with dialogue") seems to be generally adequate, however some flexibility could be given to the contracting authority to choose another method provided in the Model Law.

29. Lastly, the Secretariat proposes to amend Section E ("Unsolicited proposals") of chapter III to emphasize the exceptional nature of the procedure set forth therein and the need for ensuring transparency and competition in the award process.

IV. Conclusions and next steps

30. The addenda to this note will contain revised drafts of the introduction and of chapters I, II and III of the *PFIP Legislative Guide* reflecting the changes proposed in paragraphs 15–29 above, for review and consideration by the Commission.

31. The revised texts in those addenda will set out the portions of the *PFIP Legislative Guide* that the Secretariat proposes to revise substantially, and indicate which portions it proposes to retain essentially as they are currently drafted, subject to amendments intended to (a) adjust the text to the new terminology indicated in paragraphs 17–19 above; and (b) eliminate or update, as appropriate, explanatory material that is dated or that otherwise unnecessarily link the advice contained in the *PFIP Legislative Guide* to the historical context in which it was originally formulated.

32. As regards the remaining chapters, the Secretariat believes that most comments received over the years are concerned with options for risk allocation or contract remedies, or the choice of dispute settlement methods that do not affect the policies expressed in the *PFIP Model Provisions*. The same holds true for most of the

comments made at the third Colloquium.[20] In some instances, it could indeed be useful to amend the advice contained in the Guide to accommodate some of those additional options. Generally, however, the Secretariat would not advocate any amendments beyond what is strictly necessary. The reason for this conservative approach is that the *PFIP Legislative Guide* is addressed to legislators and not to contract drafters. The advice it contains on contractual matters is mostly of an enabling nature and aims at reminding the legislator of the need for preserving the flexibility needed by the contracting authority to find appropriate contract solutions. To that end, the *PFIP Legislative Guide* should be adequately informative, but needs not to offer an exhaustive discussion of contract practice.

33. The Secretariat would request the Commission to consider whether it generally agrees with the course proposed for updating the *PFIP Legislative Guide*. The Secretariat would further request the Commission to review, revise at it sees fit, and, if it so wishes, approve in principle the revised chapters contained in the addenda to this note. Lastly, the Secretariat would seek a mandate from the Commission to proceed with the necessary terminological and technical adjustments to the reminder of the *Guide*, with the assistance of outside experts, as appropriate, with a view to publishing the consolidated revised version later this year.

[20] The report of the colloquium is available (in English only) at http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2017.html.

Annex

Legislative Recommendations not transformed into Model Legislative Provisions

Legislative Recommendations of Chapter I, "General legislative institutional framework"	
Recommendation 2 (identification of competent public authorities) **Recommendation 3** (eligible types of projects) **Recommendation 4** (eligible infrastructure sectors) **Recommendation 5** (geographical coverage of concessions; exclusivity)	The Working Group considered recommendations 2–5, on the scope of authority to award concessions, as a unitary set. As a general remark, it was recalled that all those recommendations served the purpose of recommending legislative clarity both as to the identification of the authorities empowered to award concession agreements and as to the scope of such powers. Accordingly, support was expressed for the view that all the aspects addressed in recommendations 2–5 might be reflected and dealt with in a single model legislative provision. (A/CN.9/505, para. 93–96).
Recommendation 6 (coordination of issuance of licences and permits)	The Working Group felt that the issue did not necessarily lend itself to be dealt with in legislation. The Working Group noted that many countries considered such coordination as a matter of administrative practice (see A/CN.9/505, para. 98). Model Provision 3 mentions this matter in footnote 4.
Recommendation 7 (separation between regulatory powers and provision of infrastructure services) **Recommendation 8** (independence and autonomy of regulatory bodies) **Recommendation 9** (transparency of regulatory processes and decisions) **Recommendation 10** (impartial review of regulatory decisions) **Recommendation 11** (settlement of disputes among public service providers)	The general view was that the recommendations dealing with the authority to regulate infrastructure, the nature and functions of regulatory bodies were not suitable to be translated into legislative language. Therefore, they should remain outside the scope of the model legislative provisions (see A/CN.9/505, para. 102).
Legislative Recommendations of Chapter II, "Project risks and government support"	
Recommendation 12 (contracting authority's freedom to allocate project risks as required)	The Working Group agreed that the recommendation had an educational rather than a prescriptive character and therefore was not suitable for a model legislative provision (see A/CN.9/505, para. 104).

Government support (see chap. II, "Project risks and government support", paras. 30–60 of the Guide)	
Recommendation 13 (identification of public authorities authorized to provide financial or economic support to PFI projects)	The Working Group noted the complexity of the issues and the various policy options mentioned in the Guide. The Working Group agreed tentatively to request a provision within square brackets (see A/CN.9/505, paras. 106–108). However, the Working Group eventually retained the substance of the recommendation as a footnote to model provision 3 (see A/CN.9/521, paras. 37–38).
Construction works (see chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 69–79 of the Guide)	
Recommendation 52 (review of construction plans and approval of construction works) **Recommendation 54** (reporting and monitoring) **Recommendation 56** (Approval of major subcontracts) **Recommendation 57** (choice of law I contracts entered into by the concessionaire) **Recommendation 58 (d)–(e)** (force majeure and remedies following default)	The Working Group was of the view that these recommendations dealt with matters of an essentially contractual nature and that no model legislative provision addressing them was desirable. The topic is however included in the list of matters to be addressed in the project agreement pursuant to model legislative provision 28 (see A/CN.9/505, paras. 138, 142, 146 and 148).

(A/CN.9/939/Add.1) (Original: English)

Note by the Secretariat on public-private partnerships (PPPs): proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (revised introduction)

ADDENDUM

Contents

Introduction and background information on PPPs*

A. Introduction

1. The roles of the public and the private sectors in the development of infrastructure have evolved considerably over time. Public services such as gas street lighting, power distribution, telegraphy and telephony, steam railways and electrical tramways date back to the nineteenth century. The private sector funded many of the early road or canal projects, and there was a rapid development of international project financing, including international bond offerings to finance railways or other major infrastructure.

2. However, during most of the twentieth century, the worldwide trend turned towards public development of infrastructure and other services. Infrastructure operators were often nationalized, or they underwent mergers and acquisitions to reduce competition. In many countries, the provision of public services by private companies required a licence or concession from the Government. The degree of openness of the world economy also receded during this period. The infrastructure sector remained privately operated only in a relatively small number of countries, often with little or no competition. In many countries, the pre-eminence of the public sector in infrastructure service provision became enshrined in the constitution.

3. The reverse trend towards private sector participation and competition in infrastructure sectors started in the early 1980s. Factors driving this development include significant technological innovations; high indebtedness and stringent budget constraints limiting the public sector's ability to meet increasing infrastructure needs; the expansion of international and local capital markets, with a consequent

* Section B offers general background information on matters that the *Guide* examines from a legislative perspective. For in-depth policy and technical information, the reader is particularly advised to consult publications by other international organizations, such as the *Guidelines for Infrastructure Development through Build-Operate-Transfer (BOT) Projects*, prepared by the United Nations Industrial Development Organization (UNIDO publication, Sales No. UNIDO.95.6.E), the Public-Private Partnerships Reference Guide – Version 3, prepared by the World Bank and its partners (International Bank for Reconstruction and Development/The World Bank, 2017), the *Recommendations of the Council on Principles for Public Governance of Public-Private Partnerships*, OECD, May 2012.

improvement in access to private funding; and an increasing number of successful international experiences with private participation and competition in infrastructure. Many countries adopted new laws, not only to regulate such transactions, but also to modify market structure and competition policies for the sectors in which they were taking place.

4. The purpose of the *Guide* is to assist in the establishment or adaptation of a legal framework to attract private investment in public infrastructure and services through public private partnerships ("PPPs"). The advice provided in the *Guide* aims to achieve a balance between facilitating PPPs and protecting the public interest. The *Guide* discusses fundamental concerns that are of public interest, which are recognized by most legal systems, despite the numerous differences in policy and legislative treatment.

5. Public interest concerns include, for example: continuity in the provision of public services; long term sustainability and affordability of projects; environmental protection, health, safety and quality standards; fairness of prices charged to the public; non-discriminatory treatment of customers or users; full disclosure of information pertaining to the operation of infrastructure facilities; flexibility to meet changed conditions, including expansion of the service to meet additional demand and periodic review of the contractual terms and conditions; accountability of decision makers and monitoring of project implementation. Fundamental concerns of the private sector, in turn, usually include issues such as stability of the legal and economic environment in the host country; transparency of laws and regulations, and predictability and impartiality in their application; enforceability of property rights, and assurances that private property is respected and not interfered with other than for reasons of public interest and only if compensation is paid; and freedom of the parties to agree on commercial terms that ensure a reasonable return on invested capital commensurate with the risks taken by private investors. The *Guide* does not provide a single set of model solutions to address these concerns, but it helps the reader to evaluate the different approaches available and to choose the one most suitable in the national or local context.

1. Organization and scope of the Guide

6. The *Guide* consists of legislative advice and recommendations in the form of notes offering an analysis of key financial, regulatory, legal policy and other issues raised in the subject area. The notes are followed, as appropriate, by model legislative provisions, which exemplify how a legislator could translate the advice and recommendations of the *Guide* into legislative language. The user is advised to read the model legislative provisions together with the notes, which provide background information to enhance their understanding.

7. The model provisions deal with matters that should be addressed in laws specifically concerned with PPPs. They do not deal with other areas of law, which, as discussed in the *Guide*, also have an impact on PPPs. Moreover, the successful implementation of PPPs typically requires various measures beyond the establishment of an appropriate legislative framework, such as adequate administrative structures and practices, organizational capability, technical expertise, appropriate human and financial resources and economic stability. Although some of these matters are mentioned in the notes, they are not addressed in the model provisions.

8. The *Guide* is intended to be used as a reference by national authorities and legislative bodies when preparing new laws or reviewing the adequacy of existing ones. For that purpose, the *Guide* helps identify areas of law that are most relevant to PPPs and discusses the content of those laws, which would be conducive to attracting private capital, national and foreign. The *Guide* briefly mentions other areas of law including, for instance, promotion and protection of investments, property law, security interests, rules and procedures on compulsory acquisition of private property, general contract law, rules on government contracts and administrative law, tax law and environmental protection and consumer protection laws (see chap. VII, "Other relevant areas of law", paras. ...) that could be enacted specifically with respect to PPPs or that should be kept in mind when establishing a legislative or regulatory

framework for PPPs. The *Guide* is not intended to provide advice on drafting agreements for the implementation of PPPs. However, the *Guide* does discuss some contractual issues (for instance, in chaps. IV, "PPP implementation: legal framework and PPP contract" and V, "Duration, extension and termination of the PPP contract", paras. …) to the extent that they relate to matters that might usefully be addressed in legislation.

9. The *Guide* covers a wide variety of PPP arrangements, in particular those that involve an obligation for the private partner to design, build, maintain and operate a new facility or system or to rehabilitate, modernize, expand, maintain and operate an existing facility or system. These facilities or systems may be operated by the private partner to provide services or goods to the public, may be open for use by the public under the control of the private partner, or may also be used by Government to meet its own needs or to support the provision of a public service. The *Guide* covers both PPPs where the private sector recovers its investment through the price charged to the public or to a public authority (or both) for the use of the infrastructure facility or system, or for the services or goods it generates, as well as PPPs in which only the contracting authority or other governmental agency pays for the facilities, goods or services provided under the PPP contract. Although PPPs are sometimes grouped with other transactions for the "privatization" of governmental functions or property, the *Guide* is not concerned with "privatization" transactions that do not relate to the development and operation of public infrastructure, facilities and services. In addition, the *Guide* does not address projects for the exploitation of natural resources, such as mining, oil or gas exploitation projects under some "concession", "licence" or "permission" issued by the public authorities of the host country.

2. Terminology used in the Guide

10. The following paragraphs explain the meaning and use of certain expressions that appear frequently in the *Guide*. For terms not mentioned below, such as technical terms used in financial and business management writings, the reader is advised to consult other sources of information on the subject, such as the *Guide*lines *for Infrastructure Development through Build-Operate Transfer (BOT) Projects* prepared by the United Nations Industrial Development Organization (UNIDO).[1]

(a) "Public infrastructure" and "public services"

11. As used in the *Guide*, the expression "public infrastructure" refers to physical facilities that directly or indirectly provide or house services essential to the public. Examples of public infrastructure in this sense may be found in various sectors and include various types of facility, equipment or system: power generation plants and power distribution networks (electricity sector); systems for local and long-distance telephone communications and data transmission networks (telecommunications sector); desalination plants, waste water treatment plants, water distribution facilities (water sector); facilities and equipment for waste collection and disposal (sanitation sector); and physical installations and systems used for public transportation, such as urban and inter-urban railways, underground trains, bus lines, roads, bridges, tunnels, ports, airlines and airports (transportation sector). The term "infrastructure" also covers facilities or systems – whether or not open or accessible to the public – that the Government or other public authorities require for their own functions (court houses, office buildings) or facilities that house public services such as schools, healthcare facilities or correctional institutions.

12. The line between publicly and privately owned infrastructures must be drawn by each country as a matter of public policy. In some countries, the Government, for instance, owns airports, in others they are privately owned but subject to regulation or to the terms of an agreement with the competent public authority. Hospital and medical facilities, as well as prison and correctional facilities, may be in public or private hands, depending on the country's preferences. Often, but not always, power

[1] UNIDO publication, Sales No. UNIDO.95.6.E, hereafter referred to as the *UNIDO BOT Guidelines.*

and telecommunication facilities are operate by private entities, but distribution remains in the public sector. No view is expressed in the *Guide* as to where the line should be drawn in a particular country.

13. The notions of public infrastructure and public services are well established in the legal tradition of some countries, being sometimes governed by a specific body of law, which is typically referred to as administrative law (see chap. VII, "Other relevant areas of law", paras. …). However, in a number of other countries, apart from being subject to special regulations, public services are not regarded as being intrinsically distinct from other types of business. As used in the *Guide*, the expressions public services and public service providers should not be understood in a technical sense that may be attached to them under any particular legal system.

(b) "Public Private Partnership", "(PPP)" and related expressions

14. The term "Public Private Partnership" (PPP) is used in practice to refer to a wide variety of contractual arrangements or joint ventures through which the public and private sector cooperate towards a common purpose, and there is no internationally acknowledged legal definition covering all possible variants. The *Guide* uses the term PPPs to specifically refer to long-term arrangements between public authorities and private entities contributing to the private financing of public infrastructure in the broad sense indicated in para. …. above.

15. PPPs are not a special new category of Government contracts. In fact, PPPs may use various well-known contractual structures (leases, concessions, services contracts, turnkey contracts, design, build-finance operate contracts). PPP arrangements covered by the *Guide* may be divided into two broad categories. Firstly, the Guide covers PPPs in which the private partner operates the infrastructure and charges a price to the public under a licence or "concession" (see para. …) issued by the Government (also known as "concession-PPP"). Secondly, the Guide covers PPPs in which the private partner undertakes some work in connection with an infrastructure or facility (ranging from design and construction, renovation, expansion, maintenance or management, any contribution thereof) or services system (information or telecommunication, customer services) but does not provide any service to the public, receiving payments directly from the contracting authority or other governmental agency ("non-concession PPP").

16. The latter situation resembles what in some legal systems is known as "partnership for infrastructure" or "partnership contract", an innovative arrangement that allows for work or services to be procured against payment over the life of the contract, without upfront commitment of public funds. Under these arrangements, the private partner typically undertakes the financing and the construction of an infrastructure facility and transfers it after completion to the contracting authority or its designee. This arrangement is most often used for construction of a facility to host a public service provided directly by the contracting authority, whereas the private partner remains responsible for the operation and maintenance of the facility for the entire duration of the PPP agreement. Regardless of the type of arrangement, the *Guide* generally refers to the public authority that enters into a PPP as the "*contracting authority"*, and to the private entity that carries out a PPP project as the "*private partner*". The agreement between contracting authority and private partner, which that sets forth the scope, terms and conditions of the PPP project is referred to in the Guide as the "*PPP contract*".

17. Where the context so requires, the Guide uses sometimes the term "project company" to refer specifically to an independent legal entity established for carrying out a particular PPP project.

(c) "Concession" and related expressions

18. In many countries, the provision of a *"public service*" by an entity other than a public authority typically requires an act of authorization by the appropriate governmental body. Different expressions are used to define such acts of authorization under national laws and in some legal systems; various expressions may be used to

denote different types of authorization. Commonly used expressions include terms such as "concession", "franchise", "licence" or "lease" ("*affermage*"). In some legal systems, in particular those belonging to the civil law tradition, certain forms of infrastructure projects are classified in well-defined categories (such as "public works concession" or "public service concession"). Where the context so requires, the *Guide* uses the word "concession" to refer generally to this act of authorization, but not in the technical sense that may be attached to it under any particular legal system or domestic law.

19. When the context requires, the *Guide* uses the word "concessionaire" to refer specifically to an entity that carries out an infrastructure project under a concession issued by a public authority of the host country. Other expressions that may be used in some legal systems to refer to some forms of PPP agreements, such as "concession agreement" or "concession contract", are not used in the *Guide*.

(d) References to national authorities

20. As used in the *Guide*, the word "Government" encompasses the various public authorities of the host country entrusted with executive or policy-making functions, at the national, provincial or local level. The expression "public authorities" is used to refer, in particular, to entities of, or related to, the executive branch of the Government. The expressions "legislature" and "legislator" are used specifically with reference to the organs that exercise legislative functions in the host country.

21. The expression "contracting authority" is generally used in the *Guide* to refer to the public authority of the host country that has the overall responsibility for the project and on behalf of which the project is awarded. Such authority may be national, provincial or local (see below, paras. …).

22. The expression "regulatory agency" is used in the *Guide* to refer to the public authority that is entrusted with the power to issue and enforce rules and regulations governing the development and the operation of the project. The regulatory agency may be established by statute with the specific purpose of regulating a particular public infrastructure sector.

(e) "Build-operate-transfer" and related expressions

23. The various types of projects referred to in this *Guide* as PPPs are sometimes divided into several categories, according to the type of private participation or the ownership of the relevant infrastructure, for example, as indicated below (see also the discussion of modalities of private sector participation in PPPs in paras. …):

(a) *Build-operate-transfer (BOT)*. A project is said to be a BOT project when the contracting authority selects a private partner to finance and construct an infrastructure facility or system and gives the private entity the right to maintain and/or operate it commercially for a certain period, at the end of which the ownership of the facility is transferred to the contracting authority;

(b) *Build-transfer-operate (BTO).* A project is said to be a BTO when the contracting authority selects a private partner to plan, finance, design and build an infrastructure facility or system that immediately becomes the property of the contracting authority upon its completion, but the private partner retains the right to maintain and operate the facility for a certain period;

(c) *Build-rent-operate-transfer (BROT) or "build-lease-operate-transfer" (BLOT).* These are variations of BOT or BTO projects where, in addition to the obligations and other terms usual to BOT projects, the private partner rents to the contracting authority the physical assets on which the facility is located for the duration of the agreement and undertakes to maintain and operate it;

(d) *Build-own-operate-transfer (BOOT).* These are projects in which a private partner is engaged for the planning, financing, design, construction, operation and maintenance of a given infrastructure facility in exchange for the right to collect fees and other charges from its users. Under this arrangement, the private entity owns the facility and its assets until it is transferred to the contracting authority;

(e) *Build-own-operate (BOO).* This expression refers to projects where the private partner owns the facility permanently and is not under an obligation to transfer it back to the contracting authority.

24. Besides acronyms used to highlight the particular ownership regime, other acronyms may be used to emphasize one or more of the obligations of the private partner. In some projects, existing infrastructure facilities are turned over to private entities to be modernized or refurbished, operated and maintained, permanently or for a given period. Depending on whether the private partner will own such an infrastructure facility, those arrangements may be called either "refurbish-operate-transfer"(ROT) or "modernize-operate transfer" (MOT), in the first case, or "refurbish-own-operate" (ROO) or "modernize-own-operate" (MOO), in the latter. The expression "design-build-finance-operate" (DBFO) is sometimes used to emphasize the private partner's additional responsibility for designing the facility and financing its construction.

B. Background information on PPPs

25. In most of the countries that have built new infrastructure through private investment, PPPs are an important tool to meet national infrastructure needs. Essential elements of national policies include the level of competition sought for each infrastructure sector, the way in which the sector is structured and the mechanisms used to ensure adequate functioning of infrastructure or public services markets. National policies to promote private investment in infrastructure are often accompanied by measures destined to introduce competition between public service providers or to prevent abuse of monopolistic conditions where competition is not feasible.

26. In devising programmes to promote private sector investment in the development and operation of public infrastructure and services, a number of countries have found it useful to review the assumptions under which public sector monopolies were established, including the historical circumstances and political conditions that had led to their creation, with a view to:

(a) Identifying those activities that still maintain the characteristics of natural monopoly; and

(b) Assessing the feasibility and desirability of introducing competition in certain infrastructure sectors.

1. Private investment and infrastructure policy

27. The measures that may be required to implement a governmental policy to promote competition in various infrastructure sectors will depend essentially on the prevailing market structure. The main elements that characterize a particular market structure include barriers to the entry of competitors of an economic, legal, technical or other nature, the degree of vertical or horizontal integration, the number of companies operating in the market as well as the availability of substitute products or services.

(a) Competition policy and monopolies

28. The term "monopoly" in the strict sense refers to a market with only one supplier. However, pure monopoly and perfect competition mark two ends of a spectrum. Most markets for commodities or services are characterized by a degree of competition that lies between those two extremes. Generally, monopolies can be classified as natural monopolies, legal monopolies and de facto monopolies; each of them may require different policy approaches:

(a) *Natural monopolies.* These economic activities allow a single provider to supply the whole market at a lower cost than two or more providers. This situation is typical for economic activities that entail large investment and high fixed costs, but decreasing costs of producing an additional unit of services (e.g. an additional cubic

metre of water) to attend an increase of demand. Natural monopolies tend to exhibit large upfront fixed investment requirements that make it difficult for a new company, lacking comparable economies of scale, to enter the market and undercut the incumbent;

(b) *Legal monopolies.* Legal monopolies are established by law and may cover sectors or activities that are or are not natural monopolies. In the latter category, monopolies exist solely because competition is prohibited. The developments that had led many countries to the establishment of legal monopolies were often based on the consideration that national infrastructure needs, in terms of both quality and quantity, could not be adequately met by leaving infrastructure to the free market;

(c) *De facto monopolies.* These monopolies may not necessarily be the result of economic fundamentals or of legal provisions, but simply of the absence of competition, resulting, for example, from the integrated nature of the infrastructure company and its ability to control essential facilities to the exclusion of other suppliers.

29. Although monopolies are sometimes justified on legal, political or social grounds, they may produce negative economic effects. A service provider operating under monopolistic conditions is typically able to fix prices above those that would be charged in competitive conditions. The surplus profit that results from insufficient competition implies a transfer of wealth from consumers to producers. Monopolies have also been found to cause a net loss of welfare to the economy because of inflated prices generated by artificially low production; a reduced rate of innovation; and insufficient efforts to reduce production costs. Furthermore, in particular in infrastructure sectors, there may be secondary effects on other markets. (For example, lack of competition and efficiency in telecommunications has negative repercussions through increases in cost for the economy at large.)

30. Despite their negative economic effects, monopolies and other regulatory barriers to competition have sometimes been maintained in the absence of natural monopoly conditions. One of the reasons cited for retaining monopolies is that they may be used to foster certain policy objectives, such as ensuring the provision of services in certain regions or to certain categories of consumer at low prices or even below cost. Examples of services for which the price may not cover costs include lifeline telephone, water or power service, discounted transport for certain categories of traveller (e.g. schoolchildren or senior citizens), as well as other services for low-income or rural users. A monopolistic service provider is able to finance the provision of such services through internal "cross-subsidies" from other profitable services provided in other regions or to other categories of consumer.

31. Another reason sometimes cited for retaining legal monopolies in the absence of natural monopoly conditions is to make the sector more attractive to private investors. Private operators may insist on being granted exclusivity rights to provide a certain service to reduce the commercial risk of their investment. However, that objective has to be balanced against the interests of consumers and the economy as a whole. For those countries where the granting of exclusivity rights is found to be needed as an incentive to private investment, it may be advisable to consider restricting competition, though on a temporary basis only (see chap. II, "Project planning and preparation", paras. XX).

(b) Scope for competition in different sectors

32. Until recently, monopolistic conditions prevailed in most infrastructure sectors either because the sector was a natural monopoly or because regulatory barriers or other factors (e.g. vertically integrated structure of public service providers) prevented effective competition. However, rapid technological progress and innovation have broadened the potential scope for competition in infrastructure sectors, prompting legislators and regulators in most countries to promote competition in various infrastructure sectors by adopting legislation that abolishes monopolies and other barriers to entry, changes the way infrastructure sectors are organized and establishes a regulatory framework that fosters effective competition.

The extent to which meaningful competition is possible depends on the sector, the size of the market and other factors.

2. Restructuring of infrastructure sectors

33. In many countries, private participation in infrastructure development has followed the introduction of measures to restructure infrastructure sectors. Legislative action typically begins with the abolition of rules that prohibit private participation in infrastructure and the removal of all other legal impediments to competition that cannot be justified by reasons of public interest. It should be noted, however, that the extent to which a particular sector may be opened to competition is a decision that is taken in the light of the country's overall economic policy. Some countries, in particular developing countries, might have a legitimate interest in promoting the development of certain sectors of local industry and might thus choose not to open certain infrastructure sectors to competition.

34. For monopolistic situations resulting from legal prohibitions rather than economic and technological fundamentals, the main legislative action needed to introduce competition is the removal of the existing legal barriers. This may need to be reinforced by rules of competition (such as the prohibition of collusion, cartels, predatory pricing or other unfair trading practices) and regulatory oversight (see chap. I, "General legislative and institutional framework", paras. …). For a number of activities, however, effective competition may not be obtained through the mere removal of legislative barriers without legislative measures to restructure the sector concerned. In some countries, monopolies have been temporarily maintained only for the time needed to facilitate a gradual, more orderly and socially acceptable transition from a monopolistic to a competitive market structure.

(a) Unbundling of infrastructure sectors

35. In the experience of some countries, it has been found that vertically or horizontally integrated infrastructure companies may be able to prevent effective competition. Integrated companies may try to extend their monopolistic powers in one market or market segment to other markets or market segments in order to extract monopoly rents in those activities as well. Therefore, some countries have found it necessary to separate the monopoly element (such as the grid in many networks) from competitive elements in given infrastructure sectors. By and large, infrastructure services tend to be competitive, whereas the underlying physical infrastructure often has monopolistic characteristics.

36. The separation of competitive activities from monopolistic ones may in turn require the unbundling of vertically or horizontally integrated activities. Vertical unbundling occurs when upstream activities are separated from downstream ones, for example, by separating production, transmission, distribution and supply activities in the power sector. The objective is typically to separate key network components or essential facilities from the competitive segments of the business. Horizontal unbundling occurs when one or more parallel activities of a monopolist public service provider are divided among separate companies, which may either compete directly with each other in the market (as is increasingly the case with power production) or retain a monopoly over a smaller territory (as may be the case with power distribution). Horizontal unbundling refers both to a single activity or segment being broken up (as in the power sector examples) and to substitutes being organized separately in one or more markets (as in the case of separation of cellular services from fixed-line telephony, for example).

37. However, the costs and benefits of such changes need to be considered carefully. Costs may include those associated with the change itself (e.g. transaction and transition costs, including the loss incurred by companies that lose benefits or protected positions as a result of the new scheme) and those resulting from the operation of the new scheme, in particular higher coordination costs resulting, for example, from more complicated network planning, technical standardization or regulation. Benefits, on the other hand, may include new investments, better or new services, more choice and lower economic costs.

(b) Recent experience in major infrastructure sectors

(i) Electricity

38. Electricity laws recently enacted in various countries call for the unbundling of the power sector by separating generation, transmission and distribution. In some cases, supply is further distinguished from distribution in order to leave only the monopolistic activity (i.e. the transport of electricity for public use over wires) under a monopoly. In those countries, the transmission and distribution companies do not buy or sell electricity but only transport it against a regulated fee. Trade in electricity occurs between producers or brokers on the one hand and users on the other. In some of the countries concerned, competition is limited to large users only or is being phased in gradually.

39. Where countries have opted for the introduction of competition in the power and gas sectors, new legislation has organized the new market structure, stipulating to what extent the market had to be unbundled (sometimes including the number of public service providers to be created out of the incumbent monopoly), or removed barriers to new entry. The same energy laws have also established specific competition rules, whether structural (e.g. prohibition of cross-ownership between companies in different segments of the market, such as production, transmission and distribution, or gas and electricity sale and distribution) or behavioural (e.g. third-party access rules, prohibition of alliances or other collusive arrangements). New institutions and regulatory mechanisms, such as power pools, dispatch mechanisms or energy regulatory agencies, have been established to make the new energy markets work. Finally, other aspects of energy law and policy have had to be amended in conjunction with these changes, including the rules governing the markets for oil, gas, coal and other energy sources.

(ii) Water and sanitation

40. The most common market structure reform introduced in the water and sanitation sector is horizontal unbundling. Some countries have created several water utilities where a single one existed before. This is particularly common in, but is not limited to, countries with separate networks that are not or only slightly interconnected. In practice, it has been found that horizontal unbundling facilitates comparison of the performance of service providers.

41. Some countries have invited private investors to provide bulk water to a utility or to build and operate water treatment or desalination plants, for example. In such vertical unbundling, the private services (and the discrete investments they require) are usually rendered under contract to a utility and do not fundamentally modify the monopolistic nature of the market structure: the plants usually do not compete with each other and are usually not allowed to bypass the utility to supply customers. A number of countries have introduced competition in bulk water supply and transportation; in some cases, there are active water markets. Elsewhere, competition is limited to expensive bottled or trucked water and private wells.

(iii) Transport

42. In the restructuring measures taken in various countries, a distinction is made between transport infrastructure and transport services. The former may often have natural monopoly characteristics, whereas services are generally competitive. Competition in transport services should be considered not only within a single mode but also across modes, since trains, trucks, buses, airlines and ships tend to compete for passengers and freight.

43. With respect to railways, some countries have opted for a separation between the ownership and operation of infrastructure (e.g. tracks, signalling systems and train stations) on the one hand and of rail transport services (e.g. passenger and freight) on the other. In such schemes, the law does not allow the track operator also to operate transport services, which are operated by other companies often in competition with each other. Other countries have let integrated companies operate infrastructure as well as services, but have enforced third-party access rights to the infrastructure,

sometimes called “trackage rights”. In those cases, transport companies, whether another rail line or a transport service company, have right of access to the track on certain terms and the company controlling the track has the obligation to grant such access.

44. In many countries, ports were until recently managed as public sector monopolies. When opening the sector to private participation, legislators have considered different models. Under the landlord-port system, the port authority is responsible for the infrastructure as well as overall coordination of port activities; it does not, however, provide services to ships or merchandise. In service ports, the same entity is responsible for infrastructure and services. Competition between service providers (e.g. tugboats, stevedoring and warehousing) may be easier to establish and maintain under the landlord system.

45. Legislation governing airports may also require changes, whether to allow private investment or competition between or within airports. Links between airport operation and air traffic control may also need to be considered carefully. Within airports, many countries have introduced competition in handling services, catering and other services to planes, as well as in passenger services such as retail shops, restaurants, parking and the like. In some countries, the construction and operation of a new terminal at an existing airport has been entrusted to a new operator, thus creating competition between terminals. In others, new airports have been built on a BOT basis and existing ones transferred to private ownership.

(c) Transitional measures

46. The transition from monopoly to market requires careful management. Political, social or other factors have led some countries to pursue a gradual or phased approach to implementation. As technology and other outside forces are constantly changing, some countries have adopted sector reforms that could be accelerated or adjusted to take those changing circumstances into account.

47. Some countries have felt that competition should not be introduced at once. In such cases, legislation has provided for temporary exclusivity rights, limitation in the number of public service providers or other restrictions on competition. Those measures are designed to give the incumbent adequate time to prepare for competition and to adjust prices, while giving the public service provider adequate incentives for investment and service expansion. Other countries have included provisions calling for the periodic revision (at the time of price reviews, for example) of such restrictions with a view to ascertaining whether the conditions that justified them at the time when they were introduced still prevail.

48. Another transitional measure, at least in some countries with government owned public service providers, has been the restructuring or privatization of the incumbent service provider. In most countries where government-owned providers of public services have been privatized, liberalization has mostly either accompanied or preceded privatization. Some countries have proceeded otherwise and have privatized companies with significant exclusivity rights, often to increase privatization proceeds. They have, however, found it difficult and sometimes very expensive to remove, restrict or shorten at a later stage the exclusive rights or monopolies protecting private or privatized public service providers.

3. Forms of private sector participation in infrastructure projects

49. PPPs may be devised in a variety of different forms, ranging from publicly owned and operated infrastructure to fully privatized projects. The appropriateness of a particular variant for a given type of infrastructure or service is a matter to be considered by the Government in view of the national needs for infrastructure and service development and an assessment of the most efficient ways in which particular types of infrastructure and services facilities may be developed and operated. In a particular sector, more than one option may be used.

(a) Public ownership and public operation

50. In cases where public ownership and control is desired, direct private financing as well as infrastructure and service, operation under commercial principles may be achieved by establishing a separate legal entity controlled by the Government to own and operate the project. Such an entity may be managed as an independent private commercial enterprise that is subject to the same rules and business principles that apply to private companies. Some countries have a well-established tradition in operating infrastructure facilities through these types of company. Opening the capital of such companies to private investment or making use of such a company's ability to issue bonds or other securities may create an opportunity for attracting private investment in infrastructure.

51. Another form of involving private participation in publicly owned and operated infrastructure may be the negotiation of "service contracts" whereby the public operator contracts out specific operation and maintenance activities to the private sector. The Government may also entrust a broad range of operation and maintenance activities to a private entity acting on behalf of the contracting authority. Under such an arrangement, which is sometimes referred to as a "management contract", the private operator's compensation may be linked to its performance, often through a profit-sharing mechanism, although compensation on the basis of a fixed fee may also be used, in particular where the parties find it difficult to establish mutually acceptable mechanisms to assess the operator's performance.

(b) Public ownership and private operation

52. Alternatively, the whole operation of public infrastructure and service facilities may be transferred to private entities. One possibility is to give the private entity, usually for a certain period, the right to use a given facility, to supply the relevant services and to collect the revenue generated by that activity. Such a facility may already be in existence or may have been specially built by the private entity concerned. This combination of public ownership and private operation has the essential features of arrangements that in some legal systems may be referred to as "public works concessions" or "public service concessions".

53. Another form of PPP is where a private entity is selected by the contracting authority to operate a facility that has been built by or on behalf of the Government, or whose construction has been financed with public funds. Under such an arrangement, the operator assumes the obligation to operate and maintain the infrastructure and is granted the right to charge for the services it provides. In such a case, the operator assumes the obligation to pay to the contracting authority a portion of the revenue generated by the infrastructure that is used by the contracting authority to amortize the construction cost. Such arrangements are referred to in some legal systems as "lease" or "*affermage*".

(c) Private ownership and operation

54. Under the third approach, the private entity not only operates the facility, but also owns the assets related to it. Here, too, there may be substantial differences in the treatment of such projects under domestic laws, for instance as to whether the contracting authority retains the right to reclaim title to the facility or to assume responsibility for its operation (see also chap. IV, "PPP implementation: legal framework and PPP contract", paras. 23–29).

55. Where the facility is operated pursuant to a governmental licence, private ownership of physical assets (e.g. a telecommunication network) is often separable from the licence to provide the service to the public (e.g. long-distance telephone services), in that the licence can be withdrawn by the competent public authority under certain circumstances. Thus, private ownership of the facility may not necessarily entail an indefinite right to provide the service.

56. There are also PPP schemes that separate the management of the facility from the provision of services to the public. These types of PPPs are typically used for the construction, expansion, refurbishment or management of facilities used

non-merchant sectors (i.e. not related to the remunerated provision of goods or services to the public), in connection with less profitable public activities. In those arrangements, the responsibility in providing the public service itself is not delegated to the private partner but remains in the hands of the contracting authority or other Government entity. As the private partner is not charging a fee or toll for the use of the facility by the public, the only or the main source of remuneration comes from the contracting authority or other Government entity.

4. Financing structures and sources of finance for infrastructure

(a) Notion of project finance

57. Large-scale PPP projects involving the construction of new infrastructure facilities are often carried out by new corporate entities specially established for that purpose by the project promoters. Such a new entity, often called a "project company", becomes the vehicle for raising funds for the project. Because the project company lacks an established credit or an established balance sheet on which the lenders can rely, the preferred financing modality for the development of new infrastructure is called "project finance". In a project finance transaction, credit will be made available to the extent that the lenders can be satisfied to look primarily to the project's cash flow and earnings as the source of funds for the repayment of loans taken out by the project company. Other guarantees either are absent or cover only certain limited risks. To that end, the project's assets and revenue, and the rights and obligations relating to the project, are independently estimated and are strictly separated from the assets of the project company's shareholders.

58. Project finance is also said to be "non-recourse" financing owing to the absence of recourse to the project company's shareholders. In practice, however, lenders are seldom ready to commit the large amounts needed for infrastructure projects solely on the basis of a project's expected cash flow or assets. The lenders may reduce their exposure by incorporating into the project documents a number of back-up or secondary security arrangements and other means of credit support provided by the project company's shareholders, the Government, purchasers or other interested third parties. This modality is commonly called "limited recourse" financing.

(b) Financing sources for infrastructure projects

59. Alternatives to traditional public financing are playing an increasing role in the development of infrastructure. In recent years, new infrastructure investment in various countries has included projects with exclusively or predominantly private funding sources. The two main types of fund are debt finance, usually in the form of loans obtained on commercial markets, and equity investment. However, financing sources are not limited to those.

(i) Equity capital

60. Equity capital for PPPs is provided in the first place by the project promoters or other individual investors interested in taking stock in the project company. However, such equity capital normally represents only a portion of the total cost of an infrastructure project. In order to obtain commercial loans or to have access to other sources of funds to meet the capital requirements of the project, the project promoters and other individual investors have to offer priority payment to the lenders and other capital providers, thus accepting that their own investment will only be paid after payment of those other capital providers. Therefore, the project promoters typically assume the highest financial risk. At the same time, they will hold the largest share in the project's profit once the initial investment is paid. Substantial equity investment by the project promoters is typically welcomed by the lenders and the Government, as it helps reduce the burden of debt service on the project company's cash flow and serves as an assurance of those companies' commitment to the project.

(ii) Commercial loans

61. Debt capital often represents the main source of funding for PPPs. Financial markets provide debt capital primarily by means of loans extended to the project company by national or foreign commercial banks, typically using funds that originate from short to medium-term deposits remunerated by those banks at floating interest rates. Consequently, loans extended by commercial banks are often subject to floating interest rates and normally have a maturity term shorter than the project period. However, where feasible and economic, given financial market conditions, banks may prefer to raise and lend medium to long-term funds at fixed rates, so as to avoid exposing themselves and the project company over a long period to interest rate fluctuations, while also reducing the need for hedging operations. Commercial loans are usually provided by lenders on condition that their payment takes precedence over the payment of any other of the borrower's liabilities. Therefore, commercial loans are said to be "unsubordinated'' or "senior" loans.

(iii) "Subordinated" debt

62. The third type of fund typically used in these projects are "subordinated" loans, sometimes also called "mezzanine" capital. Such loans rank higher than equity capital in order of payment, but are subordinate to senior loans. This subordination may be general (i.e. ranking generally lower than any senior debt) or specific, in which case the loan agreements specifically identify the type of debt to which it is subordinated. Subordinated loans are often provided at fixed rates, usually higher than those of senior debt are. As an additional tool to attract such capital, or sometimes as an alternative to higher interest rates, providers of subordinated loans may be offered the prospect of direct participation in capital gains, by means of the issue of preferred or convertible shares or debentures, sometimes providing an option to subscribe for shares of the project company at preferential prices.

(iv) Institutional investors

63. In addition to subordinated loans provided by the project promoters or by public financial institutions, subordinated debt may be obtained from financing companies, investment funds, insurance companies, collective investment schemes (e.g. mutual funds), pension funds and other so-called "institutional investors". These institutions normally have large sums available for long-term investment and may represent an important source of additional capital for PPPs. Their main reasons for accepting the risk of providing capital to PPP projects are the prospect of remuneration and interest in diversifying investment.

(v) Capital market funding

64. PPP projects also use capital market funding. Funds may be raised by the placement of preferred shares, bonds and other negotiable instruments on a recognized stock exchange. Typically, the public offer of negotiable instruments requires regulatory approval and compliance with requirements of the relevant jurisdiction, such as requirements concerning the information to be provided in the prospectus of issuance and, in some jurisdictions, the need for prior registration. Bonds and other negotiable instruments may have no other security than the general credit of the issuer or may be secured by a mortgage or other lien on specific property.

65. Access to capital markets is usually greater for existing public utilities with an established commercial record than for companies specially established to build and operate a new infrastructure and lacking the required credit rating. Indeed, a number of stock exchanges require that the issuing company have some established record over a certain minimum period before being permitted to issue negotiable instruments.

(vi) Financing by Islamic financial institutions

66. One additional group of potential capital providers are Islamic financial institutions. Those institutions operate under rules and practices derived from the Islamic legal tradition. One of the most prominent features of banking activities under

their rules is the absence of interest payments or strict limits to the right to charge interest and consequently the establishment of other forms of consideration for the borrowed money, such as profit-sharing or direct participation of the financial institutions in the results of the transactions of their clients. As a consequence of their operating methods, Islamic financial institutions may be more inclined than other commercial banks to consider direct or indirect equity participation in a project.

(vii) Financing by international financial institutions

67. International financial institutions may also play a significant role as providers of loans, guarantees or equity to PPPs. A number of projects have been co-financed by the World Bank, the International Finance Corporation or by regional development banks, which actively promote the form of PPP to conduct such projects.

68. International financial institutions may also play an instrumental role in the formation of "syndications" for the provision of loans to the project. Some of those institutions have special loan programmes under which they become the sole "lender of record" to a project, acting on its own behalf and on behalf of participating banks and assuming responsibility for processing disbursements by participants and for subsequent collection and distribution of loan payments received from the borrower, either pursuant to specific agreements or based on other rights that are available under their status of preferred creditor. Some international financial institutions may also provide equity or mezzanine capital, by investing in capital market funds specialized in securities issued by infrastructure operators. Lastly, international financial institutions may provide guarantees against a variety of political risks, which may facilitate the project company's task of raising funds in the international financial market (see chap. II, "Project planning and preparation", paras. …).

(viii) Support by export credit and investment promotion agencies

69. Export credit and investment promotion agencies may provide support to the project in the form of loans, guarantees or a combination of both. The participation of export credit and investment promotion agencies may provide a number of advantages, such as lower interest rates than those applied by commercial banks and longer-term loans, sometimes at a fixed interest rate (see chap. II, "Project planning and preparation", paras. …).

(ix) Combined public and private finance

70. In addition to loans and guarantees extended by commercial banks and national or multilateral public financial institutions, in a number of cases public funds have been combined with private capital for financing new projects. Such public funds may originate from government income or sovereign borrowing. They may be combined with private funds as initial investment or as long-term payments, or may take the form of governmental grants or guarantees. Infrastructure projects may be co-sponsored by the Government through equity participation in the project company, thus reducing the amount of equity and debt capital needed from private sources (see chap. II, "Project planning and preparation", paras. …).

5. Main parties involved in implementing infrastructure projects

71. The parties to a PPP project may vary greatly, depending on the infrastructure sector, the modality of private sector participation and the arrangements used for financing the project. The following paragraphs identify the main parties in the implementation of a typical PPP project involving the construction of a new infrastructure facility and carried out under the "project finance" modality.

(a) Contracting authority and other public authorities

72. The execution of a PPP frequently involves a number of public authorities in the host country at the national, provincial or local level. The contracting authority is the main body responsible for the project within the Government. Furthermore, the implementation of the project may require active participation (e.g. for the issuance

of licences or permits) of other public authorities in addition to the contracting authority, at the same or at a different level of Government. Those authorities play a crucial role in the execution of PPPs.

73. The contracting authority or another public authority normally identifies the project pursuant to its own policies for infrastructure development in the sector concerned and determines the type of private sector participation that would allow the most efficient operation of the infrastructure facility (see chapter III, "Project planning and preparation", Section X paras. …). Thereafter, the contracting authority conducts the process that leads to the award of the contract to the selected private partner (see chap. III, "Contract award", paras. 12–18), Furthermore, throughout the life of the project, the Government may need to provide various forms of support – legislative, administrative, regulatory and sometimes financial – so as to ensure that the facility is successfully built and adequately operated (see chap. IV, "PPP implementation: legal framework and PPP contract", paras. …). Finally, in some projects the Government may become the ultimate owner of the facility.

(b) Project company and project promoters

74. PPPs are usually carried out by a joint venture of companies including construction and engineering companies and suppliers of heavy equipment interested in becoming the main contractors or suppliers of the project. The companies that participate in such a joint venture are referred to in the *Guide* as the "promoters" of the project. Those companies will be intensively involved in the development of the project during its initial phase and their ability to cooperate with each other and to engage other reliable partners will be essential for timely and successful completion of the work. Furthermore, the participation of a company with experience in operating the type of facility being built is an important factor to ensure the long-term viability of the project. Where an independent legal entity is established by the project promoters, other equity investors not otherwise engaged in the project (usually institutional investors, investment banks, bilateral or multilateral lending institutions, sometimes also the Government or a government-owned corporation) may also participate. The participation of local investors, where the project company is required to be established under the laws of the host country (see chap. IV, "PPP implementation: legal framework and PPP contract", paras. …), is sometimes encouraged by the Government.

(c) Lenders

75. The risks to which the lenders are exposed in project finance, be it nonrecourse or limited recourse, are considerably higher than in conventional transactions. This is even more the case where the security value of the physical assets involved (e.g. a road, bridge or tunnel) is difficult to realize, given the lack of a "market" where such assets could easily be sold, or act as obstacles to recovery or repossession. This circumstance affects not only the terms under which the loans are provided (e.g. the usually higher cost of project finance and extensive conditions to funding), but also, as a practical matter, the availability of funds.

76. Owing to the magnitude of the investment required for a PPP project, loans are often organized in the form of "syndicated" loans with one or more banks taking the lead role in negotiating the finance documents on behalf of the other participating financial institutions, mainly commercial banks. Commercial banks that specialize in lending for certain industries are typically not ready to assume risks with which they are not familiar (for a discussion of project risks and risk allocation, see chap. II, "Project planning and preparation", paras. 8–29). For example, long-term lenders may not be interested in providing short-term loans to finance infrastructure construction. Therefore, in large-scale projects, different lenders are often involved at different phases of the project. With a view to avoiding disputes that might arise from conflicting actions taken by individual lenders or disputes between lenders over payment of their loans, lenders extending funds to large projects sometimes do so under a common loan agreement. Where various credit facilities are provided under separate loan agreements, the lenders will typically negotiate a so-called

"inter-creditor agreement". An inter-creditor agreement usually contains provisions dealing with matters such as provisions for disbursement of payments, pro rata or in a certain order of priority; conditions for declaring events of default and accelerating the maturity of credits; and coordination of foreclosure on security provided by the project company. This important topic of the rights provided to the lender is also discussed in chap. IV "*PPP implementation: legal framework and PPP contract*", Section E (security interests) subsection two (Security interests in intangible assets) and in the chap. VII, "*Other areas of law*", Section B, subsection 3.

(d) International financial institutions and export credit and investment promotion agencies

77. International financial institutions and export credit and investment promotion agencies will have concerns of generally the same order as other lenders to the project. In addition to this, they will be particularly interested in ensuring that the project execution and its operation are not in conflict with particular policy objectives of those institutions and agencies. Increasing emphasis is being given by international financial institutions to the environmental impact of infrastructure projects and their long-term sustainability. The methods and procedures applied to select the private partner will also be carefully considered by international financial institutions providing loans to the project. Many global and regional financial institutions and national development funding agencies have established guidelines or other requirements governing procurement with funds provided by them, which is typically reflected in their standard loan agreements (see also chap. III, "Contract award", paras. …; see also UNCITRAL Model law on Public Procurement).

(e) Insurers

78. Typically, an infrastructure project will involve casualty insurance covering its plant and equipment, third-party liability insurance and worker's compensation insurance. Other possible types of insurance include insurance for business interruption, interruption in cash flows and cost overrun (see chap. IV, "PPP implementation: legal framework and PPP contract", paras. 119 and 120). Those types of insurance are usually available on the commercial insurance markets, although the availability of commercial insurance may be limited extraordinary events outside the control of the parties (e.g. war, riots, vandalism, earthquakes or hurricanes). The private insurance market is playing an increasing role in coverage against certain types of political risk, such as contract repudiation, failure by a public authority to perform its contractual obligations or unfair calls for independent guarantees. In some countries, insurance underwriters structure comprehensive insurance packages aimed at avoiding certain risks being left uncovered owing to gaps between individual insurance policies. In addition to private insurance, guarantees against political risks may be provided by international financial institutions, such as the World Bank, the Multilateral Investment Guarantee Agency and the International Finance Corporation, by regional development banks or by export credit and investment promotion agencies (see chap. II, "Project planning and preparation", paras. 61–74).

(f) Independent experts and advisers

79. Independent experts and advisers play an important role at various stages of PPPs. Experienced companies typically supplement their own technical expertise by retaining the services of outside experts and advisers, such as financial experts, international legal counsel or consulting architectural and engineering firms. Merchant and investment banks often act as advisers to project promoters in arranging the finance and in formulating the project to be implemented, an activity that, while essential to project finance, is quite distinct from the financing itself. Independent experts may advise the lenders to the project, for example, on the assessment of project risks in a specific host country. They may also assist public authorities in devising sector-specific strategies for infrastructure development and in formulating an adequate legal and regulatory framework. Furthermore, independent experts and advisers may assist the contracting authority in the preparation of feasibility and other preliminary studies, in the formulation of requests for proposals or standard

contractual terms and specifications, in the evaluation and comparison of proposals or in the negotiation of the PPP contract.

80. In addition to private entities, a number of intergovernmental organizations (e.g. UNIDO and the regional commissions of the Economic and Social Council) and international financial institutions (e.g. the World Bank and the regional development banks) have special programmes whereby they may either provide this type of technical assistance directly to the Government or assist the latter in identifying qualified advisers.

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Note by the Secretariat on public-private partnerships (PPPs): proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (revised chapters I and II)

ADDENDUM

Contents

I. General legal and institutional framework

[*Paras. 2, 5 (old 4), and 8 (old 5) appeared in the existing chapter I, "General legislative and institutional framework". Additions and amendments are indicated in the text.*]

A. General remarks

1. PPPs are one of the options that Governments may use to develop infrastructure or procure facilities or systems required for the provision of public services or for use by a public entity. An appropriate legal framework is needed to attract private investment to those projects that the Government considers worthwhile to implement as PPP. Both countries considering the adoption of new laws, and countries where such a legal framework already exists should ensure that the relevant laws and regulations are drafted clearly, comply with fundamental principles of good governance and sustainable development, and are comprehensive yet sufficiently flexible to respond to the country's infrastructure development goals and policies and to keep pace with the technology and market developments in various infrastructure sectors. This chapter deals with some general issues that domestic legislators should consider when setting up or reviewing the legal framework for PPPs in order to achieve these objectives. Section B (paras. …) discusses the guiding principles and options for a legal framework for PPPs; section C (paras. …) deals with the scope of authority to carry out projects as PPPs; and section D (paras. …) offers an overview of institutional and procedural arrangements for the regulation of infrastructure sectors.

B. Guiding principles and options for legal framework for PPPs

2. This section considers general guiding principles that should inspire the legal framework for PPPs. It further points out the possible implications that the constitutional law of the host country may have for the implementation of some of these projects. Lastly, this section deals briefly with available options regarding the level and type of instrument that a country may need to enact and their scope of application.

1. General guiding principles for a legal framework for PPPs

3. The Sustainable Development Goals express the commitment of United Nations member States, inter alia, to "develop quality, reliable, sustainable and resilient infrastructure, including regional and transborder infrastructure, to support economic development and human well-being, with a focus on affordable and equitable access for all."[1] The legal framework for PPPs is one of the policy tools that a country may use to carry out its strategy for the development of public infrastructure and services, and should be formulated and implemented in a manner that is consistent with the country's strategy and conducive to achieving its goals.

4. Therefore, when considering the enactment of laws and regulations to enable PPPs or in reviewing the adequacy of the existing legal framework, domestic legislators and regulators may wish to take into account some internationally recognized principles of good governance and sustainable development. The United Nations General Assembly, for instance has recognized "the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship".[2] Similarly, in article 5, paragraph 1, of the nearly universally adopted United Nations Convention against Corruption,[3] the States Parties undertake to "develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability". These and other principles more specifically aimed at deriving most benefit of PPPs, which have inspired legislative actions in various countries, are discussed briefly in the following paragraphs.

(a) Public interest

5. As PPPs are a tool for the implementation of a country's strategies and policies for developing infrastructure and public services, the PPP legal framework must promote and protect the public interest. In the context of PPPs, public interest refers, on the one hand, to the interests of the Government as provider and regulator of infrastructure and public services, and, on the other hand, as purchaser, user and possibly owner or operator of the facilities or systems developed under the PPP, or party to the PPP contract. Each of these perspectives needs adequate consideration by the legislator. While the *Guide* focuses on the role of the contracting authority as party to the PPP contract (which is extensively discussed, in particular, in chap. IV, "PPP implementation: legal framework and PPP contract" and chap. V, "Duration, extension and termination of the PPP contract"), it also pays attention to the role of Government as infrastructure and public services regulator (see, in particular, this chapter, paras. … and chap. IV, "PPP implementation: legal framework and PPP

[1] *Transforming our world: the 2030 Agenda for Sustainable Development* (United Nations General Assembly Resolution 70/1, of 25 September 2015), Goal 9.1.

[2] "We recognize the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship, and in this regard we commend the work of the United Nations Commission on International Trade Law in modernizing and harmonizing international trade law." (Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, General Assembly resolution 67/1 of 24 September 2012).

[3] The Convention was adopted by the United Nations General Assembly resolution 58/4 of 31 October 2003 and entered into force on 14 December 2005.

contract", paras. …) as well as manager and trustee of public property and resources (see, in particular, chap. III, "Contract award").

6. Public interest in the context of PPPs also refers, on the other hand, to the interests of the country's citizens and companies as users of the infrastructure, as consumers and users of the services or goods it generates or as ultimate beneficiaries of the public services which are provided with the support of the facilities or systems developed under the PPP. From this perspective, the legislative framework for PPPs must take into account, and be coordinated with, the specific regulatory regime for the particular infrastructure or service sector (see, in particular, this chapter, paras. …; and chap. IV, "PPP implementation: legal framework and PPP contract", paras. …), and also general rules on consumer protection (see chap. VII, "Other relevant areas of law").

(b) Transparency

7. A transparent legal framework is characterized by clear and readily accessible rules and by efficient procedures for their application. Transparent rules and administrative procedures create predictability, enabling the private sector to estimate the costs and risks of an investment and thus to offer the most advantageous terms. Transparent rules and administrative procedures may also foster openness through provisions requiring the publication of administrative decisions, including, when appropriate, an obligation to state the grounds on which they are based and to disclose other information of public relevance. They also help to guard against arbitrary or improper actions or decisions by the contracting authority or its officials and thus help to promote confidence in a country's PPP programme.

8. Transparent rules and procedures offer a framework for the exercise of discretion in the implementation of PPPs projects. Transparent rules and procedures limit the exercise of discretion, where appropriate, allowing it to be monitored and, where necessary, challenged. Transparent rules and administrative procedures are a key element of promoting accountability for actions or decisions taken by Government, thus supporting integrity and public confidence. A transparent set of rules and administrative procedures governing the planning and implementation of PPP projects will facilitate the evaluation of a country's PPP programme and individual projects against their desired outcomes.

9. Transparency of rules and administrative procedures is needed throughout the lifecycle of PPP projects, from planning and project development to the operation of the infrastructure and the delivery of services to citizens. A transparent legal framework for PPPs may mandate, for instance, the publication of key decisions on project implementation, including the justification for choosing a PPP in the concrete case (see chap. II, "Project planning and preparation", paras. ...). Transparency is particularly important for the award of PPP contracts, for which the *Guide* stresses five key aspects: the public disclosure of the legal framework; the publication of project opportunities; the prior determination and publication of the key terms of the contract against which offers are to be assessed; the visible conduct of the process according to the prescribed rules and procedures; and the existence of a system to monitor that the applicable rules are being followed and to enforce them if necessary (see chap. III, "Contract award", ...).

(c) Fairness, stability and predictability

10. Closely related to the principle of transparency is the requirement of a fair, stable and predictable legal framework for PPPs. Laws and regulations are the tools with which Governments regulate and ensure the provision of public services to their citizens. At the same time, they provide the means for public service providers and their customers to protect their rights. A fair legal framework takes into account the various (and sometimes conflicting) interests of the Government, the public service providers and their customers and seeks to achieve an equitable balance between them. The private sector's business considerations, the users' right to adequate services (both in terms of quality and price), the Government's responsibility for ensuring the continuous provision of essential services and its role in promoting national

infrastructure development are but a few of the interests that deserve appropriate recognition in the law.

11. A stable legal framework is particularly important for PPPs in view of the typically long duration of infrastructure projects. The private partners need to be able to forecast and evaluate risks and possible changes in the life of the project in order to mobilize the resources needed and take the necessary steps to mitigate the consequences of anticipated risks. The contracting authority and the public, too, should be able to rely on continuity of services and the conditions under which they are provided. Of course, the legal framework for PPPs must be capable of adaptation to meet changing needs (see ...). However, unjustified, untimely or arbitrary changes of laws and regulations destabilize performance by the private partner, undermine the mutual trust basis needed for a successful PPP and ultimately jeopardize the Government's infrastructure and public service development goals and policies.

12. A stable legal framework for PPPs would allow to predict the outcome of administrative or judicial decisions. This has positive effects for all parties involved. The private partner, for instance, will be able to plan and manage the project more efficiently if it is able to rely on a predictable outcome of various administrative procedures that are required during project implementation (construction and zoning permits, technical inspections or regulatory decisions). The contracting authority may itself be subject to the consequences of decisions by other authorities and will benefit likewise from a predictable process. The public, too, will find comfort in a system in which it could anticipate, for instance, that decisions concerning conditions for the provision of the public service, where this is the object of a PPP, will follow a predictable pattern, in accordance with the applicable laws and regulations, rather than being made out of extraneous considerations. Sound and clear rules are as much a condition to ensure predictability, as are the efficiency of the administrative procedures and the qualification and training of those responsible for enforcing the legal framework.

(d) Proper management, integrity and accountability

13. Depending on the type of project or the nature of the relevant facility or system, a PPP could involve the management of public property, the disbursement of public funds or both. Therefore, it is essential that the applicable laws and regulations set forth appropriate safeguards to prevent mismanagement, misappropriation or other forms of improper management of public property or funds. Most provisions to this effect may be found in laws and regulations that govern public property or administrative procedures, budgetary and accounting controls as well as criminal laws (see chap. VII, "Other relevant areas of the law", paras. …). In any event, given the magnitude of some PPP projects, the Government should satisfy itself that the relevant administrative and criminal laws will extend to PPPs, and those PPPs will not be misused to escape applicable controls. As regards specific laws on PPPs or on infrastructure sectors in which PPPs may be entered into, it is important to ensure that provisions on PPP planning, contract award, contract content and the operation of the infrastructure facility or system will promote best practices in property management of public property and funds and will not contain loopholes that encourage improper conduct.

14. Closely linked to the need to avoid mismanagement of public property or funds is the requirement of ensuring integrity in the award and performance of PPP contracts. Here, too, it would normally be for other bodies of law to set forth the substantive rules to uphold integrity in the form of criminal provisions, administrative law standards and codes of conduct. A central concern in order to promote integrity is the need to prevent conflicts of interest throughout the main stages of PPPs: from planning through bidding all the way to the winding up of a project. The magnitude of many PPP projects, their typically long duration, and the need for constant interaction between Government officials, agents of the contracting authority and employees or agents of the private partner may encourage, and create innumerable opportunities for, bribery, extortion or other corrupt practices. It is imperative to ensure that officials of the contracting authority will not benefit directly or indirectly

from the project or their dealings with the private partner. The private partner, too, should not exercise improper influence on any official involved in project design, selection, implementation or regulation. Appropriate safeguards should be provided during project design (see chap. II, "Project planning and preparation", paras. …), contract award (see chap. III, "Contract awards", paras. …) and operation (see chap. IV, "PPP Implementation: Legal framework and PPP contract", paras. …). Beyond economic and financial damage, corrupt practices in PPPs may have serious negative consequences for the public at large, in particular where the PPP involves the provision of a public service or the management of an infrastructure used by the public. Indeed, corrupt practices often result in improper lenience towards lowered safety, security or quality standards, which may be the cause of accidents or other hazards likely to cause damage to property or to endanger the health or lives of citizens.

15. An effective system to uphold integrity must be enforced through an effective accountability system. Here, too, the essential mechanisms are expected to be found in other areas of the law, in particular penal and administrative laws and rules governing the investigation and trial of criminal cases (see chap. VII, "Other relevant areas of the law", paras. …). Laws and regulations specific to PPPs can contribute to accountability by setting forth appropriate disclosure and reporting requirements, as well as the possibility for the contracting authority or other relevant Government body to audit the accounts or otherwise reasonably request relevant information from the private partner (see chap. IV, "PPP Implementation: Legal framework and PPP contract" paras. …).

(e) Economy and efficiency

16. The legal and regulatory framework should set the conditions necessary to ensure that PPP projects offer economy and efficiency throughout their lifecycle. Prior to embarking in the selection of a project partner, the contracting authority should be required to conduct a rigorous planning and feasibility assessment, examining, in particular, the extent to which a PPP optimizes the use of resources to achieve the intended impact of the project concerned (or a "value for money" test). PPP projects should only move forward if those tests demonstrate, for instance: (a) that the project offers an optimal relationship between the cost, time and other resources, and the quality of the subject matter of the project; (b) that, if structured as a PPP, the project is expected to deliver the required level of services at a lower level of cost, time and other resources, without reducing the quality of those services, than would otherwise have been the case; and (c) that a PPP will deliver a better-than-required level of services or achieving a better return on investment in the project for the cost, time and other resources than would otherwise have been the case (see chap. II, "Project planning and preparation"…),

(f) Long-term sustainability

17. Important objectives of a country's infrastructure development policy include ensuring the long-term provision of public services, continuously improving the quality of infrastructure, and achieving economic, environmental and social sustainability. PPP are one of the tools that a country may use to implement its policy, and therefore the laws and regulations dealing specifically with PPPs should help to promote those objectives. Proper planning and preparation are indispensable to ensure the sustainability of infrastructure projects, in particular when carried out as PPPs. Positive steps, from a general policy perspective, include the formulation of a master plan for infrastructure development, including public services, and the establishment of priority sectors, projects or types of project based on socioeconomic considerations, financial implications, effects on sustainable development, and other relevant factors.

18. Proper planning and preparation of individual projects requires careful choice of project type, based on financial and other capacity of the contracting authority (i.e. whether public procurement and operation or any particular type of PPP). Unrealistic assumptions about the advantages or costs of a PPP model are likely to nullify the expectations of infrastructure development through PPPs, and should be

avoided as much as possible through careful planning and project assessment at the early stages (see chap. II, "Project assessment and risks", paras. …). Indeed, poor planning or ill-conceived rules or procedures may lead to inadequate contractual or regulatory arrangements for the operation and maintenance of public infrastructure, severely limit efficiency in all sectors of infrastructure, reduce service quality and increase costs for the Government or users (see chap. IV, "PPP implementation: legal framework and PPP contract", paras. …). From a legislative perspective, it is important to ensure that the host country has the institutional capacity to undertake the various tasks entrusted to public authorities authorized to enter into PPPs throughout their phases of implementation (see chap. II, "Project assessment and risks", paras. …).. One way by which a Government can ascertain the readiness of its institutions to handle PPP projects is to conduct an assessment of its public investment capabilities including a review of institutions and procedures responsible for national and sectoral planning, investment budgeting, project appraisal and selection, and managing and monitoring of project implementation. The efficiency of a country's overall institutional and administrative resources is essential to ensure the sustainability of PPP project and a country is well advised to follow best practices to assess them.[4]

(g) Competition

19. Another measure to enhance the long-term sustainability of PPPs within the context of a national infrastructure policy is to achieve a correct balance between competitive and monopolistic infrastructure operation and provision of public services. Competition may reduce overall costs and provide more back-up facilities for essential services. In certain sectors, competition has also helped to increase the productivity of infrastructure investment, to enhance responsiveness to the needs of the customers and to obtain better quality for public services, thus improving the business environment in all sectors of the economy. [*moved here from old para. 6 of chapter II, last three sentences*]

20. For laws and regulations directly related to PPPs, competition has two dimensions. On the one hand, the scope for competition in the sector or activity concerned is one of the elements that the contracting authority should be required to examine at the project planning stage (see chap. II, "Project planning and preparation", paras. ...). The contracting authority's assessment should serve as a basis for determining whether or not the private partner should have an exclusive right to operate the infrastructure or to provide the relevant services under the PPP, or whether the sector or marker could benefit from competition (see "Introduction and background information on PPPs", paras. …; see further this chapter, paras. ...). On the other hand, competition is usually one of the structural elements of public procurement systems, and aims at maximizing economy (or "value for money") for the public sector. Competition for PPPs contracts in the form of a rigorous contest among potential investors and private entities for the opportunity to be awarded the PPP contract can reduce overall costs and other resource demands, increase the productivity of infrastructure investment, enhance responsiveness to the needs of the customers and thus obtain better quality of public services. Competition has the potential both to improve value for money in PPPs and to increase the likelihood of achieving the intended outcome of the project concerned. Competition is also one of the principles that should guide domestic public procurement systems pursuant to article 9, paragraph 1, of the United Nations Convention against Corruption. The *Guide* therefore strongly recommends the use of competitive procedures for the award of PPP contracts (see chap. III, "Contract award", paras. …). Promoting potential investors' and private entity participation in PPPs is a key prerequisite for competition for PPP contracts. The procurement procedures recommended in the *Guide* recognize, however, that in the context of complex infrastructure projects, competition is most effective by limiting the number of participants. Two reasons justify this apparent paradox: first, the technical, commercial and financial complexity of most PPP project

[4] The International Monetary Fund, for instance, has developed a Public Investment Management Assessment (PIMA) to help countries evaluate the strength of the public investment management practices (see http://www.imf.org/external/np/fad/publicinvestment/#5).

would make it excessively cumbersome, time and resource consuming for the contracting authority to have to examine a potentially large number of proposals; second, the high costs of participating in the procedure discourage private entities from participating unless they assess their chances of winning the ultimate contract as reasonable. Consequently the procurement procedures recommended in the *Guide* start with a process to identify a limited number of high-quality potential partners (see chap. III, "Contract award", paras. …).

2. Constitutional law and PPPs

[*Paras. 19–34 (old 7–22) appeared in the existing chapter I, "General legislative and institutional framework". Additions and amendments are indicated in the text.*]

21. The constitutional law of a number of countries refers to the duty of the State to ensure the provision of public services. Some of them list the infrastructure and service sectors that come under the responsibility of the State, while in others the task of identifying those sectors is delegated to the legislator. Some national constitutions reserve the provision of certain public services exclusively to the State or to specially created public entities. Other constitutions, however, authorize the State to engage private entities for the development and operation of infrastructure and the provision of public services. In some countries, there are limitations to the participation of foreigners in certain sectors or requirements that the State should participate in the capital of the companies providing public services.

22. For countries wishing to use PPPs to develop public infrastructure and services, it is important to review existing constitutional rules to identify possible restrictions to their implementation. In some countries, Uncertainties regarding the legal basis for PPPs may delay their implementation. Sometimes, concerns that PPPs might contravene constitutional rules on State monopolies or on the provision of public services have led to judicial disputes, with a consequent negative impact on the implementation of the projects.

23. It is further important to take into account constitutional rules relating to the ownership of land or infrastructure facilities. The constitutional law of some countries contains limitations to private ownership of land and certain means of production. In other countries, private property is recognized, but the constitution declares all or certain types of infrastructure to be State property. Restrictions of this nature can be an obstacle to the execution of projects that entail private operation, or private operation and ownership, of the relevant infrastructure (see further chap. IV, "PPP implementation: legal framework and PPP contract", paras. ...).

3. General and sector-specific legislation

24. The law plays a central role in promoting confidence in PPPs. The legal framework for PPPs will generally comprise a primary law or set of laws, secondary regulations or decrees, internal rules, and guidance, drawing on the policy choices made by the legislator and the Government. The law typically embodies a political commitment, provides specific legal rights and may represent an important guarantee of stability of the legal and regulatory regime by setting forth the general rules under which those projects are awarded and implemented. Laws governing the award and implementation of PPP projects, including sector-specific legislation, are typically supplemented, and should be coordinated with, laws and regulations on various other matters, including international obligations of the country on taxation or investment protection (see chap. VII, "Other relevant areas of the law").

25. As a matter of constitutional law or legislative practice, some countries may need to adopt specific legislation in respect of individual projects. In other countries with a well-established tradition of awarding concessions to the private sector for the provision of public services, the Government is authorized by general legislation to award to the private sector any activity carried out by the public sector having an economic value that makes such activity capable of being exploited by private entities. General legislation of this type creates a framework for providing a uniform treatment to issues that are common to PPP in different infrastructure sectors.

26. However, by its very nature, general legislation is normally not suitable to address all the particular requirements of different sectors. Even in countries that have adopted general legislation addressing cross-sectoral issues, it has been found that supplementary sector-specific legislation allows the legislator to formulate rules that take into account the market structure in each sector (see "Introduction and background information on PPPs", paras. …). It should be noted that in many countries sector-specific legislation was adopted at a time when a significant portion or even the entirety of the national infrastructure consisted of State monopolies. For countries interested in promoting private sector investment in infrastructure it is advisable to review existing sector-specific legislation so as to ascertain its suitability for PPPs. Countries that consider the adoption of a general law on PPPs may wish to use this opportunity to review and amend, as appropriate, existing sector-specific laws in order to ensure their consistency with the general PPP law, or otherwise clearly indicate which text prevails in case of conflict.

27. Sector-specific legislation may further play an important role in establishing a framework for the regulation of individual infrastructure sectors (see below, paras. …). Legislative guidance is particularly useful in countries at the initial stages of setting up or developing national regulatory capacities. Such legislation represents a useful assurance that the regulators do not have unlimited discretion in the exercise of their functions, but are bound by the parameters provided by the law. However, it is generally advisable to avoid rigid or excessively detailed legislative provisions dealing with contractual aspects of the implementation of PPPs, which in most cases would not be adequate to their long-term nature (see further chap. IV, "PPP implementation: legal framework and PPP contract", paras. …; and chap. V, "Duration, extension and termination of the PPP contract", paras. …).

28. Many countries have used legislation to establish the general principles for the organization of infrastructure sectors and the basic policy, institutional and regulatory framework. However, the law may not be the best instrument to set detailed technical and financial requirements. Many countries have preferred to enact regulations setting forth more detailed rules to implement the general provisions of domestic laws on PPPs. Regulations are found to be easier to adapt to a change in environment, whether the change results from the transition to market-based rules or from external developments, such as new technologies or changing economic or market conditions. As stressed earlier in the *Guide* (see above, paras. ...), stability of the legal framework is essential to promote confidence in a country's PPP policy. Countries that choose to limit the enabling legislation to general principles and to use regulations for detail matters should avoid too frequent changes of regulations or inconsistencies between regulations and the laws on which they are based, as these are common sources of uncertainty and disputes in PPPs (see further chap. IV, "PPP implementation: legal framework and PPP contract", paras. ...). Whatever the instrument used, clarity and predictability are of the essence.

C. Scope of authority to enter into PPPs

29. The implementation of PPPs may require the enactment of special legislation or regulations expressly authorizing the State to entrust the development of infrastructure or the provision of public services to private entities. The existence of express legislative authorization may be an important measure to foster the confidence of potential investors, national or foreign, in a national policy to promote private sector investment in infrastructure through PPPs.

1. Authorized agencies and relevant fields of activity

30. In some legal systems, the Government's responsibility for the development of infrastructure or the provision of public services may not be delegated without prior legislative authorization. For those countries that wish to develop public infrastructure or services through PPPs, it is particularly important to state clearly in the law the authority to entrust entities other than public authorities of the host country with the right to provide certain public services. Such a general provision may be

particularly important in those countries where public services are governmental monopolies or where it is envisaged to engage private entities to provide certain services that used to be available to the public free of charge (see further chap. IV, "PPP implementation: legal framework and PPP contract", paras. …).

31. Where general legislation is adopted, it is also advisable to identify clearly the public authorities or levels of government competent to award infrastructure projects and to act as contracting authorities. In order to avoid unnecessary delay, it is particularly advisable to have rules in place that make it possible to ascertain the persons or offices that have the authority to enter into commitments on behalf of the contracting authority (and, as appropriate, of other public authorities) at different stages of negotiation and to sign the PPP contract. It is useful to consider the extent of powers that may be needed by authorities other than the central Government to carry out projects falling within their purview. For projects involving offices or agencies at different levels of government (for example, national, provincial or local), where it is not possible to identify in advance all the relevant offices and agencies involved, other measures may be needed to ensure appropriate coordination among them (see below, paras. …).

32. For purposes of clarity, it is advisable to identify in such general legislation those sectors in which concessions may be awarded. Alternatively, where this is not deemed feasible or desirable, the law might identify those activities, which may not be the object of a concession (for example, activities related to national defence or security).

2. Purpose and scope of PPPs

33. It may be useful for the law to define the nature and purpose of projects for which PPPs may be entered into in the country. One possible approach may be to define the various categories of projects according to the extent of the rights and obligations assumed by the private partner (for example, "build-operate-transfer", "build-own-operate", "built-transfer-operate" and "build-transfer"). However, given the wide variety of schemes that may come into play in connection with private investment in infrastructure (see "Introduction and background information on PPPs, paras. …), this approach is not advisable. As an alternative, the law could generally provide that PPPs may be entered into for the development of any or specific types or public infrastructure or services. The law could clarify that PPPs may involve the direct provision of services to the public by the private partner pursuant to a concession issued by the competent authority, or the management and operation of an infrastructure used by the contracting authority or other Government body for the provision of public services or to house its own activities. The law could further clarify that the private partner's remuneration may take the form of a right to charge a price for the use of the facility or premises or for the service or goods it generates, or of other payment or remuneration agreed to by the parties. Lastly, it may be useful for the law to further clarify that PPPs may be used for the construction and operation of a new infrastructure facility or system or for maintenance, repair, refurbishment, modernization, expansion and operation of existing infrastructure facilities and systems, or only for the management and delivery of a public service.

34. Another important issue concerns the nature of the rights vested in the private partner, in particular whether the right to provide the service is exclusive or whether the private partner will face competition from other infrastructure facilities or service providers. Exclusivity may concern the right to provide a service in a particular geographical region (for example, a communal water distribution company) or embrace the whole territory of the country (for example, a national railway company); it may relate to the right to supply one particular type of goods or services to one particular customer (for example, a power generator being the exclusive regional supplier to a power transmitter and distributor) or to a limited group of customers (for example, a national long-distance telephone carrier providing connections to local telephone companies).

35. The decision whether or not to grant exclusivity rights to a certain project or category of projects should be taken in the light of the host country's policy for the

sector concerned. As discussed earlier, the scope for competition varies considerably in different infrastructure sectors. While certain sectors, or segments thereof, have the characteristics of natural monopolies, in which case open competition is usually not an economically viable alternative, other infrastructure sectors have been successfully opened to free competition (see "Introduction and background information on PPPs", paras. …).

36. It is desirable therefore to deal with the issue of exclusivity in a flexible manner. Rather than excluding or prescribing exclusive PPPs, it may be preferable for the law to authorize the grant of exclusive rights when it is deemed to be in the public interest, such as in cases where the exclusivity is justified for ensuring the technical or economic viability of the project. The contracting authority should state the reasons for granting exclusivity in the assessment and studies that it is required to make prior to starting the procedure to select the private partner (see chap. II, "project planning and preparation", …). Sector-specific laws may also regulate the issue of exclusivity in a manner suitable for each particular sector.

D. Administrative coordination

[*The Secretariat proposes to move section D, paras. 23–29 of chapter I to the draft revised chapter II, which appears in* A/CN.9/939/Add.2.]

E. Authority to regulate infrastructure services

[*Paras. 35–37 (old 30–32) appeared in the existing chapter I, "General legislative and institutional framework". Additions and amendments are indicated in the text.*]

37. PPP projects that involve the direct provision or services or goods to the public by the private partner ("concession PPPs") often relate to sectors or activities that are subject to special regulation. The applicable regulatory regime may consist of substantive rules, procedures, instruments and institutions. That framework represents an important instrument to implement the governmental policy for the sector concerned (see "Introduction and background information on PPPs", paras. …). Depending on the institutional structure of the country concerned and on the allocation of powers between different levels of government, provincial or local legislation may govern some infrastructure sectors, in full or concurrently with national legislation.

38. Regulation of infrastructure services involves a wide range of general and sector-specific issues, which may vary considerably according to the social, political, legal and economic reality of each host country. While occasionally discussing some of the main regulatory issues that are encountered in a similar context in different sectors (see, for instance, chap. IV, "PPP implementation: legal framework and PPP contract", paras. … and …), the *Guide* is not intended to exhaust the legal or policy issues arising out of the regulation of various infrastructure sectors. The term "regulatory agencies" refers to the institutional mechanisms required to implement and monitor the rules governing the activities of infrastructure operators. Because the rules applicable to infrastructure operation often allow for a degree of discretion, a body is required to interpret and apply them, monitor compliance, impose sanctions and settle disputes arising out of the implementation of the rules. The specific regulatory tasks and the amount of discretion they involve will be determined by the rules in question, which can vary widely.

39. The *Guide* assumes that a country that chooses to authorize PPPs in any of those sectors has satisfied itself that it has in place the proper institutional and bureaucratic structures and human resources necessary for the implementation of PPPs. Nevertheless, as a contribution to domestic legislatures considering the need for, and desirability of, establishing regulatory agencies for monitoring the provision of public services, this section discusses some of the main institutional and procedural issues that may arise in that connection. The discussion contained in this section is illustrative of different options that have been used in domestic legislative measures

to set up a regulatory framework for PPPs, but the *Guide* does not thereby advocate the establishment of any particular model or administrative structure. Practical information and technical advice may be obtained from international financial institutions that carry out programmes to assist their member countries in setting up an adequate regulatory framework (such as the World Bank and the regional development banks).

[*The Secretariat proposes no substantive amendments to section E, paras. 33–51, of chapter I, as they appear in the Legislative Guide, except for the terminology changes explained in A/CN.9/939, paras. 17–19 and 31, which, if approved by the Commission, the Secretariat will make in the final version of the Guide.*]

General provisions

Model provision 1. PPP Guiding Principles

Option 1

WHEREAS the [*Government*] [*Parliament*] of [...] wishes to enable the use of public-private partnerships in infrastructure development and the provision of associated services to the public;

WHEREAS, for those purposes, the [*Government*] [*Parliament*] considers it desirable to regulate public-private partnerships so as to enhance transparency, fairness, stability and predictability; promote proper management, integrity; competition and economy; and ensure and long-term sustainability;

[*Other objectives that the enacting State might wish to state*];

Be it therefore enacted as follows:

Option 2

This law establishes the procedures for the approval, award and implementation of public-private partnership projects, in accordance with the principles of transparency, fairness, stability, proper management, integrity, completion, economy, and long-term sustainability.

Model provision 2. Definitions

For the purposes of this law:

(a) Public-private partnership (PPP) means an agreement between a contracting authority and a private entity for the implementation of an infrastructure project, against payments by the contracting authority or the users of facility;

(b) "Infrastructure facility" means physical facilities and systems that directly or indirectly provide services to the general public;

(c) "Infrastructure project" means the design, construction, development and operation of new infrastructure facilities or the rehabilitation, modernization, expansion or operation of existing infrastructure facilities;

(d) "Contracting authority" means the public authority that has the power to enter into a PPP contract [*under the provisions of this law*];[1]

(e) "Private Partner" means the private entity retained by the contracting authority to carry out a project under a PPP contract;

[1] It should be noted that this definition relates only to the power to enter into PPP contracts. Depending on the regulatory regime of the enacting State, a separate body, referred to as "regulatory agency" in subpara. (h), may have responsibility for issuing rules and regulations governing the provision of the relevant service.

(f) "PPP contract" means the mutually binding agreement or agreements between the contracting authority and the private partner that set forth the terms and conditions for the implementation of a PPP;

(g) "Bidder" or "bidders" means persons, including groups thereof, that participate in selection proceedings for the award of the PPP contract;[2]

(h) "Unsolicited proposal" means any proposal relating to the implementation of an infrastructure project that is not submitted in response to a request or solicitation issued by the contracting authority within the context of a selection procedure;

(i) "Regulatory agency" means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the infrastructure facility or the provision of the relevant services.[3]

Model provision 3. Authority to enter into PPP contracts

The following public authorities have the power to enter into PPP contracts[4] for the implementation of infrastructure projects falling within their respective spheres of competence: [*the enacting State lists the relevant public authorities of the host country that may enter into PPP contracts by way of an exhaustive or indicative list of public authorities, a list of types or categories of public authority or a combination thereof*].[5]

Model provision 4. Eligible infrastructure sectors

PPP contracts may be entered into by the relevant authorities in the following sectors: [*the enacting State indicates the relevant sectors by way of an exhaustive or indicative list*].[6]

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[2] The term "bidder" or "bidders" encompasses, according to the context, both persons that have sought an invitation to take part in pre-selection proceedings or persons that have submitted a proposal in response to a contracting authority's request for proposals.

[3] The composition, structure and functions of such a regulatory agency may need to be addressed in special legislation (see paras. …).

[4] It is advisable to establish institutional mechanisms to coordinate the activities of the public authorities responsible for issuing the approvals, licences, permits or authorizations required for the implementation of PPP in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned (see chap. II, "Project planning and preparation", paras. …). In addition, for countries that contemplate providing specific forms of government support to infrastructure projects, it may be useful for the relevant law, such as legislation or a regulation governing the activities of entities authorized to offer government support, to identify clearly which entities have the power to provide such support and what kind of support may be provided (see chap. II, "Project planning and preparation", paras …).

[5] Enacting States may generally have two options for completing this model provision. One alternative may be to provide a list of authorities empowered to enter into concession contracts, either in the model provision or in a schedule to be attached thereto. Another alternative might be for the enacting State to indicate the levels of government that have the power to enter into those contracts, without naming relevant public authorities. In a federal State, for example, such an enabling clause might refer to "the Union, the states [or provinces] and the municipalities". In any event, it is advisable for enacting States that wish to include an exhaustive list of authorities to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

[6] It is advisable for enacting States that wish to include an exhaustive list of sectors to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

II. Project planning and preparation

A. General remarks

1. PPPs are one of the means that Governments use to develop infrastructure or systems needed to provide a public service or support the functions of a Government entity. When properly designed and implemented, PPPs can create opportunities for reducing the commitment of public funds and other resources for infrastructure development or the provision of public services. They also make it possible to transfer to the private sector a number of risks that the private sector may be able to control or mitigate in more efficient or economical terms than the Government.

2. The extent to which those expected benefits would actually materialize depends on various factors. They include the adequacy and stability of the overall legal and regulatory framework (see chap. I, "General legal and institutional framework", paras. …), the selection of a qualified private partner (see chap. III, "Contract award", paras. ...), the technical and commercial feasibility of the project, the soundness of the contractual arrangements and their fitness during the entire life of the project (see chap. IV, "PPP implementation: legal framework and PPP contract", paras. …). While some of the factors that compose this equation may be outside the control of the parties, an essential prerequisite for the success of a PPP is a comprehensive, rigorous and professionally conducted planning and preparation phase that tests the projects assumptions and anticipates risks and contingencies throughout the entire lifecycle of a PPP.

3. As discussed in section B, the legal framework for PPPs should therefore require, and provide the mechanisms for, a mandatory review of the project's assumptions in order for the competent authorities to assess accurately whether a PPP is the adequate option for developing the infrastructure or service concerned, as compared to direct procurement, financing and management by the Government (paras. …). These preliminary studies should also analyse the main risks encountered in PPPs, including common contractual solutions for risk allocation, and the degree of flexibility that will be needed to allocate project risks efficiently (see section C, paras. …). Section D, paras. …, discusses institutional and administrative aspects of project preparation and coordination. Section E (paras. …) sets out policy considerations that the Government may wish to take into account when considering the level of direct governmental support that may be provided to infrastructure projects, such as the degree of public interest in the execution of any given project and the need to avoid the assumption by the Government of open-ended or excessive contingent liabilities. Lastly, sections F (paras. …) and G (paras. …) outline guarantees and support measures that may be provided by export credit agencies and investment promotion agencies.

4. Other chapters of this *Guide* deal with related aspects of the host Government's legal regime that are of relevance to the credit and risk analysis of a project. The reader is referred in particular to chapters IV, "PPP implementation: legal framework and PPP contract"; V, "Duration, extension and termination of the PPP contract"; VI, "Settlement of disputes"; and VII, "Other relevant areas of law". [*old para. 7 of chapter II*]

B. Project assessment and options

5. One important measure to ensure the successful implementation of PPPs is to require the relevant public authority to conduct a preliminary assessment of the project's feasibility, including economic and financial aspects, such as expected economic advantages of the project, estimated cost and potential revenue anticipated from the operation of the infrastructure facility, as well as the economic, social and environmental impact of the project. The studies prepared by the contracting authority should, in particular, identify clearly the expected output of the project, provide sufficient justification for the investment, propose a modality for private sector participation and describe a particular solution to the output requirement. [*para. 5*

moved here from para. 25, section D of chapter I, "General legislative and institutional framework"]

1. Economy and efficiency ("value for money") assessment

6. One of the main objectives of any system for the award of public contracts, and a central concern of the UNCITRAL Model Law on Public Procurement, for instance, is to maximize economy and efficiency. The Guide to Enactment of the Model Law explains, in this connection, that "economy" (which is often termed "value for money" or "best value"), means an optimal relationship between the price paid and other factors, including the quality of the subject matter of the procurement, and pre-supposes that the public purchaser's needs are in fact met. "Efficiency" in procurement means that relationship between the transaction costs and administrative time of each procurement procedure and its value are proportionate. "Efficiency" also includes the notion that the costs of the procurement system as a whole are also proportionate to the value of all procurement conducted through that system.

7. Economy and efficiency are central concerns in all PPP projects. Some of them may fall under the scope of general public procurement law, in particular those where the contracting authority undertakes to make direct payments to the private partner. Other types of PPPs projects, however, do not involve the disbursement of public funds to pay the project partner, and the role of the contracting authority as an overall project manager may be quite different from the role of Government in traditional public procurement. This means that the notions of economy and efficiency (or "value for money") in PPP have a broader meaning than in a narrow public procurement context.

8. Indeed, in the context of PPPs, rather than focusing mainly on the price paid for works or services performed by the private partner, the Government needs to be able to demonstrate that carrying out the project as a PPP is not only more economical, but also a more efficient option than, for example, through public procurement of works or services or through public operation of the infrastructure or service system. Poorly conceived or ill-designed PPP projects may lead to project failure, public service disruption, cost overruns or fears of undue profit making by the private sector at the cost of the public interest. With a view to ensuring transparency and good governance, the contracting authority needs to show that carrying out the project as a PPP offers the best "value for money". Therefore, the law should require a thorough assessment of the project's economy and efficiency ("value for money") as a mandatory step in the approval process of any proposed project, and as a condition precedent in order for the contracting authority to proceed with preparations for the selection of the project partner.

9. Generally, the test should include a quantitative and qualitative analysis of the costs, benefits and quality of the project that conclusively shows that carrying out the project as a PPP is the best available option. A PPP project should be considered to offer "value for money" only if operating the project as a PPP would result in a better quality delivered at lower cost than using any other method or arrangement to carry out the project or deliver a comparable outcome. It may even be useful to repeat the test after the bidding process in order to ensure a full consistency in the calculation method and in the results (see chap. III, "Contract award", paras. …).

10. The contracting authority may use various tools to conduct a value for money assessment. A common and widely used tool is the so-called "public sector comparator". This test consists of an estimate of the hypothetical cost of a public sector project throughout its lifecycle if were to be carried out by the Government. The public sector comparator uses the proposed output specification and the proposed risk allocation as a basis to compare the PPP option with a hypothetical model of the project costs if it were to be carried out under the most efficient modality for project delivery through the public sector offering the same level and quality of service expected of the private sector, and taking into account the lifecycle risks of the project. The starting point is typically the best estimate of the capital cost and lifetime operations and maintenance cost of implementing the project if delivered by the public sector.

11. The methodology for conducting a "value for money" test and the exact matrix of factors to be taken into account may vary according to the nature of the project, and it may evolve over time. Where a central approving authority, coordinating or advising body exists (see section ...), the host country might consider setting up dedicated structures to review periodically or systematically the methodology used and set appropriate parameters therefor. It should be noted, however, that the usefulness and accuracy of a value for money assessment depends on the availability and reliability of public sectors comparators, which may be limited in countries with little experience in PPPs or in advanced Government accounting and management practices, as may be the case in some developing countries. Moreover, an accurate "value for money" analysis might be beyond the capacity of some public authorities, as there might be insufficient or incomplete data to undertake the assessment. Furthermore, the efficiency of the Government entity to be used as a public sector comparator would have a significant bearing on the project costs, and the contracting authority may not have the expertise to factor public sector performance adequately as part of a comparative analysis. These potential limitations underscore the importance of ensuring that the contracting authority or other bodies in charge of planning for PPPs have the required human and technical resources needed to conduct this assessment. The Government will also be well advised the keep abreast with current international standards and guidance for an adequate value for money assessment.[5]

12. The need for an accurate and realistic confirmation of the project's business case is even more important in view of the financing structure of most PPP projects. In the past, debt financing for infrastructure development was obtained on the basis of credit support from project sponsors, multilateral and national export credit agencies, Governments and other third parties. Those traditional sources have not been able to meet the growing needs for infrastructure capital. Indeed, PPP projects have been increasingly funded on a project finance basis. [*old para. 2, chapter II*]

13. Project finance, as a method of financing, seeks to establish the creditworthiness of the project company on a "stand alone" basis, even before construction has begun or any revenues have been generated, and to borrow on the basis of that credit. Commentators have observed that project finance may hold the key to unlocking the vast pools of capital theoretically available in the capital markets for investment in infrastructure. However, project finance has distinctive and demanding characteristics from a financial point of view. Principal among these is that, in a project finance structure, financing parties must rely mainly upon the project company's assets and cash flows for repayment. If the project fails they will have no recourse, or only limited recourse, to the financial resources of a sponsor company or other third party for repayment (see also "Introduction and background information on PPPs", paras. 54 and 55). [*old para. 3, chapter II*]

14. The financial methodology of project financing requires a precise projection of the capital costs, revenues and projected costs, expenses, taxes and liabilities of the project. In order to predict these numbers precisely and with certainty and to create a financial model for the project, it is typically necessary to project the "base case" amounts of revenues, costs and expenses of the project company over a long period – often 20 years or more – in order to determine the amounts of debt and equity the project can support. Central to this analysis is the identification and quantification of risks. For this reason, the identification, assessment, allocation and mitigation of risks is at the heart of project financing from a financial point of view. [*old para. 4,*

[5] To support Governments in early stage identification and selection of projects suitable to be delivered on a PPP basis, the UN Economic and Social Commission for Asia and the Pacific (UNESCAP) designed the PPP qualitative value-for-money toolkit, which is an online instrument allowing governments and public authorities to undertake the right PPP project selection, based on value for money. The toolkit is available at the following address: https://ppp.unescap.org/. See also World Bank. 2017. *Public-Private Partnerships: Reference Guide Version 3*, Section 3.2.4 Assessing Value for Money of the PPP. World Bank, Washington, D.C. © World Bank; World Bank Institute; Public-Private Infrastructure Advisory Facility. 2013. *Value-for-Money Analysis-Practices and Challenges: How Governments Choose When to Use PPP to Deliver Public Infrastructure and Services*. World Bank, Washington, D.C. © World Bank.

chapter II] Indeed, risk allocation is at the core of every PPP, and a thorough understanding of the risk allocation arrangements is a precondition to drafting the PPP contract. The appropriate application of risk allocation principles is what determines whether a given PPP project will be capable of attracting financed and will be sustainable throughout its lifecycle. (A summary presentation of the most common risks in PPPs and general consideration on risk allocation is set out in section B, paras. …).

2. Fiscal risk assessment

15. Another important reason for requiring an accurate and realistic confirmation of the project's business case as a condition precedent for the project to move ahead as a PPP is the need to avoid unexpected cost for the public sector ("fiscal risk"). In many countries, investment projects have been carried out as PPPs not for efficiency reasons, but to circumvent budget constraints and postpone recording the fiscal costs of providing infrastructure services. Hence, some Governments ended up carrying out projects that either could not be funded within their budgetary means, or that exposed public finances to excessive fiscal risks. It is therefore advisable for the contracting authority or any central unit with overall responsibility for PPP-related policy (see below, para. …) to assess at this early stage the potential fiscal costs and risks arising from a proposed PPP project, where this assessment was not already an integral party of the mandatory "value for money" test (see paras. ...). In order to fully estimate the expected outcomes and budgetary implications of the project throughout its life-cycle, the assessment should consider at least four main variables of PPP projects:

(a) *The initiator of a project:* The impact of main fiscal indicators (i.e. deficit and debt) varies depending on the public entity ultimately responsible for the project (e.g. central, local governments, state-owned enterprises, etc.);

(b) *Who controls the asset:* The likelihood and extent of fiscal risk level varies depending on the government's ability to control the PPP-related asset – either through ownership, lease, right of use or other interest;

(c) *Who ultimately pays for the infrastructure*: The funding structure of the project (i.e. whether the government pays for the infrastructure facility or system using public funds; whether the private partner collects fees directly from users of the infrastructure facility or system; or whether there is a combination of both) is crucial to assess the project's implication on main fiscal aggregates;

(d) *Whether the Government provides additional support to the project*. Governments can not only fund PPP projects directly but they can also support the project in a variety of ways, including providing guarantees, equity capital, or tax and customs benefits (see below, paras. …). Such an early assessment of the fiscal impact of any Government support envisaged for a PPP project will be crucial to avoid exposure to open-ended liabilities and secure a long-term commitment of public resources that promotes the sustainability of the country's infrastructure development strategy and policies.

16. Governments may use various methods and tools for conducting this assessment. The International Monetary Fund and the World Bank have developed an analytical tool to help Governments quantify the macro-fiscal implications of PPP projects. Designed to be used mostly by PPP units in ministries of finance, the PPP Fiscal Risk Assessment Model (P-FRAM) uses standard software to process project-specific and macroeconomic data and automatically generate standardized outcomes, including: (a) project cash flows; (b) fiscal tables and charts both on a cash and accrual basis; (c) debt sustainability analysis with and without the PPP project; (d) sensitivity analysis of main fiscal aggregates to changes in macroeconomic and project-specific parameters; and (e) a summary risk matrix of the project.[6]

[6] http://www.imf.org/external/np/fad/publicinvestment/#5.

3. Welfare and social impact assessment

17. The purpose of the "value for money" test is to permit an informed preliminary decision as to whether PPP is at all an efficient and economically justifiable alternative to other forms of project development through public procurement. Failure of a proposed project to pass the value for money test does not necessarily mean that the project as such is not feasible, but should prompt the contracting authority to consider other options that are more affordable than a PPP. Likewise, the fact that a proposed project shows value for money does not necessarily mean that the project is worthwhile pursuing as a PPP. The Government must be satisfied that the project meets its overall infrastructure and public service development needs and strategies (see chap. I ...), as well as the Government's broader economic and social policies, with due regard being paid to commitments undertaken to achieve its sustainable development goals.

18. Indeed, essential as it is, the value for money test emphasizes monetarily quantifiable parameters of good governance in infrastructure and public service development. In order to fully assess the benefits – but also potential risks of a PPP – the Government should consider conducting an alternative assessment of the project. Firstly, from a purely financial viewpoint, the authorities involved may wish to calculate the impact of the availability of the infrastructure concerned, the fiscal returns on the investment in addition to the cash-flow position. Secondly, as the PPPs projects are by nature of great importance for the public in terms of size and service rendered, the social impact of the project should be addressed by the public authority during the preparatory phase. Of particular importance is a consideration by the Government of the extent to which the project, whether or not carried as a PPP, is in line with relevant United Nations Sustainable Development Goals. In general, it is recommended to assess at the planning stages the sustainability of the project and its environmental, economic and social impact. From the viewpoint of good governance and transparency, it is further advisable at this stage to consider the interests of the non-commercial partners and stakeholders – possibly through an adequate consultation mechanism – in order to foster public support for the project and reduce the risk of challenges or even litigation at later stages.

4. The issue of the exclusivity

19. The contracting authority needs further to consider at the planning stages the extent to which the private partner should obtain exclusive rights for the operation of the infrastructure or provision of the relevant service, or whether the private partner might may even need such exclusivity as a guarantee for the recovery of the original investment. This preliminary assessment should consider the geographic scope of the exclusivity – if any should be granted – and take into account the country's policies for the sector concerned (see "Introduction and background information on PPPs", paras. ... and chap. I, "General legal and institutional framework", paras. …). Not only will the issue of exclusivity play a central role in assessing the project's financial and commercial viability and its economic and social impact, but, from a practical point of view, exclusivity will be one of the central contract provisions (see chap. IV, "PPP implementation: legal framework and PPP contract, paras. …), but will impact the level of Government support that the private partner may require (see section D, Government Support, (f) Protection from competition).

20. The contracting authority should consider carefully the macroeconomic impact and policy disadvantages of granting exclusive rights to the private partner as well as the overall welfare costs of eliminating competition. As private partners may have a keen interest in exclusivity, the risk of collusion and corruption in this context may be particularly high. Laws and regulations may establish appropriate parameters for granting exclusivity, and should generally require the contracting authority to provide a justification for its recommendation to grant exclusivity.

C. Project risks and risk allocation

21. The precise allocation of risks among the various parties involved is typically defined after consideration of a number of factors, including the public interest in the development of the infrastructure in question and the level of risk faced by the project company, other investors and lenders (and the extent of their ability and readiness to absorb those risks at an acceptable cost). Adequate risk allocation is essential to reducing project costs and to ensuring the successful implementation of the project. Conversely, an inappropriate allocation of project risks may compromise the project's financial viability or hinder its efficient management, thus increasing the cost of the service. [*old para. 1, of chapter II*]

[*The Secretariat proposes no significant substantive amendments to section B, paras. 8–29 of chapter II, as they appear in the Legislative Guide, except for the terminology changes explained in A/CN.9/939, paras. 17–19 and 31, which, if approved by the Commission, the Secretariat will make in the final version of the Guide.*]

D. Administrative coordination

[*Paras. 22–24 and 29–31 have been moved here from section D of chapter I, "General legislative and institutional framework". Additions and amendments are indicated in the text.*]

22. Depending on the administrative structure of the host country, PPPs may require the involvement of several public authorities, at various levels of government. For instance, the competence to lay down regulations and rules for the activity concerned may rest in whole or in part with a public authority at a level different from the one that is responsible for providing the relevant service. It may also be that both the regulatory and the operational functions are combined in one entity, but that the authority to award government contracts is centralized in a different public authority. For projects involving foreign investment, it may also happen that certain specific competences fall within the mandate of an agency responsible for approving foreign investment proposals.

23. International experience has demonstrated the usefulness of entrusting a central unit within the host country's administration with the overall responsibility for formulating policy and providing practical guidance on PPPs. Such a central unit may also be responsible for coordinating the input of the main public authorities that interface with the project company. It is recognized, however, that such an arrangement may not be possible in some countries, owing to their particular administrative organization. Where it is not feasible to establish such a central unit, other measures may be considered to ensure an adequate level of coordination among the various public authorities involved, as discussed in the following paragraphs.

1. Coordination of preparatory measures

24. Following the identification of the future project, and a positive evaluation of the proposed PPP as the best option for implementing it, it is for the Government to establish the project's relative priority and to assign human and other resources for its implementation. At that point, it is desirable that the contracting authority review existing statutory or regulatory requirements relating to the operation of infrastructure facilities of the type proposed with a view to identifying the main public authorities whose input will be required for the implementation of the project. It is also important at this stage to consider the measures that may be required in order for the contracting authority and the other public authorities involved to perform the obligations they may reasonably anticipate in connection with the project. For instance, the Government may need to make advance budgeting arrangements to enable the contracting authority or other public authorities to meet financial commitments that extend over several budgetary cycles, such as long-term commitments to purchase the project's output (see chap. IV, "PPP implementation: legal framework and PPP

contract", paras. ... and …). Furthermore, a series of administrative measures may be needed to implement certain forms of support provided to the project, such as tax exemptions and customs facilitation (see chap. II, "Project planning and preparation", paras. …), which may require considerable time.

2. Preparations for the selection of the private partner

25. The choice of the best private partner capable of developing the project to the contracting authority's satisfaction is the central condition for the success of the project. This is why the contracting authority must turn its attention as early as possible to preparing a selection procedure appropriate to ensure that result (see chap. III, "Contract award"). As most modern laws on public procurement do, the UNCITRAL Model Procurement Law generally allows the procuring entity the flexibility to determine what will constitute value for money in each procurement and how to conduct the procurement procedure in a way that will achieve it. Specifically, the UNCITRAL Model Law on Public Procurement gives the procuring entity a broad discretion to decide what to purchase, and in determining what will be considered responsive to the procuring entity's needs (art. 10), who can participate and on what terms (arts. 9, 18 and 49) and the criteria that will be applied in selecting the winning submission (art. 11). This level of flexibility is also desirable for the selection of the private partner to carry out a PPP project.

26. Flexibility does not mean, however, that the contracting authority should be free to make those decisions at any time or alter the nature of the procedure without proper justification. To the contrary, it is already essential at the planning stage for the contracting authority to identify and study in detail the appropriate selection procedure from among those provided for in the country's general public procurement laws or any specific laws on PPPs (see chap. IIII, "Contract award", paras. …). Indeed the choice of the appropriate procedure will depend on a number of practical aspects that the contracting authority needs to consider in conjunction at the project preparation phase. Indeed the choice of the PPP modality (see chap. I, "General legal and institutional framework", paras. …), the ownership and maintenance arrangements envisaged for the facility (see chap. I, "General legal and institutional framework", paras. ...), the payment model (e.g. whether user fees or government payments) and other essential elements of project design will determine, for instance, the degree of interest of the contracting authority for the physical aspects of work and may, in turn, influence the extent to which the contracting authority wishes to control technical aspects by preparing a set of specifications, or prefers instead to allow bidders until the end to propose their own solutions to meet the expected output. Different selection processes may be available to meet the contracting authority's preferences (see chap. III, "Contract award", paras. ...).

27. The contracting authority will also need to consider important aspects of the contract award process already at this stage. The contracting authority will have to consider the need for, or desirability of, a pre-selection process, in light of the level of competition actually available in the market and the need for ensuring a robust and transparent selection process. The contracting authority will need to consider carefully the pre-selection criteria in light of both the desired output but also the nature of the PPP envisaged. The contracting authority will also need to prepare appropriate evaluation criteria to permit a ranking of proposals leading to the choice of the bidder offering the best value for money. From a practical point of view, the contracting authority will have to ensure that it will be able to avail itself of the required technical expertise to evaluate proposals, both in technical, as well as financial and commercial aspects.

28. Another crucial step in the preparatory process is for the contracting authority to refine the risk allocation assumptions considered when doing the "value for money" test and determine the essential terms of the contract, including the non-negotiable ones, as this will constitute a central element of the selection process and one of the bases for comparing the proposals received (see chap. III, "Contract award", paras. …). The time needed for concluding the PPP contract after the selection of the private partner selected is often excessively long, adding to the overall project cost.

The contracting authority can help shorten that time and make the final negotiations more structured and efficient by using as much as possible standards documents that, based on previous experience and practice, reflect the essential terms of the PPP (adapted, of course, to the circumstances of the project in question).

3. Arrangements for facilitating the issuance of licences and permits

29. Legislation may play a useful role in facilitating the issuance of licences and permits that may be needed in the course of a project (such as licences under foreign exchange regulations; licences for the incorporation of the private partner; authorizations for the employment of foreigners; registration and stamp duties for the use or ownership of land; import licences for equipment and supplies; construction licences; licences for the installation of cables or pipelines; licences for bringing the facility into operation; and spectrum allocation for mobile communication). The required licences or permits may fall within the competence of various organs at different levels of the administration and the time required for their issuance may be significant, in particular when the approving organs or offices were not originally involved in conceiving the project or negotiating its terms. Delays in bringing an infrastructure project into operation because of missing licences or permits for reasons not attributable to the private partner is likely to result in an increase in the cost of the project and in the price paid by the users.

30. Thus, it is advisable to conduct an early assessment of licences and permits needed for a particular project in order to avoid delay in the implementation phase. A possible measure to enhance the coordination in the issuance of licences and permits might be to entrust one organ with the authority to receive the applications for licences and permits, to transmit them to the appropriate agencies and to monitor the issuance of all licences and permits listed in the request for proposals and other licences that might be introduced by subsequent regulations. The law may also authorize the relevant agencies to issue provisional licences and permits and set forth a period beyond which those licences and permits are deemed to be granted unless they are rejected in writing.

31. However, it should be noted that the distribution of administrative authority among various levels of government (for example, local, regional and central) often reflects fundamental principles of a country's political organization. Therefore, there are instances where the central government would not be in a position to assume responsibility for the issuance of all licences and permits or to entrust one single body with such a coordinating function. In those cases, it is important to introduce measures to counter the possibility of delay that might result from such distribution of administrative authority, such as, for instance, agreements between the contracting authority and the other public authorities concerned to facilitate the procedures for a given project or other measures intended to ensure an adequate level of coordination among the various public authorities involved and to make the process of obtaining licences more transparent and efficient. Furthermore, the Government might consider providing some assurance that it will assist the private partner as much as possible in obtaining licences required by domestic law, for instance by providing information and assistance to bidders regarding the required licences, as well as the relevant procedures and conditions. From a practical point of view, in addition to coordination among various levels of government and various public authorities, there is a need to ensure consistency in the application of criteria for the issuance of licences and for the transparency of the administrative process.

E. Government support

[*The Secretariat proposes no significant substantive amendments to section C, paras. 30–60 of chapter II, as they appear in the Legislative Guide, except* for *the terminology changes explained in A/CN.9/939, paras. 17–19 and 31, which, if approved by the Commission, the Secretariat will make in the final version of the Guide.*]

F. Guarantees provided by international financial institutions

[*The Secretariat proposes no significant substantive* amendments *to section C, paras. 61–71 of chapter II, as they appear in the Legislative Guide, except for the terminology changes explained in* A/CN.9/939*, paras. 17–19 and 31, which, if approved by the Commission, the Secretariat will make in the final version of the Guide.*]

G. Guarantees provided by export credit agencies and investment promotion agencies

[*The Secretariat proposes no significant substantive amendments to section C, paras. 72–74 of chapter II, as they appear in the Legislative Guide, except for the terminology changes explained in A/CN.9/939, paras. 17–19 and 31, which, if approved by the Commission, the Secretariat will make in the final version of the Guide.*]

Model legislative provisions

II. Project planning and preparation

Model provision 5. PPP project proposals

1. A contracting authority envisaging to develop infrastructure or services through a PPP shall carry out or procure a feasibility study to assess whether the project meet the conditions for approval set for in [*these provisions*].

2. The feasibility study shall:

(a) Identify the public infrastructure or service needs to be met by the proposed PPP project and how the project meets relevant national or local priorities for the development of public infrastructure and services;

(b) Assess the various options available to the contracting authority to satisfy those needs and conclusively demonstrate the comparative advantage, strategic and operational benefits of implementation as PPP, in particular that the project:

(i) Offers a more economic and efficient solution as a PPP than if it were to be procured and carried out by the contracting authority or another public body (“value for money”); and

(ii) Will not lead to unexpected financial liabilities for the public sector (“fiscal risk”).

3. In addition to the feasibility study, the request for approval of a PPP project shall:

(a) Assess the project’s social, economic and environmental impact;

(b) Identify the technical requirements and expected inputs and deliverables;

(c) Consider the extent to which the project activities can be performed by a private partner under a contract with the contracting authority;

(d) Identify the licences, permits or authorizations that the contracting authority or any other any public authority may be required to issue in connection with the approval or implementation of the project;

(e) Identify and assess the main project risks and describe the proposed risk allocation under the contract;

(f) Identify any proposed form of Government support for the implementation of the project;

(g) Determine the capacity of the contracting authority to effectively enforce the contract, including the ability to monitor and regulate project implementation and the performance of the private partner;

(h) Identify the appropriate procedure for contract award.

Model provision 6. Approval of PPP project proposals

1. The [*the enacting State indicates the competent body*] shall be responsible for [approving proposed PPP projects submitted to it by contracting authorities] [advising the [*the enacting State indicates the competent body*] as to whether a proposed PPP project meets the approval conditions set forth in [*these provisions*].

2. The [*the enacting State indicates the competent body*] shall be responsible, in particular for:

(a) Reviewing PPP project proposals and feasibility studies submitted by contracting authorities for purposes of ascertaining whether a proposed project is worthwhile being carried out as a PPP and meets the requirements set forth in [*these provisions*];

(b) Reviewing the contracting authority's capability for carrying out the project and making appropriate recommendations;

(c) Reviewing the draft requests for proposal prepared by contract authorities to ensure conformity with the approved proposal and feasibility study;

(d) Advising the Government on administrative procedures relating to PPPs;

(e) Developing guidelines relating to PPPs;

(f) Advising contracting authorities on the methodology for conducting feasibility and other studies;

(g) Preparing standard bidding and contract documents for use by contracting authorities;

(h) Issuing advice in connection with the implementation of PPP projects;

(i) Assisting contracting authorities as required to ensure that PPPs are carried out in accordance with [*these provisions*]; and

(j) Performing any other functions in connection with PPPs that the [*the enacting States indicates the competent body to issue regulations implementing the model provisions*] may assign to it.

Model provision 7. Administrative coordination

The [*the enacting State indicates the competent body*] shall [establish] [propose to the [*the enacting State indicates the competent body*] the establishment of] institutional mechanisms to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of PPP projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned.

(A/CN.9/939/Add.3) (Original: English)

Note by the Secretariat on public-private partnerships (PPPs): proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (revised chapter III)

ADDENDUM

Contents

III. Contract award

A. General remarks

1. The present chapter deals with methods and procedures recommended for use in the award of PPP contracts. In line with the advice of international organizations, such as UNIDO[1] and the World Bank,[2] the *Guide* expresses an obvious and strong preference for the use of competitive selection procedures, which are widely recognized as being best suited for promoting economy, efficiency and transparency, among other general principles that should guide PPP laws and regulations (see chapter I, para. …). This is also consistent with article 9, paragraph 1, of the United Nations Convention against Corruption, which requires its States Parties to take the necessary steps "to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption." The *Guide* recognizes, however, that under exceptional circumstances contracts may be awarded without competitive procedures in consideration of the specific aspects of the project but subject to the safeguards recommended herein (see paras. …).

2. The selection procedures recommended in this chapter present some of the features of the request for proposals with dialogue (RFP with dialogue) under article 49 of the UNCITRAL Model Law on Public Procurement.[3] In addition to the request for proposals with dialogue, the UNCITRAL Model Law on Public Procurement provides for other procurement methods, such as two-stage tendering (art. 48) or competitive negotiations (art. 51), which may also be used for the award of PPP contracts, depending on the project characteristics and the assessment made by the contracting authority during the planning phase (see chapter II, "Project

[1] *Guidelines for Infrastructure Development through Build-Operate-Transfer (BOT) Projects*, United Nations Industrial Development Organization, p. 91 seq. (UNIDO publication, Sales No. UNIDO.95.6.E)

[2] Public-Private Partnerships Reference Guide – Version 3, World Bank and its partners, p. 160 seq. (International Bank for Reconstruction and Development/The World Bank, 2017).

[3] UNCITRAL Model Law on Public Procurement (2011).

planning and preparation", paras. …). Where appropriate, this chapter refers the reader to those, as well as to various other provisions of the UNCITRAL Model Law on Public Procurement that usefully supplement the selection procedure described herein. When choosing the most appropriate selection methods and deciding on the structure and practical manner of conducting it, the contracting authority should also bear in mind the general principles of PPP laws and regulations (see chapter I, "General legal and institutional framework", paras. …) and the objectives that an adequate PPP contract award process should attain (see below, paras. …).

1. Selection procedures covered by the *Guide*

3. Through PPP projects a contracting authority is able to bundle together several activities that it would otherwise have procured separately (namely, design, construction, operation and maintenance but also financing and the general management of the whole life cycle of the infrastructure or service). The overall objective is to reallocate risks between the public and private sector in a manner that offers incentives to enhance the provision of public infrastructure or services. Nevertheless, even in those projects intended to be entirely funded by the private sector, and repaid through user fees and other charges, the Government remains ultimately accountable for the quality and cost of the infrastructure and services. Accordingly, except for some specific matters peculiar to PPPs and therefore not usually regulated in public procurement procedures, the main part of the selection of the private partner should be aligned or coexists with the relevant principles and best practices for public procurement.

4. This chapter deals primarily with selection procedures suitable for use in relation to infrastructure projects that involve an obligation, on the part of the selected private partner, to undertake finance, design and physical construction, repair or expansion works in the infrastructure concerned with a view to subsequent private operation and provision of services to the public by the private partner. The award procedures discussed in this chapter may also serve for the award of PPPs contracts under which the facility would be subsequently operated and maintained by the private partner, but would be used by the contracting authority or other public body for its own needs or to house public services. This chapter does not deal specifically with other methods of selecting providers of public services through licensing or similar procedures, or of merely disposing of State property through capital increases or offerings of shares.

2. General objectives of selection procedures

5. For the award of PPP contracts, the contracting authority may either apply methods and procedures already provided in the laws of the country or establish procedures specifically designed for that purpose. The law of the country may specify and regulate the most appropriate method for selecting the private partner for PPP in order to ensure transparency in the process. In all cases, it is important to ensure that such procedures are generally conducive to attaining the fundamental objectives of rules governing the award of public contracts. Those objectives are discussed briefly below.

(a) Economy and efficiency

6. In connection with PPP projects, "economy" refers to the selection of a private partner that is capable of performing works and delivering services of the desired quality at the most advantageous price or that offers the best commercial proposal. Experience shows that one of the best ways to achieve economy is to promote competition among bidders. Competition provides them with incentives to offer their most advantageous terms and it can encourage them to adopt efficient or innovative technologies or production methods in order to do so.

7. It should be noted, however, that competition does not necessarily require the participation of a large number of bidders in a given selection process. For large projects, in particular, there may be reasons for the contracting authority to wish to limit the number of bidders to a manageable number (see para. …). Provided that

appropriate procedures are in place, the contracting authority can take advantage of effective competition even where the competitive base is limited.

8. Economy can often be promoted through participation by foreign companies in selection proceedings. Not only can foreign participation expand the competitive base, it can also lead to the acquisition by the contracting authority and its country of technologies that are not available locally. Foreign participation in selection proceedings may be necessary where there exists no domestic expertise of the type required by the contracting authority. A country wishing to achieve the benefits of foreign participation should ensure that its relevant laws and procedures are conducive to such participation.

9. "Efficiency" refers to selection of a private partner within a reasonable amount of time, with minimal administrative burdens and at reasonable cost both to the contracting authority and to participating bidders. In addition to the losses that can accrue directly to the contracting authority from inefficient selection procedures (owing, for example, to delayed selection or high administrative costs), excessively costly and burdensome procedures can lead to increases in the overall project costs or even discourage competent companies from participating in the selection proceedings altogether, which would endanger the final objective that is to attract the best potential economic operators for the project.

(b) Promotion of the integrity of and confidence in the selection process

10. Another important objective of rules governing the selection of the private partner is to promote the integrity of and confidence in the process. Thus, an adequate selection system will usually contain provisions designed to ensure fair treatment of bidders, to reduce or discourage unintentional or intentional abuses of the selection process by persons administering it or by companies participating in it and to ensure that selection decisions are taken on a proper basis.

11. Promoting the integrity of the selection process will help to promote public confidence in the process and in the public sector in general. Bidders will often refrain from spending the time and sometimes substantial sums of money to participate in selection proceedings unless they are confident that they will be treated fairly and that their proposals or offers have a reasonable chance of being accepted. Those which do participate in selection proceedings in which they do not have that confidence would probably increase the project cost to cover the higher risks and costs of participation. Ensuring that selection proceedings are run on a proper basis could reduce or eliminate that tendency and result in more favourable terms to the contracting authority.

12. To guard against corruption by government officials, including employees of the contracting authorities, the host country should have in place an effective system of sanctions. These could include sanctions of a criminal nature that would apply to unlawful acts of officials conducting the selection process and of participating bidders, such as debarment or suspension from the selection process. Conflicts of interest should also be avoided, for instance by requiring that officials of the contracting authority or each member of the evaluation commission or single evaluator fill a declaration of the absence of conflicts of interest at the beginning of the process. Officials, their spouses, relatives and associates shall be barred from owning a debt or equity interest in a company participating in a selection process or accepting to serve as a director or employee of such a company. Furthermore, in line with the provisions of the UNCITRAL Model Law on Public Procurement (art. 21), the law governing the selection proceedings should obligate the contracting authority to reject offers or proposals submitted by a party who gives or agrees to give, directly or indirectly, to any current or former officer or employee of the contracting authority or other public authority a gratuity in any form, an offer of employment or any other thing or service of value, as an inducement with respect to an act or decision of or procedure followed by the contracting authority in connection with the selection proceedings. This obligation shall be applicable at any time in the selection proceeding and not limited to the tender period. These provisions may be supplemented by other measures, such as the requirement that all companies invited

to participate in the selection process undertake neither to seek to influence unduly the decisions of the public officials involved in the selection process nor otherwise to distort the competition by means of collusive or other illicit practices (that is, the so-called "integrity agreement"). Also, in the procurement practices adopted by some countries, bidders are required to guarantee that no official of the procuring entity has been or shall be admitted by the bidder to any direct or indirect benefit arising from the contract or the award thereof. Breach of such a provision typically constitutes a breach of an essential term of the contract.

13. The confidence of investors may be further fostered by adequate provisions to protect the confidentiality of proprietary information submitted by them during the selection proceedings. This should include sufficient assurances that the contracting authority will treat applications to pre-qualify or for pre-selection, as well as proposals eventually received in such a manner as to avoid the disclosure of their contents to competing bidders or to any unauthorized person; that any discussions or negotiations will be confidential; and that trade or other information that bidders might include in their proposals will not be made known to their competitors.

(c) Transparency of laws and procedures

14. Transparency of laws and procedures, including judicial decisions and administrative rulings with precedent value, governing the selection of the private partner will help to achieve a number of the policy objectives already mentioned. Transparent laws are those in which the rules and procedures to be followed by the contracting authority and by bidders are fully disclosed, are not unduly complex and are presented in a systematic and understandable way. Transparent procedures are those which enable the bidders to ascertain what procedures have been followed by the contracting authority and the basis of decisions taken by it. The publication of upcoming opportunities by the public authority is another means to achieve transparency, as it helps potential bidders to know what is to be procured and how.

15. One of the most important ways to promote transparency and accountability is to include provisions requiring that the contracting authority maintain a record of the selection proceedings (see paras. …). A record summarizing key information concerning those proceedings facilitates the exercise of the right of aggrieved bidders to seek review. That in turn will help to ensure that the rules governing the selection proceedings are, to the extent possible, self-policing and self-enforcing. Furthermore, adequate record requirements in the law will facilitate the work of public authorities exercising an audit or control function and promote the accountability of contracting authorities to the public-at-large as regards the award of infrastructure projects.

16. An important corollary of the objectives of economy, efficiency, integrity and transparency is the availability of administrative and judicial procedures for the review of decisions made by the authorities involved in the selection proceedings (see paras. …).

3. Special features of selection procedures for PPPs

17. Modern procurement systems provide public authorities with a broad range of procurement methods and greater freedom to choose the best procedure to meet their needs. The formal procedures and the objectivity and predictability that characterize the competitive selection procedures generally provide optimal conditions for competition, transparency and efficiency. Thus, the use of competitive selection procedures in PPPs has been recommended by UNIDO, which has formulated detailed practical guidance on how to structure those procedures.[1] The procurement policies of the World Bank also advocate the use of competitive selection procedures at national level, when such national legislation is correctly developed. A private partner selected pursuant to bidding procedures acceptable to the World Bank is generally free to adopt its own procedures for the award of contracts required to implement the project. However, where the private partner was not itself selected pursuant to those competitive procedures, the award of subcontracts has to be done pursuant to competitive procedures acceptable to the World Bank.[2]

18. It should be noted, however, that no international legislative model has thus far been specifically devised for competitive selection procedures in PPPs. Newly drafted domestic laws on competitive procedures for public procurement services may be suitable for PPPs or sometimes contain specific provisions applicable to PPPs. In view of the particular issues raised by PPPs, which are briefly discussed below, it is advisable for the Government to consider reviewing the suitability of existing procedures for the selection of the private partner in a PPP project.

(a) Range of bidders to be invited

19. The award of PPP projects typically involves complex, time-consuming and expensive proceedings, and the sheer scale of most infrastructure projects reduces the likelihood of obtaining proposals from a large number of suitably qualified bidders. In fact, competent bidders may be reluctant to participate in bid for high-value projects if the competitive field is too large and where they run the risk of having to compete with unrealistic proposals or proposals submitted by unqualified bidders. Open tendering without a pre-selection phase is therefore usually not advisable for the award of most PPP contracts, except perhaps for small-scale projects where the contracting authority may wish to seek proposals from all qualified bidders.

(b) Definition of project requirements

20. In traditional public procurement of construction works the procuring authority usually assumes the position of a *maître d'ouvrage* or employer, while the selected contractor carries out the function of the performer of the works. The procurement procedures emphasize the inputs to be provided by the contractor, that is, the contracting authority establishes clearly what is to be built, how and by what means. It is therefore common for invitations to tender for construction works to be accompanied by extensive and very detailed technical specifications of the type of works and services being procured. In those cases, the contracting authority will be responsible for ensuring that the specifications are adequate to the type of infrastructure to be built and that such infrastructure will be capable of being operated efficiently.

21. However, for many PPPS, the contracting authority may envisage a different allocation of responsibilities between the public and the private sector. In those cases, after having established a particular infrastructure need, the contracting authority may prefer to leave to the private sector the responsibility for proposing the best solution for meeting such a need, subject to certain requirements that may be established by the contracting authority (for example, regulatory performance or safety requirements, sufficient evidence that the technical solutions proposed have been previously tested and have met internationally acceptable safety and other standards). The selection procedure used by the contracting authority may thus give more emphasis to the output expected from the project (that is, the services or goods to be provided) than to technical details of the works to be performed or means to be used to provide those services (see paras. …).

(c) Evaluation criteria

22. For projects to be financed, owned and operated by public authorities, goods, construction works or services are typically purchased with funds available under approved budgetary allocations. With the funding sources usually secured, the main objective of the procuring entity is to obtain the best value for the funds it spends. Therefore, in those types of procurement the decisive factor in establishing the winner among the responsive and technically acceptable proposals (that is, those which have passed the threshold with respect to quality and technical aspects) is often the global price offered for the construction works, which is calculated on the basis of the cost of the works and other costs incurred by the contractor, plus a certain margin of profit.

23. Many PPPs, in turn, are expected to be financially self-sustainable, with the development and operational costs being recovered from the project's own revenue, although some projects ("non-concession PPPs") may involve a specific payment by the contracting authority (see Introduction, para. …). Therefore, a number of other

factors linked with the capacity of the potential private partner to handle certain risks of the project that the public sector is not willing to assume (mainly – but not only – in connection with the technology or the specific sector), will need to be considered in addition to the construction and operation cost and the price to be paid by the users or the public authority. For instance, the contracting authority will need to consider carefully the financial and commercial feasibility of the project as presented by the bidders in the frame of the preliminary assessment undertaken by the public authority, the soundness of the financial arrangements proposed by the bidders and the reliability of the technical solutions used and their adaptability to the local context. Such interest exists even where no governmental guarantees or payments are involved, because unfinished projects or projects with large cost overruns or higher than expected maintenance costs often have a negative impact on the overall availability of needed services and on the public opinion in the host country. Also, the contracting authority will aim at formulating qualification and evaluation criteria that give adequate weight to the need to ensure the continuous provision of and, as appropriate, universal access to the public service concerned. Furthermore, given the usually long duration of PPP contracts, the contracting authority will need to satisfy itself as to the soundness and acceptability of the arrangements proposed for the operational phase and will weigh carefully the service elements of the proposals (see para. …).

(d) Negotiations with bidders

24. Laws and regulations governing tendering proceedings for the procurement of goods and services often prohibit negotiations between the contracting authority and the contractors concerning a proposal submitted by them. The rationale for such a strict prohibition, which is also contained in article 44 of the UNCITRAL Model Law on Public Procurement, is that negotiations might result in an "auction", in which a proposal offered by one contractor is used to apply pressure on another contractor to offer a lower price or an otherwise more favourable proposal. As a result of that strict prohibition, contractors selected to provide goods or services pursuant to traditional procurement procedures are typically required to sign standard contract documents provided to them during the procurement proceedings.

25. The situation is different in the award of PPP contracts. The complexity and long duration of such projects makes it unlikely that the contracting authority would be in a position to determine in advance the technical and other requirements of the project without discussing the needs and the various available options to meet them with the qualified bidders. This is the reason why the *Guide* recommends the use of a selection process such as the request for proposals with dialogue set forth in article 49 of the UNCITRAL Model Law on Public Procurement, which provides a transparent structure for negotiations between the contracting authority and the bidders at a stage of the process that does not lead to changes to the basis on which the competition was carried out (see paras. ….; on the importance of proper project planning and preparation to clarify the scope for negotiations at the selection stage, see also chapter II).

4. Preparations for the selection proceedings

26. The award of PPP contracts is in most cases a complex exercise requiring careful planning and coordination among the offices involved. By ensuring that adequate administrative and personnel support is available to conduct the type of selection proceeding that it has chosen, the Government plays an essential role in promoting confidence in the selection process. Additionally, the involvement of a PPP unit or a PPP office at national or local level is widely seen as a good practice in order to streamline the preparation for the selection proceedings.

(a) Early information on forthcoming PPP projects

27. Countries that include PPP projects in their medium- and long-term infrastructure planning, as the *Guide* encourages them to do (see chapter II, "Project planning and preparation", paras. …), may wish to publish information regarding

planned or possible future selection proceedings for PPP projects for the forthcoming months or years, as contemplated in article 6 of the UNCITRAL Model Law on Public Procurement. The purpose of this early notice is to enable more suppliers and contractors to learn about contract opportunities, assess their interest in participation and plan their participation in advance accordingly. Publication of such information may also have a positive impact in the broader governance context, in particular in opening up procurement to general public review and civil society and local community participation. In practice, such advance notices may be useful, for example, to investigate whether the market could respond to the contracting authority's needs before any selection process is initiated. This type of market investigation may prove useful in rapidly evolving markets (such as in the information and telecommunication sector) to allow the public sector to assess whether there are recent or envisaged innovative solutions. Responses to the advance notice might reveal that it would not be feasible or desirable to carry out the project as planned by the public authority. Based on the data collected, the contracting authority may take a more informed decision as regards the most appropriate selection method to award the forthcoming contact. This advance notice should not be confused with a notice seeking expressions of interest that is usually published in conjunction with request-for-proposals proceedings (see paras. …) since publishing such expression of interest notice does not oblige the contracting authority to request proposals from all those that expressed interest.

(b) Appointment of the award committee

28. One important preparatory measure is the appointment of the committee that will be responsible for evaluating the proposals and making an award recommendation to the contracting authority. The appointment of qualified and impartial members to the selection committee is not only a requirement for an efficient evaluation of the proposals, but may further foster the confidence of bidders in the selection process.

29. Another important preparatory measure is the appointment of the independent advisers who will assist the contracting authority in the selection procedures. The contracting authority may need, at this early stage, to retain the services of independent experts or advisers to assist in establishing appropriate qualification and evaluation criteria, defining performance indicators (and, if necessary, project specifications) and preparing the documentation to be issued to bidders. Consultant services and advisers may also be retained to assist the contracting authority in the evaluation of proposals, drafting and negotiation of the project agreement. Consultants and advisers can be particularly helpful by bringing a broad range of technical expertise that may not always be available in the public administration of the contracting authority, such as technical or engineering advice (for example, on technical assessment of the project or installations and technical requirements of contract); environmental advice (for example, environmental assessment and operation requirements); or legal and financial advice (for example, on financial projections, review of financing sources, assessing the adequate ratio between debt and equity and drafting of contractual and financial information documents).

(c) Feasibility and other studies

30. As indicated earlier (see chapter II, "Project planning and preparation", para. …), one of the initial steps that should be taken by the Government in relation to a proposed infrastructure project is to conduct a preliminary assessment of its feasibility, including economic and financial aspects such as expected economic advantages of the project, estimated cost and potential revenue anticipated from the operation of the infrastructure facility, and its social and environmental impact. The option to develop infrastructure as a PPP requires a positive conclusion on the feasibility and financial viability of the project under such PPP form to the exclusion of any other procurement method. In some countries, it has been found useful to provide for some public participation in the preliminary assessment of the project's social and environmental impact and the various options available to minimize it.

31. Prior to starting the proceedings leading to the selection of a prospective private partner, it is advisable for the contracting authority to review and, in most cases, expand those initial studies. In some countries contracting authorities are advised to formulate model projects for reference purposes (typically including a combination of estimated capital investment, operation and maintenance costs) prior to inviting proposals from the private sector. The purpose of such model projects is to demonstrate the viability of the commercial operation of the infrastructure and the affordability of the project in terms of total investment cost and cost to the public. They will also provide the contracting authority with a useful tool for comparison and evaluation of proposals. The confidence of bidders will be promoted by evidence that the technical, economic and financial assumptions of the project, as well as the proposed role of the private sector, have been carefully considered by the contracting authority.

(d) Preparation of documentation

32. Selection proceedings for the award of PPP contracts typically require the preparation of extensive documentation, including a project outline, pre-selection documents, the request for proposals, instructions for preparing proposals and a draft of the PPP contract. The quality and clarity of the documents issued by the contracting authority plays a significant role in ensuring an efficient and transparent selection procedure. Here too, the work of PPP units has been widely described as very positive in the process, by gathering the publication of clear and concise documents that are in line with the practice of the bidders.

33. Standard documentation prepared in sufficiently precise terms may be an important element to facilitate the negotiations between bidders and prospective lenders and investors. It may also be useful for ensuring consistency in the treatment of issues common to most projects in a given sector. However, in using standard contract terms it is advisable to bear in mind the possibility that a specific project may raise issues that had not been anticipated when the standard document was prepared or that the project may necessitate particular solutions that might be at variance with the standard terms. Careful consideration should be given to the need to achieve an appropriate balance between the level of uniformity desired for project agreements of a particular type and the flexibility that might be needed for finding project-specific solutions.

B. Pre-selection of bidders

34. Given the technical nature of most PPP projects and the complexity of many of them, the contracting authority should seek proposals only from bidders who satisfy certain qualification criteria. In traditional government procurement, the pre-qualification proceedings may consist of the verification of certain formal requirements, such as adequate proof of technical capability or prior experience in the type of procurement, so that all bidders who meet the pre-qualification criteria are automatically admitted to the tendering phase. The pre-selection proceedings for complex procurement or PPP projects may, in turn, involve elements of comparison and selection. This may be the case, for example, where the contracting authority establishes a ranking of pre-selected bidders (see para. …). In the case of smaller projects or less complex projects, however, the contracting authority may wish to stimulate greater competition among potential bidders and invite proposals from all those who meet the required qualifications, without ranking them. In order to avoid arbitrariness and possible improper handling of the selection process, it is advisable that the value threshold beyond which a pre-selection would be mandatory be set forth in the law or by regulations issued thereunder.

35. In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four). For that purpose, those countries apply a quantitative rating system for technical, managerial financial, environmental, ethical and other compliance

standards such as clean debarment record, anti-corruption status criteria, taking into account the nature of the project. Quantitative pre-selection criteria are found to be more easily applicable and transparent than qualitative criteria involving the use of merit points. However, in devising a quantitative rating system, it is important to avoid unnecessary limitation of the contracting authority's discretion in assessing the qualifications of bidders. The contracting authority may also need to take into account the fact that the procurement guidelines of some multilateral financial institutions may restrict the use of pre-selection proceedings for the purpose of limiting the number of bidders to a predetermined number. In any event, where such a rating system is to be used, that circumstance should be clearly stated in the pre-selection documents.

1. Invitation to the pre-selection proceedings

36. In order to promote transparency and competition, it is advisable to advertise the invitation to the pre-selection proceedings in a manner that reaches an audience wide enough to provide an effective level of competition. The laws of many countries identify publications, usually the official gazette or other official publication, in which the invitation to the pre-selection proceedings is to be published. The electronic publication of the invitation through specially dedicated portals, including through the website of the PPP unit – if any – is also a widely used and effective means of circulating the invitation to the pre-qualification. With a view to fostering participation of foreign companies and maximizing competition, the contracting authority may wish to have the invitations to the pre-selection proceedings internationally, so as to be widely accessible to potentially interested international bidders. One possible medium is *Development Business*[4] of the United Nations.

37. Pre-selection documents should contain sufficient information for bidders to be able to ascertain whether the works and services entailed by the project are of a type that they can provide and, if so, how they can participate in the selection proceedings. The invitation to the pre-selection proceedings should, in addition to identifying the infrastructure to be built or renovated, contain information on other essential elements of the project, such as the services to be delivered by the private partner, the financial arrangements envisaged by the contracting authority (for example, whether the project will be entirely financed by user fees or tolls or whether public funds may be provided as direct payments, loans or guarantees) and, where already known, a summary of the main required terms of the project agreement to be entered into as a result of the selection proceedings (risk allocation).

2. Pre-selection criteria

38. In addition, the invitation to the pre-selection proceedings should include general information similar to the information typically provided in pre-selection documents under general rules on public procurement.[5]

39. Generally, bidders should be required to demonstrate that they possess the professional, technical and environmental qualifications, financial and human resources, equipment and other physical facilities, managerial capability, reliability and experience necessary to carry out the project. Additional criteria that might be particularly relevant for PPPs may include the ability to manage the financial aspects of the project and previous experience in operating public infrastructure or in providing services under regulatory oversight (for example, quality indicators of their past performance, size and type of previous projects carried out by the bidders); the level of experience of the key personnel to be engaged in the project; sufficient organizational ability (including minimum levels of construction, operation and maintenance equipment); ability to sustain the financing requirements for the engineering, construction and operational phases of the project (demonstrated, for instance, by evidence of the bidders' ability to provide an adequate amount of equity to the project and sufficient evidence from reputable banks attesting the bidder's good

[4] www.devbusiness.com.

[5] See UNCITRAL Model Procurement Law, arts. 7, 8 and 10.

financial standing). More recent developments have seen contracting authorities requesting that the bidders demonstrate that they meet recognized ethical standards (environmental certification, clean anti-corruption records, labor policy declarations). Qualification requirements should cover all phases of an infrastructure project, including financing management, engineering, construction, operation and maintenance, where appropriate. In addition, the bidders should be required to demonstrate that they meet such other qualification criteria as would typically apply under the general procurement laws of the country.[6]

40. One important aspect to be considered by the contracting authority relates to the relationship between the award of one particular project and the governmental policy pursued for the sector concerned (see "Introduction and background information on PPPs", paras. …). Where competition is sought, the Government may be interested in ensuring that the relevant market or sector is not dominated by one enterprise. To implement such a policy and to avoid market domination by bidders who may have already been awarded a PPP contract within a given sector of the economy, the contracting authority may wish to include in the pre-selection documents for new PPPs provisions that limit the participation of or prevent another award to such bidders. For purposes of transparency, it is desirable for the law to provide that, where the contracting authority reserves the right to reject a proposal on those or similar grounds, adequate notice of that circumstance must be included in the invitation to the pre-selection proceedings.

41. Qualification requirements should apply equally to all bidders. A contracting authority should not impose any criterion, requirement or procedure with respect to the qualifications of bidders that has not been set forth in the pre-selection documents. When considering the professional, technical and environmental qualifications of bidding consortia, the contracting authority should consider the individual specialization of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

3. Issues relating to the participation of bidding consortia

42. Given the large scale of most infrastructure projects, the interested companies typically participate in the selection proceedings through consortia especially formed for that purpose. Therefore, information required from members of bidding consortia should relate to the consortium as a whole as well as to its individual participants. For facilitating the liaison with the contracting authority, it may be useful to require in the pre-selection documents that each consortium designate one of its members as a focal point for all communications with the contracting authority. It is generally advisable for the contracting authority to require that the members of bidding consortia submit a sworn statement undertaking that, if awarded the contract, they shall bind themselves jointly and severally for the obligations assumed in the name of the consortium under the PPP contract. Alternatively, the contracting authority may reserve itself the right to require at a later stage that the members of the selected consortium establish an independent legal entity to carry out the project (see also chapter IV, "PPP implementation: legal framework and PPP contract", paras. …).

43. It is also advisable for the contracting authority to review carefully the composition of consortia and their parent companies. It may happen that one company, directly or through subsidiary companies, joins more than one consortium to submit

[6] For example, that they have legal capacity to enter into the PPP contract; that they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended and they are not the subject of legal proceedings for any of the foregoing; that they have fulfilled their obligations to pay taxes and social security contributions in the State; that they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a certain period of years preceding the commencement of the selection proceedings or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings (see UNCITRAL Model Law on Public Procurement, art. 9, para. 2).

proposals for the same project. Such a situation should not be allowed, since it raises the risk of leakage of information or collusion between competing consortia, thus undermining the credibility of the selection proceedings. It is therefore advisable to provide in the invitation to the pre-selection proceedings that each of the members of a qualified consortium may participate, either directly or through subsidiary companies, in only one bid for the project. A violation of this rule should cause the disqualification of the consortium and of the individual member companies, save for exceptional situations in which participation in multiple consortia might be authorized, for instance, because the project in question requires know-how or a proprietary method or technology that only one or a few companies possess.

4. Pre-selection and domestic preferences

44. The laws of some countries provide for some sort of preferential treatment for domestic entities or afford special treatment to bidders that undertake to use national goods or employ local labour. Such preferential or special treatment is sometimes provided as a material qualification requirement (for example, a minimum percentage of national participation in the consortium) or as a condition for participating in the selection procedure (for example, to appoint a local partner as a leader of the bidding consortium). The preferential treatment given to domestic operators, or even the outright exclusion of foreign entities, is also sometimes justified for strategic and sensitive sectors, such as national defence and security operations. The contracting authority should disclose any such limitation among eligibility criteria from the outset of the process, include them in the record of the selection proceedings and make the reasons available to any person upon request, in accordance with article 8 of the UNCITRAL Model Law on Public Procurement.

45. Domestic preferences may give rise to a variety of issues. Firstly, their use is not permitted under the guidelines of some international financial institutions and might be inconsistent with international obligations entered into by many States pursuant to agreements on international trade or regional economic integration or trade facilitation. Furthermore, from the perspective of the host country it is important to weigh the expected advantages against the disadvantage of depriving the contracting authority of the possibility of obtaining better options to meet the national infrastructure needs. It is also important not to allow total insulation from foreign competition so as not to perpetuate lower levels of economy, efficiency and competitiveness of the concerned sectors of national industry. This is the reason why many countries that wish to provide some incentive to national suppliers, while at the same time taking advantage of international competition, do not contemplate a blanket exclusion of foreign participation or restrictive qualification requirements. Domestic preferences may take the form of special evaluation criteria establishing margins of preference for national bidders or bidders who offer to procure supplies, services and products in the local market. The margin of preference technique, which is provided in article 11, paragraph 3, of the UNCITRAL Model Law on Public Procurement, is more transparent than subjective qualification or evaluation criteria. Furthermore, it allows the contracting authority to favour local bidders that are capable of approaching internationally competitive standards, and it does so without simply excluding foreign competition. Additionally, it has been witnessed that forced use of local content may lead to reduction of liability of the bidders regarding quality or even final output of the project. Where domestic preferences are envisaged, they should be announced in advance, preferably in the invitation to the pre-selection proceedings.

5. Contribution towards costs of participation in the selection proceedings

46. According to articles 38 and 49, paragraph 4, of the UNCITRAL Model Law on Public Procurement the price charged for the pre-selection documents should only reflect the cost of providing them to the bidders. In recognition of the high cost of the preliminary studies and preparatory work, including for the formulation of the request for proposals, standard contracts and other relevant bidding documents, in international practice it is not uncommon for a contracting authority to seek at least partial recovery of those costs through so-called “development fees” set above the

mere cost of printing the bidding documents. A contracting authority should attempt to align the level of those fees with similar projects, bearing in mind market practices and expectations. Indeed, development fees should not be used as an additional tool to limit the number of bidders. Such a practice is both ineffective and adds to the already considerable cost of participation in the pre-qualification proceedings. The high costs of preparing proposals for infrastructure projects and the relatively high risks that a selection procedure may not lead to a contract award may function as a deterrent for some companies to join in a consortium to submit a proposal, in particular when they are not familiar with the selection procedures applied in the host country.

47. Therefore, some countries authorize the contracting authority to consider arrangements for compensating pre-qualified bidders if the project cannot proceed for reasons outside their control or for contributing to the costs incurred by them after the pre-selection phase, when justified in a particular case by the complexity involved and the prospect of significantly improving the quality of the competition. When such contribution or compensation is envisaged, appropriate notice should be given to potential bidders at an early stage, preferably in the invitation to the pre-selection proceedings.

6. Pre-selection procedures

48. The contracting authority should respond to any request by a bidding consortium for clarification of the pre-selection documents that is received by the contracting authority within a reasonable time prior to the deadline for the submission of applications so as to enable the bidders to make a timely submission of their application. The response to any request that might reasonably be expected to be of interest to other bidders should, without identifying the source of the request, be communicated to all bidders to which the contracting authority provided the pre-selection documents.

49. Upon completion of the pre-selection phase, the contracting authority usually draws up a short list of the pre-selected bidders that will subsequently be invited to submit proposals. One practical problem sometimes faced by contracting authorities concerns proposals for changes in the composition of bidding consortia during the selection proceedings. From the perspective of the contracting authority, it is generally advisable to exercise caution in respect of proposed substitutions of individual members of bidding consortia after the closing of the pre-selection phase. Changes in the composition of consortia may substantially alter the basis on which the pre-selected bidding consortia were short-listed by the contracting authority and may give rise to questions about the integrity of the selection proceedings. As a general rule, only pre-selected bidders should be allowed to participate in the selection phase, unless the contracting authority can satisfy itself that a new consortium member meets the pre-selection criteria to substantially the same extent as the exiting member of the consortium and the results of the pre-selection would remain the same should the new consortium member have participated originally in the consortium.

50. While the criteria used for pre-selecting bidders should not be weighted again at the evaluation phase, the contracting authority may wish to reserve itself the right to require, at any stage of the selection process, that the bidders again demonstrate their qualifications in accordance with the same criteria used to pre-select them.

C. Procedures for requesting proposals

51. This section discusses the procedures for requesting proposals from the pre-selected bidders. As stated above, the procedures follow the main features of the request for proposals with dialogue provided in the UNCITRAL Model Law on Public Procurement, with some adaptations needed to fit the needs of contracting authorities.

1. Structure and phases of the procedure

52. The choice of the procedure for requesting proposals will depend on the nature of the contract, on how precisely the contracting authority can determine the technical requirements and whether output results (or performance indicators) are used for selection of the private partner. If it is both feasible and desirable for the contracting authority to formulate performance indicators or project specifications to the necessary degree of precision or finality, the selection process may be structured as a single-stage procedure. In that case, after having concluded the pre-selection of bidders, the contracting authority would proceed directly to issuing a final request for proposals (see paras. …). The contract would be awarded to the bidder submitting the proposal that offers the best combined terms of (a) criteria other than price specified in the request for proposals and (b) price (see UNCITRAL Model Law on Public Procurement, art. …, para. 10). Some flexibility may be added to the process (for instance where the contracting authority needs to consider and negotiate the financial aspects of proposals only after assessing their technical, quality and performance characteristics) by allowing a final round of consecutive negotiations with bidders submitting responsive proposals, in the order of their ranking (see UNCITRAL Model Law on Public Procurement, art. 50).

53. Single-stage bidding may be appropriate for relatively simple, small-scale projects where the contracting authority possesses sufficient technical knowledge and does not expect the private sector to come forward with alternative solutions, technology or know-how. In most PPP projects, however, it may not be feasible for the contracting authority to formulate its requirement in sufficiently detailed and precise project specifications or performance indicators to permit proposals to be formulated, evaluated and compared uniformly on the basis of those specifications and indicators. This may be the case, for instance, when the contracting authority has not determined the type of technical and material input that would be suitable for the project in question (for example, the type of construction material to be used in a bridge). The larger the project, and the greater its complexity, the less likely it is that single-stage selection procedures would be adequate or lead to a satisfactory result. In such cases, it might be considered undesirable, from the standpoint of obtaining the best value for money, for the contracting authority to proceed on the basis of specifications or indicators it has drawn up in the absence of discussions with bidders as to the exact capabilities and possible variations of what is being offered. This is why, in most cases, the contracting authority considers that interaction with suppliers or contractors is necessary (a) to refine its statement of needs and present them in a common description (two-stage tendering) or (b) to define its statement of needs and invite proposals to meet them (request for proposals with dialogue).

(a) Two-stage procedure

54. Where the selection procedure is divided into two stages,[7] the initial request for proposals typically calls upon the bidders to submit proposals relating to output specifications and other characteristics of the project as well as to the proposed contractual terms. The invitation for bids would allow bidders to offer their own solutions for meeting the particular infrastructure need in accordance with defined standards of service. The proposals submitted at this stage would typically consist of solutions on the basis of a conceptual design or performance indicators without indication of financial elements, such as the expected price or level of remuneration. They shall not be considered as binding proposals and the contracting authority should not even solicit price commitment at this stage.[8]

55. To the extent the terms of the contractual arrangements are already known by the contracting authority, they should be included in the request for proposals, possibly in the form of a draft of the PPP contract. Knowledge of certain contractual terms, such as the risk allocation envisaged by the contracting authority, is important

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[7] Article 48 of the UNCITRAL Model Law on Public Procurement sets forth procedures for two-stage tendering.

[8] See *Guide to Enactment of the UNCITRAL Model Law on Procurement*, p. 188.

in order for the bidders to formulate their proposals and discuss the "bankability" of the project with potential lenders (see chapter II, "Project planning and preparation", paras. …). The initial response to those contractual terms, in particular the risk allocation envisaged by the contracting authority, may help the contracting authority reassess the feasibility of the project as originally conceived. However, it is important to distinguish between the procedure to request proposals and the negotiation of the final contract, after the project has been awarded. The purpose of this initial stage is to enable the contracting authority to formulate its requirement subsequently in a manner that enables a final competition to be carried out on the basis of a single set of parameters. The invitation of initial proposals at this stage should not lead to a negotiation of the terms of the contract prior to its final award.

56. The contracting authority may then convene a meeting of bidders to clarify questions concerning the request for proposals and accompanying documentation. The contracting authority may, at the first stage, engage in discussions with any bidder concerning any aspect of its proposal. The contracting authority should treat proposals in such a manner as to avoid the disclosure of their contents to competing bidders or any other person not expressly authorized to obtain such information. Any discussions need to be confidential and one party to the discussions should not reveal to any other person any technical, financial or other information relating to the discussions without the consent of the other party.

57. Following those discussions, the contracting authority should review and, within the limits allowed by the law, revise the initial project specifications on their technical, quality or performance aspects. In formulating those revised specifications, the contracting authority should not modify the subject matter of the project, but could delete or modify any aspect of the technical, quality or performance characteristics of the project originally set forth in the request for proposals. The contracting authority could also at this stage delete or modify any criterion for examining or evaluating proposals initially provided and adding any new criterion, if necessary as a result of changes made in the technical, quality or performance characteristics of the project. Any such deletion, modification or addition should be communicated to bidders in the invitation to submit final proposals. Bidders not wishing to submit a final proposal should be allowed to withdraw from the selection proceedings without forfeiting any security that they may have been required to provide.

(b) Request for proposals with dialogue

58. Another procedure that the contracting authority may use to select the private partner for a PPP project is the request for proposals with dialogue.[9] This is a procedure designed for the procurement of relatively complex items and services. The typical use for this method is procurement aimed at seeking innovative solutions to technical issues such as saving energy, achieving sustainable procurement, or infrastructure needs. In such cases, there may be different technical solutions: the material may vary, and may involve the use of one source of energy as opposed to another (wind vs. solar vs. fossil fuels).

59. Request for proposals with dialogue is procedurally similar to two-stage tendering, but with several distinguishing features. The method allows the technical, quality and performance characteristics and financial aspects of the contracting authority's needs to be discussed between the contracting authority and potential suppliers or contractors, again within the framework of a transparent and structured process. The process results in a request for a "best and final offer" (BAFO) to meet the contracting authority's needs, but there is no single, common set of technical specifications beyond stated minimum technical requirements. BAFOs can present a variety of technical solutions to those needs; in this sense, the suppliers and contractors are responsible for designing the technical solutions. The contracting authority examines those solutions to ascertain whether they meet its needs; evaluating them on a competitive but equal basis is a more complex procedure than in two-stage tendering.

[9] See UNCITRAL Model Law on Public Procurement, article 49.

60. In summary, the objective is to enable suppliers and contractors to understand, through the dialogue with the contracting authority, the needs of the contracting authority as outlined in its request for proposals. The dialogue, which may involve several stages, is an interaction between the contracting authority and the suppliers or contractors on both technical, quality and performance characteristics of their proposals and the financial aspects of their proposals. The dialogue may involve a discussion of the financial implications of particular technical solutions, including the price or price range. However, as in two-stage tendering, it is not intended to involve binding negotiations or bargaining from any party to the dialogue. Upon conclusion of the dialogue, the suppliers and contractors make BAFOs to meet the contracting authority's needs. BAFOs of different suppliers or contractors may be similar in some respects while significantly different in others, in particular as regards proposed technical solutions. The method therefore gives the contracting authority the opportunity to compare different technical solutions to meet its needs.

61. Methods based on this type of dialogue have proved to be beneficial to the contracting authority in the procurement of relatively complex items and services where the opportunity cost of not engaging in dialogue with suppliers or contractors is high, while the economic gains of engaging in the process are evident. In addition to the typical uses described above, they may be appropriate for example in the procurement of architectural or construction works, where there are many possible solutions to the contracting authority's needs and in which the personal skill and expertise of the supplier or contractor can be evaluated only through dialogue. The complexity need not be at the technical level: in infrastructure projects, for example, there may be different locations and types of construction as the main variables. The method has enabled the contracting authority in such situations to identify and obtain the best solution to its procurement needs.

62. The procedure itself involves two stages. At the first stage, the contracting authority issues a solicitation setting out a description of its needs expressed as terms of reference to guide suppliers or contractors in drafting their proposals. The needs can be expressed in functional, performance or output terms but are required to include minimum technical requirements. By comparison with two-stage tendering, it is not intended that the procedure will involve the contracting authority in setting out a full technical description of the subject matter of the procurement.

63. The method requires the contracting authority to issue a statement of needs with minimum technical requirements, to understand technical solutions that are proposed and to evaluate them on a comparative basis, and so may require capacity in procurement officials that is not required in other procurement methods, particularly to avoid the method's use as an alternative to appropriate preparation for the procurement. A particular risk is that the responsibility of defining procurement needs may be shifted to suppliers and contractors or the market. Although the suppliers or contractors, not the contracting authority, make proposals to meet the contracting authority's needs, they should not take a lead in defining those needs.

2. Content of the request for proposals

64. The contracting authority should invite the bidders to submit proposals with respect to the project specifications, performance indicators and contractual terms. The request for proposals should generally include all information necessary to provide a basis to enable the bidders to submit proposals that meet the needs of the contracting authority and that the contracting authority can compare in an objective and fair manner. The content and level of detail of the information provided to bidders at this stage will vary according to the type of PPP envisaged and the nature of the selection procedure used by the contracting authority. The information may be less detailed and would be typically less focused on technical aspects in cases where the contracting authority has used the procedure of request for proposals with dialogue provided for in article 49 of the UNCITRAL Model Law on Public Procurement. However, where the contracting authority has instead used a two-stage procedure, the contracting authority would already have previously issued a less detailed initial solicitation for bids without price, and engaged in discussions with the bidders whose

bids had not been rejected. Thus, at this stage, the contracting authority would have prepared a more extensive set of terms and conditions, as provided in article 48, paragraphs 2 and 3, of the UNCITRAL Model Law on Public Procurement.[10]

(a) General information to bidders

65. General information to bidders should cover, as appropriate, those items which are ordinarily included in solicitation documents or requests for proposals for the procurement of goods, construction and services.[11] Particularly important is the disclosure of the criteria to be used by the contracting authority in determining the successful proposal and the relative weight or order of importance of such criteria (see paras. …).

(i) Information on feasibility studies

66. It is advisable to include in the general information provided to bidders instructions for the preparation of feasibility studies they may be required to submit with their proposals. Such feasibility studies should not substitute for the "value for money", financial risk and other feasibility and impact assessment studies that the contracting authority is required to conduct prior to obtaining approval for the project (see chapter II, "Project planning and preparation", paras. …). The bidders' own feasibility study would typically cover, for instance, the following aspects:

(a) *Commercial viability*. In particular in projects financed on a non-recourse or limited recourse basis, it is essential to establish the need for the project outputs and to evaluate and project such needs over the proposed operational life of the project, including expected demand (for example, traffic forecasts for roads) and pricing (for example, tolls). In order to facilitate the contracting authority's examination, bidders should also describe the scenarios used to justify the commercial viability of their proposal;

(b) *Engineering design and operational feasibility*. Bidders should demonstrate the suitability of the technology they propose, including equipment and processes, to national, local and environmental conditions, the likelihood of achieving the planned performance level and the adequacy of the construction methods and schedules. This study should also define the proposed organization, methods and procedures for operating and maintaining the completed facility, and provide information on the anticipated technology development;

(c) *Financial viability*. Bidders should indicate the proposed sources of financing for the construction and operation phases, including debt capital and equity investment. While the loan and other financing agreements in most cases are not executed until after the signing of the PPP contract, the bidders should be required to submit sufficient evidence of the lenders' intention to provide the specified financing.

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[10] "2. The solicitation documents shall call upon suppliers or contractors to present, in the first stage of two-stage-tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or performance characteristics of the subject matter of the procurement, as well as to contractual terms and conditions of supply and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.

"3. The procuring entity may, in the first stage, engage in discussions with suppliers or contractors whose initial tenders have not been rejected pursuant to provisions of this Law concerning any aspect of their initial tenders. When the procuring entity engages in discussions with any supplier or contractor, it shall extend an equal opportunity to participate in discussions to all suppliers or contractors."

[11] For example, instructions for preparing and submitting proposals, including the manner, place and deadline for the submission of proposals and the period of time during which proposals shall be in effect and any requirements concerning tender securities; the means by which bidders may seek clarifications of the request for proposals, and a statement as to whether the contracting authority intends, at this stage, to convene a meeting of bidders; the place, date and time for the opening of proposals and the procedures to be followed for opening and examining proposals; the manner in which the proposals will be evaluated; the minimum requirements that proposals must meet in order to be considered responsive (see UNCITRAL Model Law on Public Procurement Law, art. 47, para. 2 and art. 49, para. 2).

In some countries, bidders are also required to indicate the expected financial internal rate of return in relation to the effective cost of capital corresponding to the financing arrangements proposed. Such information is intended to allow the contracting authority to consider the reasonableness and affordability of the proposed prices or fees to be charged by the private partner and the potential for subsequent increases therein;

(d) *Environmental impact*. This study should identify possible negative or adverse effects on the environment as a consequence of the project and indicate corrective measures that need to be taken to ensure compliance with the applicable environmental standards. Such a study should take into account, as appropriate, the relevant environmental standards of international financial institutions and of national, provincial and local authorities.

(ii) Information on bid securities

67. It is advisable for the request for proposals to indicate any requirements of the contracting authority with respect to the issuer and the nature, form, amount and other principal terms of any bid security that the bidders may be required to provide so as to cover those losses which may result from withdrawal of proposals or failure by the selected bidder to conclude a PPP contract. In order to ensure fair treatment of all bidders, requirements that refer directly or indirectly to the conduct by the bidder submitting the proposal should not relate to conduct other than withdrawal or modification of the proposal after the deadline for submission of proposals or before the deadline if so stipulated in the request for proposals; failure to achieve financial closing; failure to sign the PPP contract if required by the contracting authority to do so; and failure to provide required security for the fulfilment of the PPP contract after the proposal has been accepted or to comply with any other condition prior to signing the PPP contract specified in the request for proposals. Safeguards should be included to ensure that a bid security requirement is only imposed fairly and for the purpose intended.[12] The need for, and the terms of, a bid security should be considered in the light of the selection process chosen and, as required, adapted to its needs. For example, bid securities are not appropriate in request for proposals with dialogue, as the security would not provide a workable solution to the issue of ensuring sufficient participation in dialogue or binding suppliers or contractors as regards their evolving proposals during the dialogue stage (to be contrasted with the best and final offer stage of the procedure).[13]

(iii) Qualification of bidders

68. In the rare cases in which no pre-selection of bidders was carried out prior to the issuance of the request for proposals or when the contracting authority has retained the right to require the bidders to demonstrate again their qualifications, the request for proposals should set out the information that needs to be provided by the bidders to substantiate their qualifications (see paras. …).

(b) Project specifications and performance indicators

69. The type of PPP project, the ownership of the infrastructure and the envisaged allocation of risks and responsibilities between the public and the private sectors (see chapter II, "Project planning and preparations", paras. …) will determine whether the contracting authority has an interest in controlling the input and technical

[12] Article 17, paragraph 2 of the UNCITRAL Model Law on Public Procurement provides certain important safeguards, including, *inter alia*, the requirement that the contracting authority should make no claim to the amount of the tender security and should promptly return, or procure the return of, the tender security document, after whichever of the following that occurs earliest: (a) the expiry of the tender security; (b) the entry into force of the project agreement and the provision of a security for the performance of the contract, if such a security is required by the request for proposals; (c) the termination of the selection process without the entry into force of a project agreement; or (d) the withdrawal of the proposal prior to the deadline for the submission of proposals, unless the request for proposals stipulates that no such withdrawal is permitted.

[13] *Guide* to enactment of the UNCITRAL Model Law on Public Procurement, p. 99, paragraph 5.

specifications of the works that the private partner will carry out, or whether it prefers to leave it for bidders to propose their own options for best meeting the needs of the contracting authority. This, in turn, will have a bearing on the contracting authority's decision as to whether it will conduct a two-staged tendering with a view to arriving at a common set of terms, technical, quality or performance characteristics against which the bidders will be asked to submit final proposals, or whether it will leave the bidders greater freedom to develop their own solutions. Ideally, the contracting authority will have thoroughly considered these options during its preparations for bidding (see chapter II, "Project planning and preparations", paras. …), as they are essential for determining the appropriate balance between the input and output elements in the project description.

70. It is generally advisable for the contracting authority to bear in mind the long-term needs of the project and to formulate its specifications in a manner that allows it to obtain sufficient information to select the bidder that offers the highest quality of services under the best economic terms.

71. Thus, the contracting authority may find it useful to formulate the project specifications in a way that defines adequately the output and performance required without being overly prescriptive in how that is to be achieved. Project specifications and performance indicators typically cover items such as the following:

(a) *Description of project and expected output*. If the services require specific buildings, such as a transport terminal or an airport, the contracting authority may wish to provide no more than outline planning concepts for the division of the site into usage zones on an illustrative basis, instead of plans indicating the location and size of individual buildings, as would normally be the case in traditional procurement of construction services. However, where in the judgement of the contracting authority it is essential for the bidders to provide detailed technical specifications, the request for proposals should include, at least, the following information: description of the works and services to be performed, including technical specifications, plans, drawings and designs; time schedule for the execution of works and provision of services; and the technical requirements for the operation and maintenance of the facility;

(b) *Minimum applicable design and performance standards, including appropriate environmental standards*. Performance standards are typically formulated in terms of the desired quantity and quality of the outputs of the facility. Proposals that deviate from the relevant performance standards should be regarded as non-responsive;

(c) *Quality of services*. For projects involving the provision of public services, the performance indicators should include a description of the services to be provided and the relevant standards of quality to be used by the contracting authority in the evaluation of the proposals. Where appropriate, reference should be made to any general obligations of public service providers as regards expansion and continuity of the service so as to meet the demand of the community or territory served, ensuring non-discriminatory availability of services to the users and granting non-discriminatory access of other service providers to any public infrastructure network operated by the concessionaire, under the terms and conditions established in the PPP contract (see chapter IV, "PPP implementation: legal framework and PPP contract", paras. …).

72. Bidders should be instructed to provide the information necessary in order for the contracting authority to evaluate the technical soundness of proposals, their operational feasibility and responsiveness to standards of quality and technical requirements, including the following information:

(a) Preliminary engineering design, including proposed schedule of works;

(b) Project cost, including operating and maintenance cost requirements and proposed financing plan (for example, proposed equity contribution or debt);

(c) The proposed organization, methods and procedures for the operation and maintenance of the project under bidding;

(d) Description of quality of services.

73. Each of the above-mentioned performance indicators may require the submission of additional information by the bidders, according to the project being awarded. For the award of a PPP contract for distribution of electricity in a specific region, for example, indicators may include minimum technical standards such as: (a) specified voltage (and frequency) fluctuation at the consumer level; (b) duration of outages (expressed in hours per year); (c) frequency of outages (expressed in a number per year); (d) losses; (e) number of days to connect a new customer; and (f) commercial standards for customer relationship (for example, number of days to pay bills, to reconnect installations or to respond to customers' complaints).

(c) Contractual terms

74. Following from the "value-for-money" and other preliminary studies conducted at the stage of project planning and feasibility assessment (see chapter II, "Project planning and preparation", paras. …) the contracting authority should be in a position to indicate in the bidding documents how it expects to allocate the project risks (see also chaps. II, "Project planning and preparation", and IV, "PPP implementation: legal framework and PPP contract"). This is important in order to set the terms of debate for dialogue and clarifications during the selection process (see paras. …), but also to establish boundaries for fine-tuning of the contract, after selection of the private partner (see paras. …). If risk allocation is left entirely open, the bidders may respond by seeking to minimize the risks they accept, which may frustrate the purpose of seeking private investment for developing the project.

75. Furthermore, the request of proposals should contain information on essential elements of the contractual arrangements envisaged by the contracting authority, including any clauses of the PPP contract that the contracting authority considers to be non-negotiable. Essential terms typically included in the request for proposals at this stage may include matters such as:

(a) The duration of the contract or invitations to bidders to submit proposals for the duration of the contract;

(b) Formulas and indices to be used in adjustments to prices;

(c) Government support and investment incentives, if any;

(d) Bonding requirements;

(e) Requirements of regulatory agencies, if any;

(f) Monetary rules and regulations governing foreign exchange remittances;

(g) Revenue-sharing arrangements, if any;

(h) Indication, as appropriate, of the categories of assets that the private partner would be required to transfer to the contracting authority or make available to a successor private partner at the end of the project period;

(i) Where a new private partner is being selected to operate an existing infrastructure, a description of the assets and property that will be made available to the private partner;

(j) The possible alternative, supplementary or ancillary revenue sources (for example, concessions for exploitation of existing infrastructure), if any, that may be offered to the successful bidder.

76. Bidders should be instructed to provide the information necessary in order for the contracting authority to evaluate the financial and commercial elements of the proposals and their responsiveness to the proposed contractual terms. The financial proposals should normally include the following information:

(a) For projects in which the private partner's income is expected to consist primarily of tolls, fees or charges paid by the customers or users of the infrastructure facility (concession-type PPP), the financial proposal should indicate the proposed price structure. For projects in which the private partner's income is expected to

consist primarily of payments made by the contracting authority or another public authority to amortize the private partner's investment or by the addition of such payments from the public partner and the tolls, fees or charges paid by the customers or users, the financial proposal should indicate the proposed amortization payments and repayment period as well as the repartition foreseen between the public partner and the users contribution;

(b) The present value of the proposed prices or direct payments based on the discounting rate and foreign exchange rate prescribed in the bidding documents;

(c) If it is estimated that the project would require financial support by the Government, the level of such support, including, as appropriate, any subsidy or guarantee expected from the Government or the contracting authority;

(d) The extent of risks assumed by the bidders during the construction and operation phase, including unforeseen events, insurance, equity investment and other guarantees against those risks.

77. In order to limit and establish clearly the scope of the negotiations that will take place during the dialogue following the evaluation of proposals (see paras. …), the final request for proposals should indicate which are the terms of the PPP contract that are deemed not negotiable.

78. It is useful for the contracting authority to require that the final proposals submitted by the bidders contain evidence showing the comfort of the bidder's main lenders with the proposed commercial terms and allocation of risks, as outlined in the request for proposals. Such a requirement might play a useful role in resisting pressures to reopen commercial terms at the stage of final negotiations. In some countries (see below paras. …), bidders are required to initial and return to the contracting authority the draft PPP contract together with their final proposals as a confirmation of their acceptance of all terms in respect of which they did not propose specific amendments.

3. Clarifications and modifications

79. The right of the contracting authority to modify the request for proposals is important in order to enable it to obtain what is required to meet its needs. It is therefore advisable to authorize the contracting authority, whether on its own initiative or as a result of a request for clarification by a bidder, to modify the request for proposals by issuing an addendum at any time prior to the deadline for submission of proposals. However, when amendments are made that would reasonably require bidders to spend additional time preparing their proposals, such additional time should be granted by extending the deadline for submission of proposals accordingly. Moreover, the contracting authority should avoid material changes to the selection process, in particular those likely to affect the pool of potential bidders, such as when the project characteristics have changed so significantly that the original documents no longer put prospective suppliers or contractors fairly on notice of the true requirements of the contracting. Where such a material change is necessary, the contracting entity may have to cancel and re-start the selection process.[14]

80. Generally, clarifications, together with the questions that gave rise to the clarifications, and modifications must be communicated promptly by the contracting authority to all bidders to whom the contracting authority provided the request for proposals. If the contracting authority convenes a meeting of bidders, it should prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the request for proposals and its responses to those requests and should send copies of the minutes to the bidders.

4. Evaluation criteria

81. As a general principle, it is important for the contracting authority to achieve an appropriate balance between evaluation criteria relating to the physical investment

[14] *Guide* to enactment of the UNCITRAL Model Law on Public Procurement, p. 95, paragraph 4.

(for example, the construction works) and evaluation criteria relating to the operation and maintenance of the infrastructure and the quality of services to be provided by the private partner. Adequate emphasis should be given to the long-term needs of the contracting authority, in particular the need to ensure the continuous delivery of the service at the required level of quality and safety.

(a) Evaluation of technical aspects of the proposals

82. Technical evaluation criteria are designed to facilitate the assessment of the technical, operational, environmental and financial viability of the proposal vis-à-vis the specifications, indicators and requirements prescribed in the request for proposals. To the extent practicable, the technical criteria applied by the contracting authority should be objective and quantifiable, so as to enable proposals to be evaluated objectively and compared on a common basis. This reduces the scope for discretionary or arbitrary decisions. Regulations governing the selection process might spell out how such factors are to be formulated and applied. Technical proposals for PPPs are usually evaluated in accordance with the following criteria:

(a) *Technical soundness*. Where the contracting authority has established minimum engineering design and performance specifications or standards, the basic design of the project should conform to those specifications or standards. Bidders should be required to demonstrate the soundness of the proposed construction methods and schedules;

(b) *Operational feasibility*. The proposed organization, methods and procedures for operating and maintaining the completed facility must be well defined, should conform to the prescribed performance standards and should be shown to be workable;

(c) *Quality of services*. Evaluation criteria used by the contracting authority should include an analysis of the manner in which the bidders undertake to maintain and expand the service, including the guarantees offered for ensuring its continuity;

(d) *Environmental standards*. The proposed design and the technology of the project to be used should be in accordance with the environmental standards set forth in the request for proposals. Any negative or adverse effects on the environment as a consequence of the project as proposed by the bidders should be properly identified, including the corresponding corrective or mitigating measures;

(e) *Enhancements*. These may include other terms the author of the project may offer to make the proposals more attractive, such as revenue-sharing with the contracting authority, fewer governmental guarantees or reduction in the level of government support;

(f) *Potential for social and economic development*. Under this criterion, the contracting authority may take into account the potential for social and economic development offered by the bidders, including benefits to underprivileged groups of persons and businesses, domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills;

(g) *Qualification of bidders*. The contracting authority should have the right to re-confirm the qualification of bidders at the evaluation stage.

(b) Evaluation of financial and commercial aspects of the proposals

83. In addition to criteria for the technical evaluation of proposals, the contracting authority needs to define criteria for assessing and comparing the financial proposals. Criteria typically used for the evaluation and comparison of the financial and commercial proposals include, as appropriate, the following:

(a) *The present value of the proposed tolls, fees, unit prices and other charges over the contract period.* For projects in which the private partner's income is expected to consist primarily of tolls, fees or charges paid by the customers or users

of the infrastructure facility, the assessment and comparison of the financial elements of the final proposals is typically based on the present value of the proposed tolls, fees, rentals and other charges over the contract period according to the prescribed minimum design and performance standards;

(b) *The present value of the proposed direct payments by the contracting authority, if any.* For projects in which the private partner's income is expected to consist primarily of payments made by the contracting authority to amortize the private partner's investment, the assessment and comparison of the financial elements of the final proposals is typically based on the present value of the proposed schedule of amortization payments for the facility to be constructed according to the prescribed minimum design and performance standards, plans and specifications;

(c) *The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs.* It is advisable for the contracting authority to include these items among the evaluation criteria so as to permit an assessment of the financial feasibility of the proposals;

(d) *The extent of financial support, if any, expected from the Government*. Government support measures expected or required by the bidders should be included among the evaluation criteria as they may entail significant immediate or contingent financial liability for the Government (see chapter II, "Project planning and preparation", paras. 30–60);

(e) *Soundness of the proposed financial arrangements.* The contracting authority should assess whether the proposed financing plan, including the proposed ratio between equity investment and debt, is adequate to meet the construction, operating and maintenance costs of the project;

(f) *The extent of acceptance of the proposed contractual terms.* Proposals for changes or modifications in the contractual terms circulated with the request for proposals (such as in those dealing with risk allocation or compensation payments) may have substantial financial implications for the contracting authority and should be carefully examined.

84. A comparison of the proposed tolls, fees, unit prices or other charges is an important factor for ensuring objectiveness and transparency in the choice between equally responsive proposals. However, it is important for the contracting authority to consider carefully the relative weight of this criterion in the evaluation process. The notion of "price" usually does not have the same value for the award of PPP contracts as it has in the procurement of goods and services. Indeed, the remuneration of the private partner is often the combined result of charges paid by the users, ancillary revenue sources and direct subsidies or payments made by the public entity awarding the contract.

85. It flows from the above that, while the unit price for the expected output retains its role as an important element of comparison of proposals, it may not always be regarded as the most important factor. Of particular importance is the overall assessment of the financial feasibility of the proposals since it allows the contracting authority to consider the bidders' ability to carry out the project and the likelihood of subsequent increases in the proposed prices. This is important with a view to avoiding project awards to bidders that offer attractive but unrealistically low prices in the expectation of being able to raise such prices once a contract is awarded.

86. It is important for the contracting authority to disclose the relative weight to be accorded to each evaluation criterion and the manner in which criteria are to be applied in the evaluation of proposals. Two possible approaches might be used to reach an appropriate balance between financial and technical aspects of the proposals. One possible approach is to consider as most advantageous the proposal that obtains the highest combined rating in respect of both price and non-price evaluation criteria. Alternatively, the price proposed for the output (for example, the water or electricity price, the level of tolls, the maintenance charges or rental fee payable by the

contracting authority) might be the deciding factor in establishing the winning proposal among the responsive proposals.

5. Submission and opening of proposals

87. Proposals should be required to be submitted in writing, signed and placed in sealed envelopes. Where the request for proposals accepts submissions by electronic means, it should require the bidders to submit their proposals in a manner that is capable of being displayed to the contracting authority and that offers reliable assurance as to the integrity of the information since the time when it was first generated in its final form.[15] A proposal received by the contracting authority after the deadline for the submission of proposals should not be opened and should be returned to the bidder that submitted it. For the purpose of ensuring transparency, national laws often prescribe formal procedures for the opening of proposals, usually at a time previously specified in the request for proposals, and require that the bidders that have submitted proposals, or their representatives, be permitted by the contracting authority to be present at the opening of the proposals or to receive confirmation that the proposal was opened guaranteeing integrity requirements. Such a requirement helps to minimize the risk that the proposals might be altered or otherwise tampered with and represents an important guarantee of the integrity of the proceedings.

88. In view of the complexity of PPP projects and the variety of evaluation criteria usually applied in the award of a project, it may be advisable for the contracting authority to apply a two-step evaluation process whereby non-financial criteria would be taken into consideration separately from, and perhaps before, financial criteria so as to avoid situations where undue weight would be given to certain elements of the financial criteria (such as the unit price) to the detriment of the non-financial criteria.

89. To that end, in some countries bidders are required to formulate and submit their technical and financial proposals in two separate envelopes. The two-envelope system is sometimes used because it permits the contracting authority to evaluate the technical quality of proposals without being influenced by their financial components. However, the method has been criticized as being contrary to the objective of economy in the award of public contracts. In particular, there is said to be a danger that, by selecting proposals initially on the basis of technical merit alone and without reference to price, a contracting authority might be tempted to select, upon the opening of the first envelope, proposals offering technically superior works and to reject proposals offering less sophisticated solutions that nevertheless meet the contracting authority's needs at an overall lower cost.

90. As an alternative to the use of a two-envelope system, the contracting authorities may require both technical and financial proposals to be contained in one single proposal, but structure their evaluation in two stages. At an initial stage, the contracting authority typically establishes a threshold with respect to quality and technical aspects to be reflected in the technical proposals in accordance with the criteria as set out in the request for proposals, and rates each technical proposal in accordance with such criteria and the relative weight and manner of application of those criteria as set forth in the request for proposals. The contracting authority then compares the financial and commercial proposals that have attained a rating at or above the threshold. When the technical and financial proposals are to be evaluated consecutively, the contracting authority should initially ascertain whether the technical proposals are prima facie responsive to the request for proposals (that is, whether they cover all items required to be addressed in the technical proposals). Incomplete proposals, as well as proposals that deviate from the request for proposals, should be rejected at this stage. While the contracting authority may ask bidders for clarifications of their proposals, no change in a matter of substance in the proposal, including changes aimed at making a non-responsive proposal responsive, should be sought, offered or permitted at this stage.

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[15] See UNCITRAL Model Law on Electronic Commerce, article 8, paragraph 1.

6. Dialogue with bidders

91. Where the contracting authority has used a two-stage tendering procedure of the type set forth in article 48 of the UNCITRAL Model Law on Public Procurement, the contracting authority, upon receipt of the final proposals, would proceed to their evaluation and ranking with a view to finalizing the PPP contract (see below, paras. …). Where, however, the contracting authority has used a request for proposals with dialogue of the type provided for in article 49 of the UNCITRAL Model Law on Public Procurement, it would, at this stage, engage in a dialogue with the responsive bidders. Article 49, paragraph 8, of the UNCITRAL Model Law on Public Procurement, sets out two requirements for the format of dialogue: that it should be held on a concurrent basis and that the same representatives of the contracting authority should be involved to ensure consistent results.

92. The dialogue may involve several rounds or phases. At the end of each round or phase, the contracting authority may refine its needs and give the participating suppliers or contractors a chance to modify their proposals in the light of those refined needs and the questions and comments put forward by the contracting authority during dialogue. During the course of the dialogue, the contracting authority should not modify the subject matter of the procurement, any qualification or evaluation criterion, any minimum requirements established pursuant to article 49, paragraph 2 (f), of the UNCITRAL Model Law on Public Procurement, any element of the description of the PPP project or any term or condition of the PPP contract that is not subject to the dialogue as specified in the request for proposals. Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that is communicated by the contracting authority to a supplier or contractor should be communicated at the same time and on an equal basis to all other participating suppliers or contractors, unless such information is specific or exclusive to that supplier or contractor or such communication would be in breach of the confidentiality provisions.

93. Following the dialogue, the contracting authority should request all suppliers or contractors remaining in the proceedings to present a best and final offer with respect to all aspects of their proposals. The request should be in writing and specify the manner, place and deadline for presenting best and final offers. One of the main distinct features of this procurement method is the absence of any complete single set of terms and conditions of the procurement beyond the minimum requirements against which final submissions are evaluated.

7. Final negotiations and contract award

94. The award committee should rate the technical and financial elements of each proposal in accordance with the predisclosed rating systems for the technical evaluation criteria and specify in writing the reasons for its rating. In order to promote the transparency of the selection process and to avoid improper use of non-price evaluation criteria, a detailed justification may be particularly important where the awarding committee recommends selecting a proposal based on technical aspects rather than on the price. The contracting authority should rank all responsive proposals on the basis of the evaluation criteria set forth in the request for proposals.

(a) Two-stage procedure

95. Where the contracting authority has used a two-stage procedure of the type set forth in article 48 of the UNCITRAL Model Law on Public Procurement, the contracting authority would at this stage invite the best-rated bidder for final negotiation of certain elements of the PPP contract. If two or more proposals obtain the highest rating, or if there is only an insignificant difference in the rating of two or more proposals, the contracting authority should invite for negotiations all the bidders that have obtained essentially the same rating. The final negotiations should be limited to fixing the final details of the transaction documentation and satisfying the reasonable requirements of the selected bidder's lenders. One particular problem faced by contracting authorities is the danger that the negotiations with the selected bidder might lead to pressures to amend, to the detriment of the Government or the

consumers, the price or risk allocation originally contained in the proposal. Changes in essential elements of the proposal should not be permitted, as they may distort the assumptions on the basis of which the proposals were submitted and rated. Therefore, the negotiations at this stage may not concern those terms of the contract which were deemed not negotiable in the final request for proposals (see para. …). The risk of reopening commercial terms at this late stage could be further minimized by insisting that the selected bidder's lenders indicate their comfort with the risk allocation embodied in their bid at a stage where there is competition among bidders (see para. …). The contracting authority's financial advisers might contribute to this process by advising whether bidders' proposals are realistic and what levels of financial commitment are appropriate at each stage. The process of reaching financial close can itself be quite lengthy.

96. The contracting authority should inform the remaining responsive bidders that they may be considered for negotiation if the negotiations with the bidder with better ratings do not result in a PPP contract. If it becomes apparent to the contracting authority that the negotiations with the invited bidder will not result in a PPP contract, the contracting authority should inform that bidder that it is terminating the negotiations and then invite for negotiations the next bidder on the basis of its ranking until it arrives at a PPP contract or rejects all remaining proposals. To avoid the possibility of abuse and unnecessary delay, the contracting authority should not reopen negotiations with any bidder with whom they have already been terminated.

(b) Request for proposals with dialogue

97. As a general rule, no negotiations with bidders would take place where the contracting authority has used a request for proposals with dialogue of the type provided for in article 49 of the UNCITRAL Model Law on Public Procurement. Indeed article 49, paragraph 12, of the UNCITRAL Model Law on Public Procurement expressly provides that "no negotiations shall take place between the contracting authority and suppliers or contractors with respect to their best and final offers." The rationale for this strict prohibition is that the dialogue phase would have already afforded ample opportunity for the bidders to offer improvements on all aspects of their proposals. The "best-and-final-offer" stage puts an end to the dialogue stage and freezes all the specifications and contract terms offered by bidders so as to restrict an undesirable situation in which the contracting authority uses the offer made by one bidder to pressure another, in particular as regards the price offered. Otherwise, in anticipation of such pressure, bidders may be led to raise the prices offered, and there is a risk to the integrity of the process.[16]

D. Contract award without competitive procedures

98. The *Guide* strongly recommends the use of competitive, structured procedures for the award of PPP contracts, as such procedures are widely recognized as being best suited for promoting the objectives of economy and efficiency ("value for money"), integrity and transparency (see chapter I, "General legal and institutional framework", paras. …; see also above, paras. …). At the same time, the contract award procedures recommended by the *Guide* avoid the rigidity that characterize some open procedures (such as traditional tendering for goods and services) and afford the contracting authority ample flexibility for choosing the operator who best suits its need, in terms of professional qualifications, financial strength, ability to ensure the continuity of the service, equal treatment of the users and quality of the proposal.

99. Direct negotiations do not ensure the level of transparency and objectivity that can be achieved by more structured competitive procedures. Moreover, in some countries there might be concerns that the higher level of discretion in those negotiations might carry with it a higher risk of abusive or corrupt practices. In view of the above, the *Guide* strongly recommends that the law should prescribe the use of

[16] *Guide* to enactment of the UNCITRAL Model Law on Public Procurement, p. 209, paragraph 27.

competitive selection procedures as a rule for the award of PPP contracts and to reserve direct negotiations (i.e. without prior recourse to competitive selection procedures of the type described herein) to exceptional and objectively justifiable situations, and subject to procedures to ensure transparency and fairness in the conduct of the selection process.

1. Authorizing circumstances

100. For purposes of transparency as well as for ensuring discipline in the award of PPP contracts, the law should identify the exceptional circumstances under which the contracting authority may be authorized to select the private partner without using competitive selection procedures. They may include, for example, the following:

(a) When there is an urgent need for ensuring immediate provision of the service and engaging in a competitive selection procedure would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part. Such an exceptional authorization may be needed, for instance, in cases of interruption in the provision of a given service or where an incumbent private partner fails to provide the service at acceptable standards or if the PPP contract is rescinded by the contracting authority, when engaging in a competitive selection procedure would be impractical in view of the urgent need to ensure the continuity of the service;

(b) In the case of projects of short duration and with an anticipated initial investment value not exceeding a specified low amount;

(c) Reasons of national defence or security;

(d) Cases where there is only one source capable of providing the required service (for example, because it can be provided only by the use of patented technology or unique know-how) including certain cases of unsolicited proposals (see paras. …);

(e) When an invitation to the pre-selection proceedings or a request for proposals has been issued, but no applications or proposals were submitted or all proposals were rejected and, in the judgement of the contracting authority, issuing a new request for proposals would be unlikely to result in a project award. However, in order to reduce the risk of abuse in changing the selection method, the contracting authority should only be authorized to award a PPP contract without using competitive selection procedures when such a possibility was expressly provided for in the original request for proposals.

2. Measures to enhance transparency in the award of contracts without competitive procedures

101. Procedures to be followed in procurement through negotiation outside structured competitive procedures are typically characterized by a higher degree of flexibility than the procedures applied to other methods of procurement. Few rules and procedures are established to govern the process by which the parties negotiate and conclude their contract. In some countries, procurement laws allow contracting authorities virtually unrestricted freedom to conduct negotiations as they see fit. The laws of other countries establish a procedural framework for negotiation designed to maintain fairness and objectivity and to bolster competition by encouraging participation of bidders. Provisions on procedures for selection through negotiation address a variety of issues discussed below, in particular, requirements for approval of the contracting authority's decision to select the private partner through negotiation, selection of negotiating partners, criteria for comparison and evaluation of offers, and recording of the selection proceedings.

(a) Approval

102. A threshold requirement found in many countries is that a contracting authority must obtain the approval of a higher authority prior to engaging in selection through negotiations outside structured competitive procedures. Such provisions generally

require the application for approval to be in writing and to set forth the grounds necessitating the use of negotiation. Approval requirements are intended, in particular, to ensure that the contract award without competitive procedures is used only in appropriate circumstances.

(b) Selection of negotiating partners

103. In order to make the award proceedings as competitive as possible, it is advisable to require the contracting authority to engage in negotiations with as many companies judged susceptible of meeting the need as circumstances permit. Beyond such a general provision, there is no specific provision in the laws of some countries on the minimum number of contractors or suppliers with whom the contracting authority is to negotiate. The laws of some other countries, however, require the contracting authority, where practicable, to negotiate with, or to solicit proposals from, a minimum number of bidders (three being as well a common number). The contracting authority is permitted to negotiate with a smaller number in certain circumstances, in particular, when fewer than the minimum number of potential bidders were available.

104. For the purpose of enhancing transparency, it is also advisable to require a notice of the negotiation proceedings to be given to bidders in a specified manner. For example, the contracting authority may be required to publish the notice in a particular publication normally used for that purpose. Such notice requirements are intended to bring the procurement proceedings to the attention of a wider range of bidders than might otherwise be the case, thereby promoting competition. Given the magnitude of most infrastructure projects, the notice should normally contain certain minimum information (a description of the project, for example, or qualification requirements) and should be issued in sufficient time to allow bidders to prepare offers. Generally the formal eligibility requirements applicable to bidders in competitive selection proceedings should also apply in negotiation proceedings.

105. In some countries, notice requirements are waived when the contracting authority resorts to negotiation following unsuccessful bidding proceedings (see para. … (e)), if all qualified bidders are permitted to participate in the negotiations or if no bids at all were received. Under the Model Law on Public Procurement, the public notice can be waived only in case of urgency, emergency or risk of disclosure of classified information.

(c) Criteria for comparison and evaluation of offers

106. Another useful measure to enhance the transparency and effectiveness of negotiations outside structured competitive procedures consists of establishing general criteria that proposals are requested to meet (for example, general performance objectives or output specifications), as well as criteria for evaluating offers made during the negotiations and for selecting the winning private partner (for example, the technical merit of an offer, prices, operating and maintenance costs and the profitability and development potential of the PPP contract). Where more than one proposal is received, some elements of competition may be usefully introduced in the negotiations. The contracting authority should identify the proposals that appear to meet those criteria and engage in discussions with the author of each such proposal in order to refine and improve upon the proposal to the point where it is satisfactory to the contracting authority. The price of each proposal could enter into those discussions. When the proposals have been finalized, it may be advisable for the contracting authority to seek a best and final offer on the basis of the clarified proposals. It is recommendable that bidders should include with their final offer evidence that the risk allocation that the offer embodies would be acceptable to their proposed lenders. From the best and final offers received, the preferred bidder can then be chosen. The project would then be awarded to the party offering the “most economical” or “most advantageous” proposal in accordance with the criteria for selecting the winning private partner set forth in the invitation to negotiate.

(d) Notice of contract award

107. The contracting authority should be required to establish a record of the selection proceedings (see paras. …) and should publish a notice of the contract award, which, except in cases involving national defence or national security interests, should disclose, in particular, the specific circumstances and reasons for the award of the contract without a proper competitive procedure (see para. …). In many countries, it has become a well-established practice to publish the full PPP contract in the interest of promoting transparency and accountability.

E. Unsolicited proposals

108. PPP projects sometimes result from proposals submitted directly by the private sector. These proposals are usually referred to as "unsolicited proposals", since they do not relate to a project for which the public sector has initiated a contract award process. Unsolicited proposals may result from the identification by the private sector of an infrastructure need that may be met by a PPP. They may also involve innovative proposals for infrastructure management and offer the potential for transfer of new technology to the host country. However, they may give rise to various concerns of transparency, accountability and value for money. Countries that nevertheless wish to allow the consideration of unsolicited proposals should carefully ponder those concerns and devise appropriate safeguards.

1. Policy considerations

109. One possible reason sometimes cited for allowing the consideration of unsolicited proposals is to provide an incentive for the private sector to submit proposals involving the use of new concepts or technologies to meet the contracting authority's needs. By the very nature of competitive selection procedures, no bidder has an assurance of being awarded the project, unless it wins the competition. The cost of formulating proposals for large infrastructure projects may be a deterrent for companies concerned about their ability to match proposals submitted by competing bidders. In contrast, the private sector may see an incentive for the submission of unsolicited proposals in rules that allow a contracting authority to negotiate such proposals directly with their authors. The contracting authority, too, may have an interest in the possibility of engaging in direct negotiations in order to stimulate the private sector to formulate innovative proposals for infrastructure development.

110. At the same time, however, the award of projects pursuant to unsolicited proposals and without competition from other bidders may expose the Government to serious criticism. Best practices of good governance require public authorities to anticipate their infrastructure needs and systematically plan for meeting them. They should build the capability to conceive and plan their own projects, rather than relying on the private sector to initiate them (see Chapter II, "Project planning and preparation", paras. …). In addition, prospective lenders, including multilateral and bilateral financial institutions, may have difficulty in lending or providing guarantees for projects that have not been the subject of competitive selection proceedings. They may fear the possibility of challenge and cancellation by future Governments (for example, because the project award may be deemed subsequently to have been the result of favouritism or because the procedure did not provide objective parameters for comparing prices, technical elements and the overall effectiveness of the project) or legal or political challenge by other interested parties, such as customers dissatisfied with increased prices or competing companies alleging unjust exclusion from a competitive selection procedure.

111. These are a few reasons why countries have preferred not to regulate unsolicited proposals or to expressly prohibit them. Countries that nevertheless wish to permit the consideration of unsolicited proposals should consider the need for, and the desirability of, devising special procedures for evaluating and handling unsolicited proposals so as to avoid their use to circumvent public investment management mechanisms. For that purpose, it may be useful to analyse two situations most

commonly mentioned in connection with unsolicited proposals, namely, unsolicited proposals claiming to involve the use of new concepts or technologies to address the contracting authority's infrastructure needs and unsolicited proposals claiming to address an infrastructure need not already identified by the contracting authority.

(a) Unsolicited proposals claiming to involve the use of new concepts or technologies to address the contracting authority's infrastructure needs

112. Generally, for projects that require the use of some kind of industrial process or method, the contracting authority would have an interest in stimulating the submission of proposals incorporating the most advanced processes, designs, methodologies or engineering concepts with demonstrated ability to enhance the project's outputs (by significantly reducing construction costs, for example, accelerating project execution, improving safety, enhancing project performance, extending economic life, reducing costs of facility maintenance and operations or reducing negative environmental impact or disruptions during either the construction or the operational phase of the project).

113. The contracting authority's legitimate interests might also be achieved through appropriately modified competitive selection procedures instead of a special set of rules for handling unsolicited proposals. For instance, if the contracting authority is using selection procedures that emphasize the expected output of the project, without being prescriptive about the manner in which that output is to be achieved (see paras. …), the bidders would have sufficient flexibility to offer their own proprietary processes or methods. In such a situation, the fact that each of the bidders has its own proprietary processes or methods would not pose an obstacle to competition, provided that all the proposed methods are technically capable of generating the output expected by the contracting authority.

114. Adding the necessary flexibility to the competitive selection procedures may in these cases be a more satisfactory solution than devising special non-competitive procedures for dealing with proposals claiming to involve new concepts or technologies. With the possible exception of proprietary concepts or technologies whose uniqueness may be ascertained on the basis of the existing intellectual property rights, a contracting authority may face considerable difficulties in defining what constitutes a new concept or technology. Such a determination may require the services of costly independent experts, possibly from outside the host country, to avoid allegations of bias. A determination that a project involves a novel concept or technology might also be met by claims from other interested companies also claiming to have appropriate new technologies.

115. However, a somewhat different situation may arise if the uniqueness of the proposal or its innovative aspects are such that it would not be possible to implement the project without using a process, design, methodology or engineering concept for which the proponent or its partners possess exclusive rights, either worldwide or regionally. The existence of intellectual property rights in relation to a method or technology may indeed reduce or eliminate the scope for meaningful competition. This is why the procurement laws of most countries authorize procuring entities to engage in single-source procurement if the goods, construction or services are available only from a particular supplier or contractor or if the particular supplier or contractor has exclusive rights over the goods, construction or services and no reasonable alternative or substitute exists (see the UNCITRAL Model Law on Public Procurement, art. 30, para. 5).

116. In such a case, it would be appropriate to authorize the contracting authority to negotiate the execution of the project directly with the proponent of the unsolicited proposal. The difficulty, of course, would be how to establish, with the necessary degree of objectivity and transparency, that there exists no reasonable alternative or substitute to the method or technology contemplated in the unsolicited proposal. For that purpose, it is advisable for the contracting authority to establish procedures for obtaining elements of comparison for the unsolicited proposal. In this situation, the use of provisions set for in the request for proposals with dialogue under the

UNCITRAL Model Law on Public Procurement is in line with the need to ensure a fair and objective treatment of the unsolicited proposals.

(b) Unsolicited proposals claiming to address an infrastructure need not already identified by the contracting authority

117. The merit of unsolicited proposals of this type consists of the identification of a potential for infrastructure development that has not been considered by the authorities of the host country. However, in and of itself this circumstance should not normally provide sufficient justification for a directly negotiated project award in which the contracting authority has no objective assurance that it has obtained the most advantageous solution for meeting its needs. An unsolicited proposal, however well justified, should not substitute for the Government's own assessment of its infrastructure needs and the planning and assessment measures required by law (see chapter II, "Project planning and preparation", paras. …).

2. Procedures for handling unsolicited proposals

118. In the light of the above considerations, it is advisable for the contracting authority to establish transparent procedures for determining whether an unsolicited proposal meets the required conditions and whether it is in the contracting authority's interest to pursue it.

(a) Restrictions to the receivability of unsolicited proposals

119. In the interest of ensuring proper accountability for public expenditures, some domestic laws provide that no unsolicited proposal may be considered if the execution of the project would require significant financial commitments from the contracting authority or other public authority such as guarantees, subsidies or equity participation. The reason for such a limitation is that the procedures for handling unsolicited proposals are typically less elaborate than ordinary selection procedures and may not ensure the same level of transparency and competition that would otherwise be achieved. However, there may be reasons for allowing some flexibility in the application of this condition. In some countries, the presence of government support other than direct government guarantees, subsidy or equity participation (for example, the sale or lease of public property to authors of project proposals) does not necessarily disqualify a proposal from being treated and accepted as an unsolicited proposal.

120. Another condition for consideration of an unsolicited proposal is that it should relate to a project for which no selection procedures have been initiated or announced by the contracting authority. The rationale for handling an unsolicited proposal without using a competitive selection procedure is to provide an incentive for the private sector to identify new or unanticipated infrastructure needs or to formulate innovative proposals for meeting those needs. This justification may no longer be valid if the project has already been identified by the authorities of the host country and the private sector is merely proposing a technical solution different from the one envisaged by the contracting authority. In such a case, the contracting authority could still take advantage of innovative solutions by applying a selection procedure involving dialogue with bidders (see paras. …). However, it would not be consistent with the principle of fairness in the award of public contracts to entertain unsolicited proposals outside selection proceedings already started or announced.

(b) Procedures for determining the admissibility of unsolicited proposals

121. A company or group of companies that approaches the Government with a suggestion for private infrastructure development should be requested to submit an initial proposal containing sufficient information to allow the contracting authority to make a prima facie assessment of whether the conditions for handling unsolicited proposals are met, in particular whether the proposed project is in the public interest. The initial proposal should include, for instance, the following information: a statement of the author's previous project experience and financial standing; a description of the project (type of project, location, regional impact, proposed

investment, operational costs, financial assessment and resources needed from the Government or third parties); details about the site (ownership and whether land or other property will have to be expropriated); and a description of the service and the works.

122. Following a preliminary examination, the contracting authority should inform the company, within a reasonably short period, whether or not there is a potential public interest in the project. If the contracting authority reacts positively to the project, the company should be invited to submit a formal proposal, which, in addition to the items covered in the initial proposal, should contain a technical and economic feasibility study (including characteristics, costs and benefits) and an environmental impact study. Furthermore, the author of the proposal should be required to submit satisfactory information regarding the concept or technology contemplated in the proposal. The information disclosed should be in sufficient detail to allow the contracting authority to evaluate the concept or technology properly and to determine whether it meets the required conditions and is likely to be successfully implemented on the scale of the proposed project. The company submitting the unsolicited proposal should retain title to all documents submitted throughout the procedure and those documents should be returned to it in the event the proposal is rejected.

123. Once all the required information is provided by the author of the proposal, the contracting authority should decide, within a reasonably short period, whether it intends to pursue the project and, if so, what procedure will be used. Choice of the appropriate procedure should be made on the basis of the contracting authority's preliminary determination as to whether or not the implementation of the project would be possible without the use of a process, design, methodology or engineering concept for which the proposing company or its partners possess exclusive rights.

(c) Procedures for handling unsolicited proposals that do not involve proprietary concepts or technology

124. If the contracting authority, upon examination of an unsolicited proposal, decides that there is public interest in pursuing the project, but the implementation of the project is possible without the use of a process, design, methodology or engineering concept for which the proponent or its partners possess exclusive rights, the contracting authority should be required to award the project by using the procedures that would normally be required for the award of PPP contracts, such as, for instance, the competitive selection procedures described in this *Guide* (see paras. …). However, the selection procedures may include certain special features so as to provide an incentive to the submission of unsolicited proposals. These incentives may consist of the following measures:

(a) The contracting authority could undertake not to initiate selection proceedings regarding a project in respect of which an unsolicited proposal was received without inviting the company that submitted the original proposal;

(b) The original bidder might be given some form of premium for submitting the proposal. In some countries that use a merit-point system for the evaluation of financial and technical proposals the premium takes the form of a margin of preference over the final rating (that is, a certain percentage over and above the final combined rating obtained by that company in respect of both financial and non-financial evaluation criteria). One possible difficulty of such a system is the risk of setting the margin of preference so high as to discourage competing meritorious bids, thus resulting in the receipt of a project of lesser value in exchange for the preference given to the innovative bidder. A preferable alternative form of incentive may be the reimbursement, in whole or in part, of the costs incurred by the original author in the preparation of the unsolicited proposal. For purposes of transparency, any such incentive should be announced in the request for proposals.

125. Notwithstanding the incentives that may be provided, the author of the unsolicited proposal should be required to meet the same qualification criteria as would be required of the bidders participating in a competitive selection proceedings (see paras. …).

(d) Procedures for handling unsolicited proposals involving proprietary concepts or technology

126. If it appears that the innovative aspects of the proposal are such that it would not be possible to implement the project without using a process, design, methodology or engineering concept for which the author or its partners possess exclusive rights, either worldwide or regionally, it may be useful for the contracting authority to confirm that preliminary assessment by applying a procedure for obtaining elements of comparison for the unsolicited proposal. One such procedure may consist of the publication of a description of the essential output elements of the proposal (for example, the capacity of the infrastructure facility, quality of the product or the service or price per unit) with an invitation to other interested parties to submit alternative or comparable proposals within a certain period. Such a description should not include input elements of the unsolicited proposal (the design of the facility, for example, or the technology and equipment to be used), in order to avoid disclosing to potential competitors proprietary information of the person who had submitted the unsolicited proposal. The period for submitting proposals should be commensurate with the complexity of the project and should afford the prospective competitors sufficient time to formulate their proposals. This may be a crucial factor for obtaining alternative proposals, for example, if the bidders would have to carry out detailed subsurface geological investigations that might have been carried out over many months by the original bidder, who would want the geological findings to remain secret.

127. The invitation for comparative or competitive proposals should be published with a minimum frequency (for example, once every week for three weeks) in at least one publication of general circulation. It should indicate the time and place where bidding documents may be obtained and should specify the time during which proposals may be received. It is important for the contracting authority to protect the intellectual property rights of the original author and to ensure the confidentiality of proprietary information received with the unsolicited proposal. Any such information should not form part of the bidding documents. Both the original bidder and any other company that wishes to submit an alternative proposal should be required to submit a bid security (see para. …). Two possible avenues may then be pursued, according to the reactions received to the invitation:

(a) If no alternative proposals are received, the contracting authority may reasonably conclude that there is no reasonable alternative or substitute to the method or technology contemplated in the unsolicited proposal. This finding of the contracting authority should be appropriately recorded and the contracting authority could be authorized to engage in direct negotiations with the original proponent. It may be advisable to require that the decision of the contracting authority be reviewed and approved by the same authority whose approval would normally be required in order for the contracting authority to select a private partner through direct negotiation (see para. …). Some countries whose laws mandate the use of competitive procedures have used these procedures in order to establish the necessary transparency required to avoid future challenges to the award of a PPP contract following an unsolicited proposal. In those countries and according the Model Law, the mere publication of an invitation to bid would permit an award to the bidder who originally submitted the unsolicited proposal, even if its bid were the only one received. This is so because compliance with competitive procedures typically requires that the possibility of competition should have been present and not necessarily that competition actually occurred. Publicity creates such a possibility and adds a desirable degree of transparency;

(b) If alternative proposals are submitted, the contracting authority should invite all the bidders to negotiations with a view to identifying the most advantageous proposal for carrying out the project (see paras. …). In the event that the contracting authority receives a sufficiently large number of alternative proposals, which appear prima facie to meet its infrastructure needs, there may be scope for engaging in full-fledged competitive selection procedures (see paras. …), subject to any incentives that may be given to the author of the original proposal (see para. …).

128. The contracting authority should be required to establish a record of the selection proceedings (paras. …) and to publish a notice of the award of the project (see para. …).

F. Confidentiality

129. In order to prevent abuse of the selection procedures and to promote confidence in the process, it is important that confidentiality be observed by all parties, especially where negotiations are involved. Such confidentiality is important in particular to protect any trade or other information that bidders might include in their proposals and that they would not wish to be made known to their competitors. Confidentiality should be kept regardless of the selection method used by the contracting authority.

G. Notice of project award

130. PPP contracts frequently include provisions that are of direct interest for parties other than the contracting authority and the private partner and who might have a legitimate interest in being informed about certain essential elements of the project. This is the case in particular for projects involving the provision of a service directly to the general public. For purposes of transparency, it may be advisable to establish procedures for publicizing those terms of the PPP contract which may be of public interest. Such a requirement should apply regardless of the method used by the contracting authority to select the private partner (for example, whether through competitive selection procedures, direct negotiations or as a result of an unsolicited proposal). One possible procedure may be to require the contracting authority to publish a notice of the award of the project, indicating the essential elements of the proposed agreements, such as: (a) the name of the private partner; (b) a description of the works and services to be performed by the private partner; (c) the duration of the contract; (d) the price structure; (e) a summary of the essential rights and obligations of the private partner and the guarantees to be provided by it; (f) a summary of the monitoring rights of the contracting authority and remedies for breach of the PPP contract; (g) a summary of the essential obligations of the Government, including any payment, subsidy or compensation offered by it; and (h) any other essential term of the PPP contract, as provided in the request for proposals.

H. Record of selection and award proceedings

131. In order to ensure transparency and accountability and to facilitate the exercise of the right of aggrieved bidders to seek review of decisions made by the contracting authority, the contracting authority should be required to keep an appropriate record of key information pertaining to the selection proceedings.

132. The record to be kept by the contracting authority should contain, as appropriate, such general information concerning the selection proceedings as is usually required to be recorded for public procurement (such as the information listed in art. 25 of the UNCITRAL Model Law on Public Procurement), as well as information of particular relevance for PPPs. Such information may include the following:

(a) A description of the project for which the contracting authority requested proposals;

(b) The names and addresses of the companies participating in bidding consortia and the name and address of the members of the bidders with whom the PPP contract has been entered into; and a description of the publicity requirements, including copies of the publicity used or of the invitations sent;

(c) If changes to the composition of the pre-selected bidders are subsequently permitted, a statement of the reasons for authorizing such changes and a finding as to the qualifications of any substitute or additional consortia concerned;

(d) Information relative to the qualifications, or lack thereof, of bidders and a summary of the evaluation and comparison of proposals, including the application of any margin of preference;

(e) A summary of the conclusions of the preliminary feasibility studies commissioned by the contracting authority and a summary of the conclusions of the feasibility studies submitted by the qualified bidders;

(f) A summary of any requests for clarification of the pre-selection documents or the request for proposals, the responses thereto, as well as a summary of any modification of those documents;

(g) A summary of the principal terms of the proposals and of the PPP contract;

(h) If the contracting authority has found most advantageous a proposal other than the proposal offering the lowest unit price for the expected output, a justification of the reasons for that finding by the awarding committee;

(i) If all proposals were rejected, a statement to that effect and the grounds for rejection;

(j) If the negotiations with the consortium that submitted the most advantageous proposal and any subsequent negotiations with remaining responsive consortia did not result in a PPP contract, a statement to that effect and of the grounds therefor.

133. For contract awards without competitive procedures (see para. …), it may be useful to include in the record of those proceedings, in addition to requirements referred to in paragraph 121 that may be applicable, the following additional information:

(a) A statement of the grounds and circumstances on which the contracting authority relied to justify the direct negotiation;

(b) The type of publicity used or the name and address of the company or companies directly invited to the negotiations;

(c) The name and address of the company or companies that requested to participate and those which were excluded from participating, if any, and the grounds for their exclusion;

(d) If the negotiations did not result in a PPP contract, a statement to that effect and of the grounds therefor;

(e) The justification given for the selection of the final private partner.

134. For selection proceedings engaged in as a result of unsolicited proposals (see paras. …), it may be useful to include in the record of those proceedings, in addition to requirements referred to in paragraph …, that may be applicable, the following additional information:

(a) The name and address of the company or companies submitting the unsolicited proposal and a brief description of it;

(b) A certification by the contracting authority that the unsolicited proposal was found to be of public interest and to involve new concepts or technologies, as appropriate;

(c) The type of publicity used or the name and address of the company or companies directly invited to the negotiations;

(d) The name and address of the company or companies that requested to participate and those which were excluded from participating, if any, and the grounds for their exclusion;

(e) If the negotiations did not result in a PPP contract, a statement to that effect and of the grounds therefor;

(f) The justification given for the selection of the final private partner.

135. It is advisable for the rules on record requirements to specify the extent and the recipients of the disclosure. Setting the parameters of disclosure involves balancing factors such as the general desirability, from the standpoint of the accountability of contracting authorities, of broad disclosure; the need to provide bidders with information necessary to enable them to assess their performance in the proceedings and to detect instances in which there are legitimate grounds for seeking review; and the need to protect the bidders' confidential trade information. In view of these considerations, it may be advisable to provide two levels of disclosure, as envisaged in article 25 of the UNCITRAL Model Law on Public Procurement. The information to be provided to any member of the general public may be limited to basic information geared to the accountability of the contracting authority to the general public. However, it is advisable to provide for the disclosure for the benefit of bidders of more detailed information concerning the conduct of the selection, since that information is necessary to enable the bidders to monitor their relative performance in the selection proceedings and to monitor the conduct of the contracting authority in implementing the requirements of the applicable laws and regulations.

136. Moreover, appropriate measures should be taken to avoid the disclosure of confidential trade information of suppliers and contractors. This is true in particular with respect to what is disclosed concerning the evaluation and comparison of proposals, as excessive disclosure of such information may be prejudicial to the legitimate commercial interests of bidders. As a general rule, the contracting authority should not disclose more detailed information relating to the examination, evaluation and comparison of proposals and proposal prices, except when ordered to do so by a competent court.

137. Provisions on limited disclosure of information relating to the selection process would not preclude the applicability to certain parts of the record of other statutes in the enacting State that confer on the public at large a general right to obtain access to government records. Disclosure of the information in the record to legislative or parliamentary oversight bodies may be mandated pursuant to the law applicable in the host country.

I. Review procedures

138. The existence of fair and efficient review procedures is one of the basic requirements for attracting serious and competent bidders and for reducing the cost and the length of award proceedings. An important safeguard of proper adherence to the rules governing the selection procedure is that bidders have the right to seek review of actions by the contracting authority in violation of those rules or of the rights of bidders. Various remedies and procedures are available in different legal systems and systems of administration, which are closely linked to the question of review of governmental actions. Whatever the exact form of review procedures, it is important to ensure that an adequate opportunity and effective procedures for review are provided. It is particularly useful to establish a workable "pre-contract" recourse system (that is, procedures for reviewing the contracting authority's acts as early in the selection proceedings as feasible). Such a system increases the possibility of taking corrective actions by the contracting authority before loss is caused and helps to reduce cases where monetary compensation is the only option left to redress the consequences of an improper action by the contracting authority. Elements for the establishment of an adequate review system are contained in chapter VIII of the UNCITRAL Model Law on Public Procurement.

139. Article 9 of the United Nations Convention against Corruption requires (among other things) procurement systems to address "[a]n effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established … are not followed." Consistent with that mandate, Chapter VIII of the UNCITRAL Model Law on Public Procurement offers a number of review provisions, which enacting States are encouraged to incorporate into their procurement laws to the extent that their legal system so permits. They include the possibility of an optional request to the procuring

entity to reconsider a decision taken in the procurement process, giving the aggrieved supplier or contractor in such case the possibility to apply either to the procuring entity, to an independent body or to the court. However, the Model Law acknowledges that the sequence of application to review bodies will very much depend on legal traditions of enacting States. Given the requirements in the Convention against Corruption, States must have both a review and an appeal mechanism, but the Model Law is flexible so that enacting States can implement its provisions in accordance with their legal traditions. Under the Model Law, any decision or action by the procuring entity allegedly not in compliance with the provisions of the procurement law may be challenged by suppliers or contractors that claim to have suffered or claim that they may suffer loss or injury because of such alleged non-compliance. This broad challenge mechanism comes with various mechanisms to ensure the efficacy of the procedure, and to appropriately balance the need to preserve the rights of suppliers and contractors and the integrity of the procurement process on the one hand and, on the other, the need to limit disruption of the procurement process. Thus, article 65 of the Model Law provides for a general prohibition against taking any step to bring the procurement contract into force while a challenge remains pending, except where urgent public interest considerations call for lifting that prohibition. The Model Law also offers provisions for suspension of procurement proceedings, as well as supporting measures to encourage early and timely resolution of issues and disputes that enable challenges to be addressed before stages of the procurement proceedings would need to be undone.

III. Contract award

Model provision 8. General rules

The contract authority shall select the private partner in accordance with model provisions 9–22 and, for matters not provided herein, in accordance with [*the enacting State indicates the provisions of its laws that provide for transparent and efficient competitive public procurement procedures equivalent to those set forth in the UNCITRAL Model Law on Public Procurement*].[17]

[17] The reader's attention is drawn to the relationship between the procedures for the selection of the private partner and the general legislative framework for the award of government contracts in the enacting State. While some elements of structured competition that exist in traditional procurement methods may be usefully applied, a number of adaptations are needed to take into account the particular needs of PPP projects, such as a clearly defined pre-selection phase, flexibility in the formulation of requests for proposals, special evaluation criteria and some scope for negotiations with bidders. The selection procedures reflected in this chapter are based largely on the features of the request for proposals, two-stage tendering, competitive negotiations and single-source procurement methods under the UNCITRAL Model Law on Public Procurement, which was adopted by UNCITRAL at its forty-fourth session, held in Vienna from 27 June to 8 July 2011. The model provisions on the selection of the concessionaire are not intended to replace or reproduce the entire rules of the enacting State on government procurement, but rather to assist domestic legislators in developing special rules for the selection of the concessionaire. The model provisions assume that there exists in the enacting State a general framework for the award of government contracts providing for transparent and efficient competitive procedures in a manner that meets the standards of the Model Procurement Law. Thus, the model provisions do not deal with a number of practical procedural steps that would typically be found in an adequate general procurement regime. Examples include the following matters: manner of publication of notices, procedures for issuance of requests for proposals, record-keeping of the procurement process, accessibility of information to the public and challenge procedures. Where appropriate, the notes to these model provisions refer the reader to provisions of the Model Procurement Law, which may, mutatis mutandis, supplement the practical elements of the selection procedure described herein.

1. Pre-selection of bidders

Model provision 9. Purpose and procedure of pre-selection

1. For the purpose of limiting the number of suppliers or contractors from which to request proposals, the contracting authority shall engage in pre-selection proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged project.

2. The invitation to participate in the pre-selection proceedings shall be published in accordance with [*the enacting State indicates the provisions of its laws governing publication of invitation to participate in proceedings for the pre-qualification of suppliers and contractors*].

3. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of invitations to participate in proceedings for the pre-qualification of suppliers and contractors*],[18] the invitation to participate in the pre-selection proceedings shall include at least the following:

(a) A description of the infrastructure facility;

(b) An indication of other essential elements of the project, such as the services to be delivered by the private partner, the financial arrangements envisaged by the contracting authority (for example, whether the project will be entirely financed by user fees or tariffs or whether public funds such as direct payments, loans or guarantees may be provided to the private partner);

(c) Where already known, a summary of the main required terms of the PPP contract to be entered into;

(d) The manner and place for the submission of applications for pre-selection and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for bidders to prepare and submit their applications; and

(e) The manner and place for solicitation of the pre-selection documents.

4. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of the pre-selection documents to be provided to suppliers and contractors in proceedings for the pre-qualification of suppliers and contractors*],[19] the pre-selection documents shall include at least the following information:

(a) The pre-selection criteria in accordance with model provision 10;

(b) Whether the contracting authority intends to waive the limitations on the participation of consortia set forth in model provision 11;

(c) Whether the contracting authority intends to request only a limited number[20] of pre-selected bidders that best meet the pre-selection criteria specified in the pre-selection documents to submit proposals upon completion of the pre-selection proceedings in accordance with model provision 12, paragraph 2; if so, the maximum number of pre-selected bidders from which the proposals will be requested and the manner in which the selection of that number will be carried out. In establishing the maximum number, the contracting authority shall bear in mind the need to ensure effective competition;

(d) Whether the contracting authority intends to require the successful bidder to establish an independent legal entity established and incorporated under the laws of [*the enacting State*] in accordance with model provision …

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[18] A list of elements typically contained in an invitation to participate in pre-qualification proceedings can be found in article 18, paragraph 3, of the Model Procurement Law.

[19] A list of elements typically contained in pre-qualification documents can be found in article 18, paragraph 5, of the Model Procurement Law.

[20] In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four).

5. For matters not provided for in this model provision, the pre-selection proceedings shall be conducted in accordance with [*the enacting State indicates the provisions of its laws on government procurement governing the conduct of proceedings for the pre-qualification or pre-selection of suppliers and contractors*].[21]

Model provision 10. Pre-selection criteria

Interested bidders must meet such of the following criteria as the contracting authority considers appropriate[22] and relevant for the particular contract:

(a) That they have the necessary professional, technical and environmental qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and personnel as necessary to carry out all the phases of the project, including design, construction, operation and maintenance;

(b) That they have sufficient ability to manage the financial aspects of the project and capability to sustain its financing requirements;

(c) That they meet ethical and other standards applicable in [*this State*]

(d) That they have the legal capacity to enter into the PPP contract;

(e) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended and they are not the subject of legal proceedings for any of the foregoing;

(f) That they have fulfilled their obligations to pay taxes and social security contributions in [*this State*];

(g) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years [*the enacting State specifies the period of time*] preceding the commencement of the contract award proceedings, or have not been otherwise disqualified pursuant to administrative suspension or debarment proceedings.

Model provision 11. Participation of consortia

1. The contracting authority, when first inviting the participation of bidders in the selection proceedings, shall allow them to form bidding consortia. The information required from members of bidding consortia to demonstrate their qualifications in accordance with model provision 10 shall relate to the consortium as a whole as well as to its individual participants.

2. Unless otherwise [authorized by ... [*the enacting State indicates the relevant authority*] and] stated in the pre-selection documents, each member of a consortium may participate, either directly or indirectly, in only one consortium[23] at the same time. A violation of this rule shall cause the disqualification of the consortium and of the individual members.

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[21] Procedural steps on pre-qualification and pre-selection proceedings, including procedures for handling requests for clarifications and disclosure requirements for the contracting authority's decision on the bidders' qualifications, can be found in article 18 and 49(3) of the Model Procurement Law

[22] The laws of some countries provide for some sort of preferential treatment for domestic entities or afford special treatment to bidders that undertake to use national goods or employ local labour. The various issues raised by domestic preferences are discussed in the *Guide* (see chapter III, "Contract award, paras. …). The *Guide* suggests that countries that wish to provide some incentive to national suppliers may wish to apply such preferences in the form of special evaluation criteria, rather than by a blanket exclusion of foreign suppliers. In any event, where domestic preferences are envisaged, they must be announced at the outset of the selection proceedings (i.e. in the invitation to the pre-selection proceedings).

[23] The rationale for prohibiting the participation of bidders in more than one consortium to submit proposals for the same project is to reduce the risk of leakage of information or collusion between competing consortia. Nevertheless, the model provision contemplates the possibility of ad hoc exceptions to this rule, for instance, in the event that only one company or only a limited

3. When considering the qualifications of bidding consortia, the contracting authority shall consider the capabilities of each of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

Model provision 12. Decision on pre-selection

1. The contracting authority shall make a decision with respect to the qualifications of each bidder that has submitted an application for pre-selection. In reaching that decision, the contracting authority shall apply only the criteria, requirements and procedures that are set forth in the pre-selection documents. All pre-selected bidders shall thereafter be invited by the contracting authority to submit proposals in accordance with model provisions 13–22.

2. Notwithstanding paragraph 1, where the contracting authority has indicated through an appropriate statement in the pre-selection documents that it reserved the right to request proposals only from a limited number of bidders that best meet the pre-selection criteria, the contracting authority shall rate the bidders on the basis of the criteria applied to assess their qualifications and draw up the list of bidders that will be invited to submit proposals upon completion of the pre-selection proceedings up to the maximum number specified in the pre-selection documents but at least three, if possible. In drawing up the list, the contracting authority shall apply only criteria and the manner of rating that are set forth in the pre-selection documents.

2. Procedures for requesting proposals

Model provision 13. Choice of selection procedure

1. A contracting authority may select the private partner for a PPP project by means of two-stage request for proposals in accordance with *[the enacting state indicates the provisions of its laws that provide for a procurement method equivalent to the two-stage tendering provided for in article 48 of the UNCITRAL Model Law on Public Procurement]* where the contracting authority assesses that discussions with bidders are needed to refine aspects of the description of the subject matter of the procurement and to formulate them with the detail required under *[the enacting state indicates the provisions of its laws that govern the content of requests for proposals as in article 10 of the UNCITRAL Model Law on Public Procurement]*, and in order to allow the contracting authority to obtain the most satisfactory solution to its procurement needs.

2. A contracting authority may select the private partner for a PPP project by means of a request for proposals with dialogue in accordance with *[the enacting state indicates the provisions of its laws that provide for a procurement method equivalent to the request for proposals with dialogue provided for in article 49 of the UNCITRAL Model Law on Public Procurement]* where it is not feasible for the contracting authority to formulate a detailed description of the subject matter of the procurement in accordance with *[the enacting state indicates the provisions of its laws that govern the content of requests for proposals as in article 10 of the UNCITRAL Model Law on Public Procurement]*, and the contracting authority assesses that dialogue with bidders is needed to obtain the most satisfactory solution to its procurement needs.

Model provision 14. Content of the request for proposals

1. The contracting authority shall provide a set of the request for proposals and related documents to each bidder invited to submit proposals that pays the price, if any, charged for those documents.

2. In addition to any other information required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of requests for proposals*],[24] the request for proposals shall include the following information:

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number of companies could be expected to deliver a specific good or service essential for the implementation of the project.

[24] A list of elements typically contained in a request for proposals can be found in articles 47 and 49 of the Model Procurement Law.

(a) General information as may be required by the bidders in order to prepare and submit their proposals;

(b) Project specifications and performance indicators, as appropriate, including the contracting authority's requirements regarding safety and security standards and environmental protection;

(c) The contractual terms proposed by the contracting authority, including an indication of which terms are deemed to be non-negotiable;

(d) The criteria for evaluating proposals and the thresholds, if any, set by the contracting authority for identifying non-responsive proposals; the relative weight to be accorded to each evaluation criterion or the descending order of importance of all evaluation criteria; and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.

Model provision 15. Bid securities

1. When the contracting authority requires bidders to provide a bid security, the request for proposals shall set forth the requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required bid security.

2. A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of:[25]

(a) If so stipulated in the request for proposals, withdrawal or modification of a proposal or a best and final offer before or after the stipulated deadline;

(b) Failure to enter into final negotiations with the contracting authority pursuant to model provision 22, paragraph 1;

(c) Failure to submit its best and final offer within the time limit prescribed by the contracting authority pursuant to model provision 18, subparagraph (e);

(d) Failure to sign the PPP contract, if required by the contracting authority to do so, after the proposal has been accepted;

(e) Failure to provide required security for the fulfilment of the concession contract after the proposal or offer has been accepted or to comply with any other condition prior to signing the concession contract specified in the request for proposals.

Model provision 16. Clarifications and modifications

The contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise any element of the request for proposals as set forth in model provision 14. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to model provision 31 the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated to the bidders in the same manner as the request for proposals at a reasonable time prior to the deadline for submission of proposals.

Model provision 17. Two-stage request for proposals

(a) Prior to issuing the request for proposals in accordance with [model provision 14] the contracting authority issues an initial request for proposals calling upon the bidders to submit, in the first stage of the procedure, initial proposals relating to project specifications, performance indicators, financing requirements or other characteristics of the project as well as to the main contractual terms proposed by the contracting authority;

(b) The contracting authority may convene meetings and hold discussions or dialogue with bidders whose initial proposals have not been rejected as non-responsive or for other

[25] General provisions on bid securities can be found in article 17 of the UNCITRAL Model Law on Public Procurement.

grounds specified in law.[26] Discussions may concern any aspect of the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders;[27]

(c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial request for proposals by deleting or modifying any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the project, including the main contractual terms, and any criterion for evaluating and comparing proposals and for ascertaining the successful bidder, as set forth in the initial request for proposals, as well as by adding characteristics or criteria to it. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to model provision 31 the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated in the invitation to submit final proposals;

(d) In the second stage of the proceedings, the contracting authority shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with model provision 14.

Model provision 18. Request for proposals with dialogue

Where a request for proposals with dialogue is used in accordance with [model provision 13(2)]:

(a) The contracting authority shall invite each bidder that presented a responsive proposal, within any applicable maximum, to participate in the dialogue. The contracting authority shall ensure that the number of bidders invited to participate in the dialogue, which shall be at least three, if possible, is sufficient to ensure effective competition;

(b) The dialogue shall be conducted by the same representatives of the contracting authority on a concurrent basis;

(c) During the course of the dialogue, the contracting authority shall not modify the subject matter of the project, any qualification or evaluation criterion, any minimum requirements, any element of the description of the project or any term or condition of the procurement contract that is not subject to the dialogue as specified in the request for proposals;

(d) Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that is communicated by the contracting authority to a bidder shall be communicated at the same time and on an equal basis to all other participating bidders, unless such information is specific or exclusive to that supplier or contractor or such communication would be in breach of the confidentiality provisions of *[the enacting state indicates the provisions of its laws equivalent to article 24 of the UNCITRAL Model Procurement Law]*;

(e) Following the dialogue, the contracting authority shall request all bidders remaining in the proceedings to present a best and final offer with respect to all aspects of their proposals. The request shall be in writing and shall specify the manner, place and deadline for presenting best and final offers.

Model provision 19. Evaluation criteria

1. The criteria for the evaluation and comparison of the technical elements of the proposals shall include at least the following:

(a) Technical soundness;

(b) Compliance with environmental standards;

(c) Operational feasibility;

(d) Quality of services and measures to ensure their continuity.

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[26] E.g. corruption, collusion, conflict of interest.

[27] General provisions on clarification of request for proposals and the conduct of meetings with bidders be found in article 15 of the UNCITRAL Model Law on Public Procurement.

2. The criteria for the evaluation and comparison of the financial and commercial elements of the proposals shall include, as appropriate:

(a) The present value of the proposed tolls, unit prices and other charges over the contract period;

(b) The present value of the proposed direct payments by the contracting authority, if any;

(c) The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;

(d) The extent of financial support, if any, expected from a public authority of [*the enacting State*];

(e) The soundness of the proposed financial arrangements;

(f) The extent of acceptance of the negotiable contractual terms proposed by the contracting authority in the request for proposals;

(g) The social and economic development potential offered by the proposals.

Model provision 20. Comparison and evaluation of proposals or offers

1. The contracting authority shall compare and evaluate each proposal or offer in accordance with the evaluation criteria, the relative weight accorded to each such criterion or the descending order of importance of evaluation criteria and the evaluation process set forth in the request for proposals.

2. For the purposes of paragraph 1, the contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects. Proposals or offers that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the procedure.

Model provision 21. Further demonstration of fulfilment of qualification criteria

The contracting authority may require any bidder that has been pre-selected to demonstrate again its qualifications in accordance with the same criteria used for pre-selection. The contracting authority shall disqualify any bidder that fails to demonstrate again its qualifications if requested to do so.[28]

Model provision 22. Contract award

1. Where a two-stage procedure is used in accordance with model provision 13(1):

(a) The contracting authority shall rank all responsive proposals on the basis of the evaluation criteria and invite for final negotiation of the PPP contract the bidder that has attained the best rating. Final negotiations shall not concern those contractual terms, if any, that were stated as non-negotiable in the final request for proposals;

(b) If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a contract, the contracting authority shall inform the bidder of termination of the negotiations and give the bidder reasonable time to formulate its best and final offer;

(c) If the contracting authority does not find that offer acceptable, it shall reject that offer and invite for negotiations the other bidders in the order of their ranking until it arrives at a concession contract or rejects all remaining proposals;

(d) The contracting authority shall not resume negotiations with a bidder with which negotiations have been terminated pursuant to this paragraph.

2. Where a request for proposals with dialogue is used in accordance with model provision 13(2):

[28] See UNCITRAL Model Law on Public Procurement, article 9(8).

(a) No negotiations shall take place between the contracting authority and bidders with respect to their best and final offers.

(b) The successful offer shall be the offer that best meets the needs of the procuring entity as determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals.

3. Direct negotiation of PPP contracts with one or more bidder s

Model provision 23. Circumstances authorizing direct negotiation

Subject to approval by [*the enacting State indicates the relevant authority*],[29] the contracting authority is authorized to negotiate a PPP contract without using the procedure set forth in model provisions 9 to 22 in the following cases:

(a) When there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures set forth in model provisions 9 to 22 would be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part;

(b) Where the project is of short duration and the anticipated initial investment value does not exceed the amount [of [*the enacting State specifies a monetary ceiling*]] [set forth in [*the enacting State indicates the provisions of its laws that specify the monetary threshold below which a project may be awarded through direct negotiations*]];[30]

(c) Where the use of the procedures set forth in model provisions 9–22 is not appropriate for the protection of essential security interests of the State;

(d) Where there is only one source capable of providing the required service, such as when the provision of the service requires the use of intellectual property, trade secrets or other exclusive rights owned or possessed by a certain person or persons;

(e) In other cases where the [*the enacting State indicates the relevant authority*] authorizes such an exception for compelling reasons of public interest.[31]

Model provision 24. Procedures for negotiation of a PPP contract

Where a PPP contract is negotiated without using the procedures set forth in model provisions 9–22 the contracting authority shall:

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[29] The rationale for subjecting the direct negotiation of a PPP contract to the approval of a higher authority is to ensure that the contracting authority makes use of this exception only in the appropriate circumstances. The model provision therefore suggests that the enacting State indicate a relevant authority that is competent to authorize negotiations in all cases set forth in the model provision. The enacting State may provide, however, for different approval requirements for each subparagraph of the model provision. In some cases, for instance, the enacting State may provide that the authority to engage in such negotiations derives directly from the law. In other cases, the enacting State may make the negotiations subject to the approval of different higher authorities, depending on the nature of the services to be provided or the infrastructure sector concerned. In those cases, the enacting State may need to adapt the model provision to these approval requirements by adding the particular approval requirement to the subparagraph concerned, or by adding a reference to provisions of its law where these approval requirements are set forth.

[30] As an alternative to the exclusion provided for in subparagraphs (b) and (c), the enacting State may consider devising a simplified procedure for request for proposals for projects falling thereunder, for instance by allowing direct solicitation in the procedures described in model provisions 9 to 22, as envisaged in article 35(2) of the UNCITRAL Model Law on Public Procurement.

[31] Enacting States that deem it desirable to authorize the use of direct negotiation procedures on an ad hoc basis may wish to retain subparagraph (g) when implementing the model provision. Enacting States wishing to limit exceptions to the selection procedures envisaged in model provisions 9–22 may prefer not to include the subparagraph. In any event, for purposes of transparency, the enacting State may wish to indicate here or elsewhere in the model provision other exceptions, if any, authorizing the use of direct negotiation procedures that may be provided for under specific legislation.

(a) Cause a notice of its intention to commence negotiations in respect of a concession contract to be published in accordance with [*the enacting State indicates the provisions of any relevant laws on procurement proceedings that govern the publication of notices*[32]];

(b) Engage in negotiations with as many persons as the contracting authority judges capable of carrying out the project as circumstances permit;

(c) Establish evaluation criteria against which proposals shall be evaluated and ranked.

4. Unsolicited proposals[33]

Model provision 25. Admissibility of unsolicited proposals

As an exception to model provisions 9 to 22, the contracting authority[34] is authorized to consider unsolicited proposals pursuant to the procedures set forth in model provisions 26 to 28, provided that such proposals do not relate to a project for which selection procedures have been initiated or announced

Model provision 26. Procedures for determining the admissibility of unsolicited proposals

1. Following receipt and preliminary examination of an unsolicited proposal, the contracting authority shall inform the proponent as soon as practicable whether or not the project is considered to be potentially in the public interest.[35]

2. If the project is considered to be potentially in the public interest under paragraph 1, the contracting authority shall invite the proponent to submit as much information on the proposed project as is feasible at this stage to allow the contracting authority to make a proper evaluation of the proponent's qualifications[36] and the technical and economic feasibility of the project and to determine whether the project is likely to be successfully implemented in the manner proposed in terms acceptable to the contracting authority. For this purpose, the proponent shall submit a technical and economic feasibility study, an environmental impact study and satisfactory information regarding the concept or technology contemplated in the proposal.

3. In considering an unsolicited proposal, the contracting authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from or referred to in the proposal. Therefore, the contracting authority shall not make use of information provided by or on behalf of the proponent in connection with its unsolicited proposal other than for the evaluation of that proposal, except with the consent of the proponent. Except as otherwise agreed by the parties, the contracting authority shall, if the proposal is rejected, return to the proponent

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[32] See UNCITRAL Model Law on Public Procurement, article 7.

[33] Enacting States wishing to enhance transparency in the use of direct negotiation procedures may establish, by specific regulations, qualification criteria to be met by persons invited to negotiations pursuant to model provisions 23 and 24. An indication of possible qualification criteria is contained in model provision 10.

[34] The model provision assumes that the power to entertain unsolicited proposals lies with the contracting authority. However, depending on the institutional and administrative arrangements of the enacting State, a body separate from the contracting authority may have the responsibility for handling unsolicited proposals or for considering, for instance, whether an unsolicited proposal is in the public interest. In such a case, the manner in which the functions of such a body may need to be coordinated with those of the contracting authority should be carefully considered by the enacting State (see footnotes 1, 3 and 17 and the references cited therein).

[35] The determination that a proposed project is in the public interest entails a considered judgement regarding the potential benefits to the public that are offered by the project, as well as its relationship to the Government's policy for the sector concerned. In order to ensure the integrity, transparency and predictability of the procedures for determining the admissibility of unsolicited proposals, it may be advisable for the enacting State to provide guidance, in regulations or other documents, concerning the criteria that will be used to determine whether an unsolicited proposal is in the public interest, which may include criteria for assessing the appropriateness of the contractual arrangements and the reasonableness of the proposed allocation of project risks.

[36] The enacting State may wish to provide in regulations the qualification criteria that need to be met by the proponent. Elements to be taken into account for that purpose are indicated in model provision 10.

the original and any copies of documents that the proponent submitted and prepared throughout the procedure.

Model provision 27. Unsolicited proposals that do not involve intellectual property, trade secrets or other exclusive

1. Except in the circumstances set forth in model provision 23, the contracting authority shall, if it decides to implement the project, initiate a selection procedure in accordance with model provisions 9 to 22 if the contracting authority considers that:

(a) The envisaged output of the project can be achieved without the use of intellectual property, trade secrets or other exclusive rights owned or possessed by the proponent; and

(b) The proposed concept or technology is not truly unique or new.

2. The proponent shall be invited to participate in the selection proceedings initiated by the contracting authority pursuant to paragraph 1 and may be given an incentive or a similar benefit in a manner described by the contracting authority in the request for proposals in consideration for the development and submission of the proposal.

Model provision 28. Unsolicited proposals involving intellectual property, trade secrets or other exclusive rights

1. If the contracting authority determines that the conditions of model provision 27, paragraph 1 (a) and (b), are not met, it shall not be required to carry out a selection procedure pursuant to model provisions 9 to 22. However, the contracting authority may still seek to obtain elements of comparison for the unsolicited proposal in accordance with the provisions set out in paragraphs 2 to 4 of this model provision.

2. Where the contracting authority intends to obtain elements of comparison for the unsolicited proposal, the contracting authority shall publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit proposals within [a reasonable period] [*the enacting State indicates a certain amount of time*].

3. If no proposals in response to an invitation issued pursuant to paragraph 2 of this model provision are received within [a reasonable period] [the amount of time specified in paragraph 2 above], the contracting authority may engage in negotiations with the original proponent.

4. If the contracting authority receives proposals in response to an invitation issued pursuant to paragraph 2, the contracting authority shall invite the proponents to negotiations in accordance with the provisions set forth in model provision 19. In the event that the contracting authority receives a sufficiently large number of proposals, which appear prima facie to meet its needs, the contracting authority shall request the submission of proposals pursuant to model provisions 9 to 22, subject to any incentive or other benefit that may be given to the person who submitted the unsolicited proposal in accordance with model provision 27, paragraph 2.

5. Miscellaneous provisions

Model provision 29. Confidentiality

The contracting authority shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders or to any other person not authorized to have access to this type of information. Any discussions, communications and negotiations between the contracting authority and a bidder pursuant to model provisions 17, 18, 21, paragraphs 1, 23, 24 or 28, paragraphs 3 and 4, shall be confidential. Unless required by law or by a court order, no party to the negotiations shall disclose to any other person any technical, price or other information in relation to discussions, communications and negotiations pursuant to the aforementioned provisions without the consent of the other party.

Model provision 30. Notice of contract award

The contracting authority shall cause a notice of the contract award to be published in accordance with [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the publication of contract award notices*[37]]. The notice shall identify the private partner and include a summary of the essential terms of the PPP contract.

Model provision 31. Record of selection and award proceedings

The contracting authority shall keep an appropriate record of information pertaining to the selection and award proceedings in accordance with [*the enacting State indicates the provisions of its laws on public procurement that govern record of procurement proceedings*].[38]

Model provision 32. Review procedures

A bidder that claims to have suffered or claims that it may suffer loss or injury because of the alleged non-compliance of a decision or action of the contracting authority with law may challenge the decision or action concerned in accordance with [*the enacting State indicates the provisions of its laws governing the review of decisions made in procurement proceedings*].

[37] See UNCITRAL Model Law on Public Procurement, article 23.

[38] The content of such a record for the various types of project award contemplated in the model provisions, as well as the extent to which the information contained therein may be accessible to the public, is set out in article 25 of the Model Procurement Law. If the laws of the enacting State do not adequately address these matters, the enacting State should adopt legislation or regulations to that effect.

B. Note by the Secretariat on public-private partnerships (PPPs): proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects: comments by the World Bank

(A/CN.9/957)

[Original: English]

The World Bank submitted to the Secretariat a paper for consideration at the fifty-first session of the Commission. The paper is reproduced as an annex to this note in the form in which it was received by the Secretariat.

The World Bank appreciates the opportunity to review the draft revised Introduction, Chapter I, Chapter II and Chapter III of the updated Guide. We would like to commend the Secretariat, as well as the experts who collaborated to provide inputs, on the draft revised text. The updated Guide will provide an important and timely contribution of critical information for governments, policymakers and other stakeholders operating in the realm of PPPs. Having reviewed the revised drafts referred to above, the World Bank's comments are as follows and focus on Chapter III (Contract Award).

Chapter III Contract Award	
Paragraph reference	Comments
15	Consideration could also be given to the transparency and publication of awarded contracts, and the performance thereof. There is a trend for countries to have laws requiring disclosure of such information and/or for the publication of contracts for public projects (which may in some cases exclude sensitive and proprietary information).
17	The structure proposed for a private partner that is not selected competitively to then select the construction contractor competitively is not an ideal structure and should be seen as sub-optimal. If it is to be discussed here, the challenges created by using such an approach need to also be discussed in detail, so that readers don't assume that since the World Bank may permit such an approach, that it is therefore optimal or preferred. As was recently carried out by the World Bank on the topic of unsolicited proposals (https://library.pppknowledgelab.org/documents/4580), in order to inform the development of guidelines, there should be case study analysis before recommending this approach to see if it brings value for money or other benefits. The unsolicited proposal analysis showed that there are fewer benefits achieved in practice than had previously been assumed, and that there are significant downsides if not well-managed. In our experience, we have seen examples where the approach of competitively subcontracting was used – but this led to high EPC (engineering, procurement and construction) prices since the concessionaire was not incentivized to keep prices low. Such approach also poses challenges for long term sustainability of the relevant project given that project proponents will typically have partners that they work with – and forcing them to work with others may not be sustainable.
23	In PPPs, whole life-cycle costs should also be considered. It is recommended for construction projects to follow this approach also, but it is even more relevant when bidders are free to offer a range

	of technical proposals to meet the outputs, some of which may be much costlier to operate than others.
36	While *Development Business* is one possible medium of communicating pre-selection processes, it is not the best way to attract international bidders. Parties looking at *Development Business* are generally construction contractors, not necessarily those concession or PPP bidders that the contracting authority will want to attract. Industry journals, conferences, embassy websites and international newspapers are far more effective media.
42	Generally speaking, joint and several liability is not an appropriate requirement for PPP or similar projects as they are long term arrangements and consortium members, particularly the construction member, will want the flexibility to exit the project after a reasonable period. In the case of the consortium member the construction warranties will benefit the project vehicle and/or the employer for the period thereof (typically 10 years). One approach is to require joint and several liability if and until the consortium members form and capitalize an SPV and the SPV enters into the PPP agreement. It is not clear why the contracting authority would require an SPV after award as an alternative to joint and several liability. An SPV is the likely approach that joint venture partners will follow as it is a mechanism for achieving limited recourse to their balance sheets (hence the difficulty with imposing joint and several liability on each member), for project financing structures, and perhaps for reasons of tax and (for foreign investors) repatriation of profits through dividends. Governments may see advantage in a special purpose vehicle for a long-term contract where there is significant private financing to ensure that the contracting party does not have other activities or legacy liabilities (i.e., so it is clean) and/or to ensure that the contracting party is incorporated in the jurisdiction of the project (if the lead member of the consortium is not).
53–68	Care needs to be taken in "best and final offer" ("***BAFO***") scenarios that the same information is shared with each bidder, so as to ensure a level playing field. This can be difficult to achieve in practice, even in countries which are familiar with the BAFO process. It should be approached with caution in less developed countries. Generally, competitive dialogue can be challenging for less developed countries, where the direct negotiation of different stages can result in perceptions of impropriety or corruption.
66 onwards	Somewhere there should be a reference to developing a data room (virtual or other); and for pre-bid meetings. There is likely to be a lot of information to be shared with bidders.
74 and 95	In order to limit to a minimum any negotiation of terms once a preferred bidder is selected, it is considered best practice to include a full PPP agreement with the request for proposals, with the opportunity for only very limited amendment on non-substantial terms.
83	Evaluation should look at financiers, the level of due diligence performed, the extent of their commitment and the distance and time to financial close. Transparency should allow increased levels of public accountability to ensure better community engagement, and reduction in abuses of the procurement and implementation processes.

100	The process of allowing a contracting authority to bypass competitive processes must be subject to review and approval of an oversight body, possibly the cabinet/executive agency or a similarly high-level body tasked with reviewing the proposed project and the justification for direct negotiation, whether further to unsolicited proposals or otherwise. In relation to (d): if this is allowed, it needs to be carefully worded as it has been used as an excuse in many projects to allow sole sourcing – but in reality, there are very few circumstances where use of an exclusive technology is truly necessary.
124	Mechanisms such as the "Swiss challenge" procurement method have been shown to be anti-competitive – a recent PPIAF and World Bank report reveals that there are few cases where competitive bids are submitted by bidders other than the proponent as there is a perception of a lack of level playing field and likelihood that the project will go to the proponent.
126	While project proponents will always be keen to stress the innovative aspects of a project, it is seldom the case that a project is in fact that innovative – this premise should be used with great caution.

VIII. FUTURE WORK

A. Note by the Secretariat on possible future work on cross-border issues related to the judicial sale of ships: proposal from the Government of Switzerland

(A/CN.9/944/Rev.1)

[Original: English]

1. In preparation for the fifty-first session of the Commission, the Government of Switzerland submitted to the Secretariat a proposal for possible future work by UNCITRAL on cross-border issues related to the judicial sale of ships. The revised text received by the Secretariat is reproduced as an annex to this note.

Annex

Proposal of the Government of Switzerland for possible future work on cross-border issues related to the judicial sale of ships

1. Introduction

At its fiftieth session (Vienna, 3 to 21 July 2017), the United Nations Commission on International Trade Law noted the importance of a proposal (A/CN.9/923) of the Comité Maritime International (CMI) drawing attention to problems arising around the world from the failure to give recognition to judgments in other jurisdictions when ordering the sale of ships.[1] While a number of delegations supported the proposal and expressed interest in taking it up, subject to the availability of working group resources and any necessary consultation with other organizations, it was agreed that additional information in respect of the breadth of the problem would be useful.[2]

It was suggested "that CMI might seek to develop and advance the proposal by holding a Colloquium so as to provide additional information to the Commission and allow it to take an informed decision in due course".[3] The Commission further "agreed that UNCITRAL, through its secretariat, and States would support and participate in a Colloquium to be initiated by CMI to discuss and advance the proposal".[4] The Commission agreed to revisit the matter at a future session.[5]

To that end, following a request from the Government of Malta, the UNCITRAL secretariat extended a formal invitation to all Member and Observer States of UNCITRAL to participate in a high-level technical Colloquium in respect of the cross-border judicial sale of ships, as well as the recognition of such sales.

Based on the outcome of the discussions during the Colloquium and based on the support of all represented industries, the government of Switzerland proposes that UNCITRAL consider taking up work on an international instrument to resolve cross-border issues on the recognition of judicial sales of ships

2. The Colloquium

The Government of Malta, through its Ministry for Transport, Infrastructure and Capital Projects, in collaboration with CMI and the Malta Maritime Law Association, co-hosted the Colloquium on 27 February 2018 at the Chamber of Commerce in Valletta, Malta. Panellists and attendees examined the scope of problems associated with judicial sales of ships, as well as possible solutions.

Participants were requested to elaborate on the proposal submitted by CMI to the Commission stating that "[p]urchasers, and subsequent purchasers, must be able to take clean title to the ship so sold and be able to de-flag the ship from its pre-sale registry and re-flag the ship in the purchaser's selected registry so as to be able to trade the vessel appropriately without the threat of costly delays and expensive litigation. This, in turn, will enable the purchased ship to trade freely; and ensures that the ship will realize a greater sale price which will benefit all the related parties, including creditors (which could include port authorities and other government instrumentalities that have provided services to a ship owner)".[6]

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[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 456–465.
[2] Ibid., para. 464.
[3] Ibid.
[4] Ibid., para. 465.
[5] Ibid.
[6] See para. 5, A/CN.9/923.

3. Participation at the Colloquium

It was noted that the lack of certainty in recognition of judgment affected a broad spectrum of industries and States. The Colloquium had 174 participants, including delegates from 60 countries. Delegates represented Governments, including Governments of flag States; the judiciary; the legal community; a number of specific industries, such as shipowners, banks/financiers, shipbrokers, ship repairers, shipbuilders, bunker suppliers, port and harbour authorities, charterers, tug operators, and ship agents; and a number of International Organizations, such as the Institute of Chartered Shipbrokers (ICS), BIMCO and the International Transport Workers Federation (ITF). The Colloquium also received a written submission by the Federation of National Associations of Ship Brokers and Agents. The participants shared how their industries and States were impacted by the lack of harmony among States in recognizing the judicial sale of a ship in another jurisdiction.

(a) Shipowners

A prominent shipowner representative identified four of the most important considerations in relation to judicial sales: (1) legal certainty; (2) maximization of the asset value; (3) availability of ship finance; and (4) ease of registration after the sale has taken place. It was stated that the failure to resolve these considerations distorted the ship sale market and caused asset value destruction to the detriment of the industry as a whole.

The presentations by shipowners, both as sellers and potential buyers, made clear that their primary interest was legal certainty, which was demonstrably absent from the current process of judicial sales. If greater certainty in the recognition process could be attained, it was thought to lead to a higher valuation in assets, in both auction and sale values, which would in turn result in greater availability of finance.

It was added that there was an interest of all involved in maritime trade (including cargo interests, trade-financing banks, insurers, and others) that the vessel employed not be stopped by unnecessary arrests instituted by former creditors or owners, despite the fact that the vessel had been sold by judicial sale. It was noted that any transit-interruption would be a nuisance to trade and shipping and would create costs and damages.

There was a clear statement by the shipowners that the situation needed to be clarified by way of an international instrument and that the points drafted by CMI could resolve the issue in a simple and pragmatic way.[7]

(b) Financiers/ship financing banks/shipbrokers

The support of many banks, regardless of their location, for an international regime to mitigate risk was emphasized. A leading ship financier, who shared the views of 11 major banks from his jurisdiction, agreed with the need for certainty and highlighted the substantial value of the assets at issue. From the perspective of lenders, it was felt that shipping markets are volatile. In light of these uncertainties, it was said that banks attempt to circumvent the problems by searching for amicable solutions, creating additional costs. Without a reliable international basis for recognition of judicial sales of vessels, it was stated that buyers would need to be satisfied with risks when obtaining the title, which would drive down the sale price.

(c) Ship registries

The registrar of the Maltese Flag, which has been the largest flag in Europe for a number of years with over 72 million tons, described the uncertainties that arise from a foreign judicial sale. It was noted that most registries are national systems designed

[7] Several references to the draft instrument were made by participants at the Colloquium. As noted in para. 3 of A/CN.9/923, "the topic has been discussed and a draft international instrument prepared at numerous meetings including the Beijing Conference in 2012, the Dublin meeting of 2013 and the Hamburg Conference of 2014 where a draft instrument was completed, and approved."

to sell domestic ships in local courts, and the difficulty of having a ship deleted from a register if it had been sold in a foreign jurisdiction was explained. It was stated that circumstances would be greatly improved for all parties by the issuance of an internationally-recognized certificate of judicial sale by the State in which a sale takes place.

It was widely felt that the creation of an instrument that retained a narrow focus on the process leading to recognition (instead of a broad project covering rules on the actual judicial sale) would be a manageable project that would increase the likelihood of having an international instrument adopted efficiently.

(d) Legal community

Legal practitioners from common law, civil law, and mixed systems cited to numerous cases, particularly cases of abuse of the process of ship arrest, in jurisdictions around the globe to highlight the lacuna in international legislation in regard to the recognition of a judicial sale by a foreign court. There was a clear consensus that the number of proceedings created unnecessary costs and frictions, thereby further devaluing assets in the commercial world. From their practical experience representing clients from all aspects of the industry, participants shared the same request of filling the legal gap and enabling a friction-free transition from the former registry to the new registry, and to the new shipowner, freeing the sold vessel from all encumbrances she may have had prior to the judicial sale.

Reference was made to the work undertaken by CMI. It was felt that CMI work not only consisted of valuable in-depth studies of the problems and their possible solutions but also demonstrated interest in adopting rules that would be suitable for industries and compliant with different legal traditions.

(e) Bunker suppliers/service providers

Typical ship creditors were represented at the Colloquium by bunker suppliers, who are often also bunker barge owners. The creditors highlighted the “need for certainty which in today’s economic climate overshadows any other commercial consideration.” It was noted that the main concern of such creditors is the fact that they operate with very small margins and that any step undertaken outside of unified and clear patterns involve economically unjustifiable costs and risks. Support was expressed in favour of a recognition regime at the Colloquium, as a regime would introduce clear and harmonized rules and outweigh the interest in arresting the vessel after a judicial sale in an attempt to obtain funds.

(f) Crew interests

It was widely felt that seafarers on board vessels belonging to owners who had defaulted would benefit from a simplified recognition process. It was stated that the crew languish in various ports all over the world, unable to leave the vessel, and have very little by way of provisioning and fuel to keep generators going. It was felt that the longer the proceedings took, the greater the pain for the crew members, who would struggle to be paid and repatriated. The ITF Malta branch, which handles dozens of such cases, expressed its support for an instrument to mitigate the hardships endured by the seafarers and their families during such affairs.

(g) Ports/port service providers

The Malta Harbour Master explained how important it was for judicial sale procedures to be as smooth and as quick as possible to assist in the management of the phenomenon of abandoned vessels, which causes havoc in ports and undermines smooth trading operations.

(h) Maltese Government

Minister Ian Borg, Minister for Transport, Infrastructure and Capital Projects, explained that as a direct result of being the largest flag in Europe, and being in the

centre of the Mediterranean, Malta heavily focused on the provision of services to the international trading community.

It was noted that Malta has a highly developed, robust and efficient legal regime providing for both judicial sale by auctions and a renowned system of court approved private sales. It was stated that all the industries, the financiers and shipbuilders who had mortgages registered in the Maltese Register of ships, as well as the hundreds of service providers, including ship repairers, bunker suppliers, suppliers of provisioning to ships, crew, cargo handling, trans-shipment, and services given to the oil and gas industry, needed the comfort of knowing that that they could resort to judicial sales in Malta, in the event the owner defaulted, and that those sales would be recognized worldwide. This would provide certainty to interested buyers, thereby increasing the value of the vessel during the sale.

Minister Borg thanked CMI for their initiative in bringing together a cross section of the maritime industry with the aim of discussing the pertinent subject. He stated, "Having an international instrument on the recognition of judicial sales of ships is an important step which aims to introduce a substantial degree of stability and uniformity in an important aspect of maritime trade. Malta's participation in the discussion of this important instrument is imperative."

4. Possible Solutions and Feasibility

The Colloquium established that the main issues and obstacles witnessed in the trade and maritime environment were:

- The lack of legal certainty in relation to the clean title which a judicial sale is intended to confer on a buyer, leading to problems being experienced in the de-registration process in the country of the former flag;
- The obstacles in relation to the recognition of the effects of the judicial sale in respect of the clearance of all former encumbrances and liens;
- The increase of transactional costs in cases of friction in the enforcement of the ship's sale and the risk of costly proceedings and payments just for nuisance value by old creditors attempting to arrest vessels after the judicial sale;
- Factoring of those risks when evaluating the level of bidding in judicial sales, causing a loss on the recoverable assets to the detriment of all creditors (such as crew, financiers, cargoes, ports, agents, bunker suppliers, barge operators, etc.) of the old shipowner resulting from a less favourable judicial sale due to the lack of certainty in respect of its recognition by courts and authorities; and
- Reduced sales proceeds leading to a downwards trend on the brokers' vessel evaluation and thereby causing a general loss of vessel values in the entire market.

Among the delegates and panellists there was consensus that:

- All parties were affected negatively by the gap in legal certainty;
- The gap could be filled from a legal perspective by providing an instrument on recognition on judicial sale of ships;
- A draft instrument that had been prepared by CMI would provide a helpful reference if work were to be taken up on this topic by UNCITRAL;
- UNCITRAL was the appropriate forum to resolve issues involving pernicious effects on cross-border trade. It was noted that UNCITRAL has experience in closely linked issues such as transborder insolvency issues and securities. The working methods of UNCITRAL, which permit close involvement of international industry organizations, would also facilitate the conclusion of an instrument that would be broadly supported across industries.

5. Conclusion

Broad consensus emerged from the Colloquium in support of an international instrument to remedy the problems arising from the lack of harmony among States in recognizing the judicial sale of a ship in another jurisdiction. For that reason, Switzerland proposes that UNCITRAL undertake work to develop an international instrument on foreign judicial sale of ships and their recognition. It is noted that CMI has undertaken significant work on identifying issues and possible solutions on this topic, and that this work has been endorsed by a number of industries and States. That work provides a useful starting point to further UNCITRAL work, providing guidance for a working group and indicating the direction that might be taken.

B. Note by the Secretariat on the work programme of the Commission

(A/CN.9/952 including Corr.1)

[Original: English]

Contents

I. Background

1. At its forty-sixth session, in 2013, the Commission agreed that it should reserve time for discussion of UNCITRAL's future work as a separate topic at each Commission session (A/68/17, para. 310). To facilitate discussion and provide a comprehensive approach, this Note has been prepared to assist the Commission's consideration of its overall work programme and planning of its activities at this fifty-first session. It covers both current and possible future legislative work, as well as current and possible future non-legislative activities.

2. When setting UNCITRAL's work programme for the forthcoming period, the Commission may also wish to recall its decision at the forty-sixth session that it would normally plan for the period to the next Commission session, but that some longer-term indicative planning (for a three-to-five-year period) may also be appropriate (A/68/17, para. 305), bearing in mind that the budget cycle is currently biennial.

II. Summary of current legislative activities and proposals for future legislative work programme

A. Current legislative programme

3. Table 1 below sets out legislative work currently under way in the Commission's Working Groups. In addition to the texts to be completed at the current session, the table indicates possible completion dates, where it is anticipated those will fall within the next two Commission sessions (i.e. fifty-second or fifty-third sessions). Where work is at an early stage of development (e.g., Working Groups III and IV), it is difficult to assess the likely completion date and the work is indicated as "ongoing".

Table 1
Current legislative activity

		Potential completion date		
WG	*Current work topic*	*2018*	*2019*	*2020*
WG I	Introductory chapter on the work on MSMEs	x		
	Business registry guide	x		
	Simplified business entity guide	ongoing		
WG II	International commercial settlement agreements resulting from mediation	x		
WG III	Investor-State dispute settlement reform	ongoing		
WG IV	Cloud computing		x	
	Identity management	ongoing		
WG V	(i) Recognition of Judgments: Model Law and Guide to Enactment	x		
	(ii) Enterprise groups: Legislative Provisions and Guide to Enactment		x	
	(iii) Obligations of directors of group members in the period approaching insolvency		x	
	(iv) MSME insolvency	ongoing		
WG VI	Model Law on Secured Transactions User's Guide		x	
PPPs	PFIP Legislative Guide revision	x		

1. Progress of Working Groups

4. At its forty-seventh session, the Commission requested that the progress and status of the work of each Working Group, as set out in their reports, be collated and presented to the Commission, so as to establish context for each Working Group's suggestions for future work and for prioritization among existing and new topics to be clearer (A/69/17, para. 253). A brief summary of the progress of each Working Group is accordingly presented below.

Micro, Small and Medium-sized Enterprises (Working Group I)

5. Working Group I commenced its discussions on a draft legislative guide on a simplified business entity at its twenty-second session (February 2014) and on a draft legislative guide on key principles of a business registry at its twenty-eighth session (May 2017). The draft legislative guide on key principles of a business registry has been submitted for completion and adoption by the Commission at its current session. A document entitled "Reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs)", which is intended to provide the overall context for work undertaken by UNCITRAL in respect of MSMEs, has also been submitted for finalization and adoption.

6. The discussion on the draft legislative guide on a simplified business entity is ongoing and will become the focus of the forthcoming meetings of the Working Group, following finalization and adoption of the draft registry guide by the Commission in 2018.

Dispute Settlement (Working Group II)

7. At its sixty-second session (February 2015), the Working Group commenced its deliberations on enforcement of settlements agreements and continued those deliberations through its sixty-third (September 2015) to sixty-eighth (February 2018)

sessions. The draft instruments on enforcement of international commercial settlement agreements resulting from mediation have been submitted for finalization and adoption by the Commission at its current session.

Investor-State Dispute Settlement Reform (Working Group III)

8. At its fiftieth session (2017), the Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS), and in particular: (a) to identify and consider concerns regarding ISDS; (b) to consider whether reform was desirable in light of any identified concerns; and (c) if the Working Group were to conclude that reform was desirable, to develop any relevant solutions to be recommended to the Commission.[1]

9. To date, the Working Group has held two sessions for deliberations (thirty-fourth (November–December 2017) and thirty-fifth (April 2018)).

Electronic Commerce (Working Group IV)

10. At its forty-eighth session (2015), the Commission requested the Secretariat to conduct preparatory work on identity management and trust services, cloud computing and mobile commerce, including through the organization of colloquiums and expert group meetings, for future discussion at the Working Group level following completion of the work on electronic transferable records (the UNCITRAL Model Law on Electronic Transferable Records was adopted by the Commission at its fiftieth session (2017)).[2] At its fifty-fifth session, (April 2017), the Working Group commenced its consideration of legal issues relating to identity management and trust services, as well as contractual aspects of cloud computing, pursuant to a request from the Commission at its forty-ninth session (2016),[3] confirmed at its fiftieth session (2017).[4] Pursuant to a request from the Commission at its fiftieth session, an expert group meeting on contractual aspects of cloud computing was convened by the Secretariat in November 2017.[5]

11. At its fifty-sixth session (April 2018), Working Group IV continued its work on those two topics.

Insolvency Law (Working Group V)

12. At its forty-fourth session (December 2013), the Working Group commenced its deliberations on a legislative text to facilitate the cross-border insolvency of enterprise groups, which together with a guide to enactment is likely to be available for finalization and adoption by the Commission at its fifty-second session (2019). At its forty-sixth session (2014), the Working Group commenced its deliberations on a model law on the recognition and enforcement of insolvency-related judgments, which has been submitted for finalization and adoption by the Commission at its current session. At its fifty-first session (May 2017), the Working Group commenced its deliberations on the insolvency of micro, small and medium-sized enterprises (MSMEs), based upon the provisions of the UNCITRAL Legislative Guide on Insolvency Law; this work is ongoing.

13. In addition to the topics noted above, a draft commentary and recommendations on the obligations of directors of enterprise group companies in the period approaching insolvency (which supplements part four of the UNCITRAL Legislative Guide on Insolvency Law dealing with obligations of directors in the period approaching insolvency) has been prepared. It is likely that the text could be finalized and adopted at the same time as the draft legislative provisions and guide to enactment on facilitating the cross-border insolvency of enterprise groups.

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[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), para. 264.
[2] Ibid., *Seventieth session, Supplement No. 17* (A/70/17), para. 358.
[3] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 235 and 353.
[4] Ibid., *Seventy-second session*, *Supplement no. 17* (A/72/17), para. 127.
[5] A/CN.9/WG.IV/WP.147, para. 7.

Security Interests (Working Group VI)

14. At its thirty-second session (December 2017), following adoption of the Guide to Enactment of the UNCITRAL Model Law on Secured Transactions at the fiftieth session of the Commission (2017), Working Group VI commenced work on a practice guide to enactment of the UNCITRAL Model Law on Secured Transactions, in accordance with a mandate given by the Commission at its fiftieth session (2017).[6] Work on the practice guide continued at the Working Group's thirty-third session (April–May 2018).

2. Updating the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000)

15. At its fiftieth session, the Commission reaffirmed the mandate given to its Secretariat to update, as necessary, the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, involving experts. It also recalled that it had requested the Secretariat to consolidate the provisions of the Legislative Guide with the Model Legislative Provisions on Privately Financed Infrastructure Projects (2003).[7] In accordance with a request from the Commission, draft text updating the Legislative Guide has been referred for consideration at its current session.[8] As part of its deliberations on that draft text, the Commission may wish to consider what further work on the text might be needed and how that might be achieved, in particular whether working group time might be required.

B. Future legislative programme

1. Background

16. At its forty-sixth session, the Commission underscored the importance of a strategic approach to the allocation of resources to, inter alia, legislative development, in the light of the increasing number of topics referred to UNCITRAL for consideration (A/68/17, paras. 294–295). The Commission has emphasized the benefit of UNCITRAL's primary working method – that is, legislative development through formal negotiations in a working group (A/69/17, para. 249).

17. The Commission has also reaffirmed that it retains the authority and responsibility for setting UNCITRAL's work plan, especially as regards the mandates of working groups, though their role in identifying possible future work and the need to allow a working group the flexibility to decide on the type of legislative text to be produced were also recalled.[9]

18. Table 2 below sets out possible future work by the Commission. It is annotated to show whether the Commission has already discussed and decided to retain certain topics on its work agenda for further consideration at a future session or whether the topic is a new proposal for possible future work.

19. In addition to Table 2, the Commission may wish to consider the more detailed descriptions in the paragraphs following that table and the other documents referred to in this section when determining its future work programme.

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[6] *Official Records of the General Assembly, Seventy-Second Session, Supplement No. 17* (A/72/17), para. 227.

[7] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 18–21 and annex I.

[8] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 273–274 and 448.

[9] At its forty-sixth session (2013), the Commission confirmed that it would consider whether to refer proposals for future work to a Working Group by reference to four considerations: 1) whether the Commission was satisfied that the topic was likely to be amenable to harmonization and the consensual development of a legislative text; 2) whether the scope of a possible future text and the policy issues for deliberation were clear; 3) whether there existed a sufficient likelihood that a proposed legislative text would enhance the law of international trade; and, 4) whether proposed work would duplicate work undertaken by other law reform bodies (A/68/17, paras. 303 and 304).

Table 2
Possible future legislative activity

Subject area	*Topic*	*Document reference*	*Status*
MSMEs (WG I)	Contracting networks for MSMEs	Paras. 21–22 below; A/CN.9/925 and 954	Proposal
Dispute Settlement (WG II)	(a) Modernizing UNCITRAL Conciliation Rules (b) Notes on organizing mediation proceedings (c) Expedited arbitration (d) Adjudication in long term projects (e) Uniform principles on the quality and efficiency of arbitral proceedings	Paras. 23–24 below; A/CN.9/934, paras. 149–164.	Proposal
Investor-State Dispute Settlement Reform (WG III)	(a) Code of ethics (b) Concurrent proceedings	Paras. 25–26 below; A/72/17, paras. 242, 254	Currently WG III – possible inclusion in the work programme of WG II
Electronic commerce (WG IV)	Mobile commerce	Paras. 27–28 below; A/70/17, para. 358	Request for preparatory work
	Single windows and paperless trade facilitation	Paras. 29–30 below; A/66/17, para. 240	Request to cooperate and contribute as appropriate to ongoing work in other organizations
Security interests (WG VI)	(a) Warehouse receipts (b) Intellectual property licensing (c) Alternative dispute resolution in secured transactions (d) Finance to micro business	Paras. 32–33 below; A/71/17, paras. 124–125; A/72/17, paras. 218–229	Decision to retain on work agenda for further discussion
Other topics	Judicial sale of ships	Paras. 34–36 below; A/CN.9/944	Proposal
	Civil law aspects of asset tracing and recovery	Para. 37 below; A/CN.9/WG.V/WP.154; A/CN.9/931, para. 95.	Proposal

2. Proposals relating to existing Working Group subject areas

MSMEs (Working Group I)

20. At its fiftieth session (2017), the Commission heard a proposal by the Government of Italy on non-equity modes of cooperation allowing businesses, prior to the creation of a legal personality, to contract with larger companies in supply

chains as a network.[10] The Commission welcomed the willingness of the proponents to conduct additional research to develop the proposal further, so that it could come before the Commission in 2018 for a decision on whether the work should go forward and, if so, in what capacity.

21. The Commission will have before it a further proposal by the Government of Italy, document A/CN.9/954.

Dispute Settlement (Working Group II)

22. At its sixth-eighth session (February 2018), Working Group II discussed possible topics for future work.[11] These included (a) possible revision of the UNCITRAL Conciliation Rules, to take account of recent developments in that field; (b) preparation of notes on mediation, akin to the UNCITRAL Notes on Organizing Arbitral Proceedings, with the aim of having a complete set of mediation instruments including an explanation for practitioners; (c) a framework for expedited arbitration; (d) model legislative provisions and contractual clauses for adjudication in long-term projects, particularly in the construction industry; and (e) uniform principles on the quality and efficiency of arbitral proceedings, which could include emergency arbitration, arbitration clauses and non-signatory parties, legal privileges and international arbitration and other topics.

23. The Working Group recommended[12] that a mandate be sought for topics (a) and (b), and that work on topic (c) should be given priority for future work, together with topic (e).

Investor-State Dispute Settlement Reform (Working Group III)

24. At its fiftieth session, the Commission had before it Notes by the Secretariat on "Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration" (A/CN.9/915); and on "Possible future work in the field of dispute settlement: Ethics in international arbitration" (A/CN.9/916). For deliberation purposes, it was agreed in the Commission that the topic of investor-State dispute settlement reform would be considered in a comprehensive manner to also include the topics of concurrent proceedings and ethics.[13] After discussion, it was generally felt that work on concurrent proceedings and a code of ethics could form part of the discussions on investor-State dispute settlement reforms. In relation to concurrent proceedings, it was mentioned that work could be considered on guidance to arbitral tribunals and to the manner in which the matter had been addressed in international investment agreements. Regarding the topic of ethics, it was highlighted that aspects mentioned in paragraphs 38 and 39 of document A/CN.9/916 would deserve further consideration. It was further suggested that work on ethics could address the conduct of various participants in the arbitral process, not just arbitrators.[14]

25. The Commission may wish to consider whether the work on ethics and concurrent proceedings might be referred to Working Group II as topics for possible future work. It might be noted, in respect of the ethics topic, that the Secretariat has received a request by the ICSID Secretariat to embark upon a jointly elaborated code of ethics for arbitrators/conciliators/ mediators/adjudicators.

Electronic Commerce (Working Group IV)

(a) Mobile commerce

26. As noted above, at its forty-eighth session (2015), the Commission had heard a proposal on issues relating to mobile commerce and payments effected with mobile devices (A/CN.9/WG.IV/WP.133). Support was expressed for undertaking work on

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[10] Ibid., paras. 451–455, discussing the proposal set forth in A/CN.9/925.
[11] A/CN.9/934, paras. 149–164.
[12] Ibid., paras. 163–164.
[13] *Official Records of the General Assembly, Seventy-second Session*, *Supplement No. 17* (A/72/17), para. 242.
[14] Ibid., para. 254.

the legal aspects of the use of mobile devices, especially for its potential relevance for developing countries, but it was noted that while matters relating to payments with electronic means had great relevance for international trade and it might be particularly desirable to update existing UNCITRAL texts in that field, any work proposal required further illustration given the complexity of the subject.[15]

27. The Commission accordingly requested the Secretariat to conduct preparatory work on several topics, including mobile commerce, for future discussion at the Working Group level, with a view to making recommendations on the exact scope, possible methodology and priorities for the consideration by the Commission at its forty-ninth session. As noted above, at its forty-ninth session, the Commission gave the Working Group a mandate to work on identity management and trust services, as well as cloud computing. Preparation of work on mobile commerce has yet to be taken up.

(b) Single windows and paperless trade facilitation

28. At its forty-fourth session (2011), the Commission requested the Secretariat to continue cooperating with other organizations undertaking work on electronic single-window facilities and to contribute to that work, as appropriate.[16]

29. The Secretariat has continued that work and reported annually to the Commission on relevant developments.[17]

30. In view of the regained momentum of e-commerce at the international level and the need for a sound legal framework to accompany a global transformation of the economy in the digital era, the Commission may wish to consider whether preparatory work on mobile commerce or other topics might be taken up following completion of the work on identity management and cloud computing.

Security Interests

31. At its fiftieth session, in addition to granting a mandate for preparation of a practice guide on secured transactions, which could include relevant issues relating to financing of micro-business, the Commission considered possible future work in the area of secured transactions on the topics listed above.[18]

32. Various suggestions were made: (a) with respect to warehouse receipts, that the Secretariat should prepare a study on the feasibility and desirability of preparing an international legal standard; (b) with respect to intellectual property licensing, that the Commission might prepare a text on contractual issues, given their importance and the fact that there were gaps in the law relating to them; and (c) with respect to the use of alternative mechanisms to resolve disputes arising in the context of secured transactions, that model rules might be prepared to address arbitrability and third-party issues. Those suggestions did not receive sufficient support for referral to a working group, but the Commission decided to retain those topics on the future work agenda for further discussion at a future session, without assigning any priority to them; a proposal on real estate financing was not retained.[19]

3. Additional proposals for possible future work

(a) Judicial sale of ships

33. At its fiftieth session, the Commission also heard a proposal by the Comité Maritime International (CMI) on possible future work on cross-border issues related

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[15] Ibid., *Seventieth session, Supplement No. 17* (A/70/17), para. 357.

[16] *Official Records of the General Assembly, Sixty-sixth Session*, *Supplement No. 17* (A/66/17), para. 240.

[17] Ibid., *Sixty-seventh Session, Supplement No, 17*, (A/67/17), paras. 86–87; *Sixty-eighth Session, Supplement No, 17*, (A/68/17), para. 313; *Sixty-ninth session, Supplement No, 17*, (A/69/17), paras. 142, 145; *Seventieth session, Supplement No, 17*, (A/70/17), para. 229; *Seventy-first session, Supplement No, 17*, (A/71/17), paras. 238–240; and *Seventy-second session, Supplement No, 17*, (A/72/17), para. 128.

[18] *Seventy-second session, Supplement No, 17*, (A/72/17), paras. 218–229.

[19] The Commission was informed that a delegation intended to prepare and submit a study on warehouse receipts for future consideration: ibid., para. 225.

to the judicial sale of ships (A/CN.9/923). After discussion,[20] the Commission agreed that additional information on the breadth of the problem would be useful. It was suggested that the CMI might seek to develop and advance the proposal by holding a colloquium in order to provide additional information to the Commission to enable it to reconsider the proposal and take an informed decision at a future session.

34. The Commission decided not to refer the proposal to a working group at that time, but agreed that UNCITRAL, through its secretariat, and States would support and participate in a colloquium to be initiated by CMI to discuss and advance the proposal.

35. The CMI convened a colloquium with the support of the Government of Malta, in Valletta on 27 February 2018. The Commission will have before it a document indicating the conclusions of that colloquium and containing a proposal by the Governments of Malta and Switzerland (A/CN.9/944) for possible future work by UNCITRAL on this topic.

(b) Civil aspects of asset tracing and recovery

36. At its fifty-second session (December 2017), Working Group V (Insolvency Law) heard a brief introduction to a proposal by the United States of America for possible future work on civil asset tracing and recovery.[21] The Working Group exchanged preliminary views on the proposal, with a view to having a more considered discussion at a future session.[22] Further details of the proposal may be available at the current session.

III. Celebration of the 60th anniversary of the New York Convention

37. The Commission may wish to note that 2018 marks the sixtieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (the "New York Convention"). A special programme to celebrate that anniversary will be held during the fifty-first session of the Commission on Thursday 28th June. To inform the Commission on developments with respect to the Convention, and to encourage an exchange of views on the promotion and application of the Convention, as well as on coordination and cooperation efforts, the Commission will hear a summary of achievements in the field and views of experts at the occasion of a celebration event. The Commission may wish to note that the Secretariat will seek to make full use of the event associated with that anniversary to encourage further treaty actions in respect of the New York Convention. The draft convention on enforcement of international settlement agreements resulting from mediation, which is to be considered by the Commission at its current session, will also be introduced.

38. Information about the anniversary program is available on the UNCITRAL website, at www.uncitral.org/pdf/english/events/Program_60_NYC.pdf.

39. The Secretariat will provide an oral report on the proceedings to the Commission.

IV. Technical cooperation and assistance activities

40. At its twentieth session (Vienna, 20 July–14 August 1987), the Commission stressed the importance of training and technical assistance were important activities that should be given a higher priority than in the past.[23]

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[20] *Official Records of the General Assembly, Seventy-second Session*, *Supplement No. 17* (A/72/17), paras. 456–465.

[21] The proposal is contained in document A/CN.9/WG.V/WP.154.

[22] A/CN.9/931, para. 95.

[23] *Official Records of the General Assembly, Forty-second Session, Supplement No. 17* (A/42/17), para. 335.

41. The Commission and the General Assembly have since reiterated their importance. More recently, in its resolution 72/113 of 7 December 2017, the General Assembly reaffirmed the importance, in particular for developing countries and economies in transition, of the technical cooperation and assistance work of the Commission. The General Assembly also reiterated its appeal to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and regional development banks, as well as to Governments in their bilateral aid programmes, to "support the technical cooperation and assistance programme of the Commission and to cooperate with the Commission and coordinate their activities with those of the Commission in the light of the relevance and importance of the work and programmes of the Commission for the promotion of the rule of law at the national and international levels and for the implementation of the international development agenda, including the achievement of the 2030 Agenda for Sustainable Development."

42. The General Assembly further stressed the need to strengthen support to Member States, upon their request, in the domestic implementation of their respective international obligations through enhanced technical assistance and capacity-building, and welcomed the efforts of the Secretary-General to ensure greater coordination and coherence among United Nations entities and with donors and recipients. The "Guidance Note on Strengthening United Nations Support to States, Upon Their Request, to Implement Sound Commercial Law Reforms" lists most forms of technical assistance activities that may be relevant in the area of commercial law.[24]

A. Designing a strategy for UNCITRAL technical assistance

43. "Technical assistance" within the context of the Commission's work programme includes essentially three types of activities: (a) dissemination of information to promote the adoption of UNCITRAL instruments and texts; (b) assistance to reform of commercial law at the domestic or regional level (primarily related to UNCITRAL instruments); and (c) information and capacity-building activities intended to support uniform interpretation of UNCITRAL instruments. The existing mandate and policy framework for technical assistance activities offers the Secretariat a sufficiently broad and flexible mandate to engage in most of the types of technical assistance and capacity-building activities that could be relevant to our field of expertise.

44. However, the Secretariat's current level of financial and human resources has limited its ability to deliver technical assistance and capacity-building at a significantly larger scale. Technical assistance activities have remained largely reactive (i.e. the Secretariat has in most instances responded to requests to participate in conferences and seminars with a limited impact on law reform or capacity-building. Moreover, the Secretariat has not so far developed a global strategy for technical assistance, including specific strategies that would group together UNCITRAL instruments by the broad but interrelated areas of law.

45. The Secretariat has considered the available options for strengthening its technical assistance programme and translating it into a longer-term technical assistance plan, which would also include shorter-term priorities. They include, on the one hand, a commitment by the Secretariat to achieving efficiency gains through sharper focus, consistent monitoring, effective evaluation and better prioritization of

[24] They include: undertaking briefing missions and participating in seminars and conferences, organized at both regional and national levels; assisting countries in assessing their trade law reform needs, including by reviewing existing legislation; assisting with the drafting of national legislation to implement UNCITRAL texts; assisting multilateral and bilateral development agencies to use UNCITRAL texts in their law reform activities and projects; providing advice and assistance to international and other organizations, such as professional associations, organizations of attorneys, chambers of commerce and arbitration centres, on the use of UNCITRAL texts; and organizing training activities to facilitate the implementation and interpretation of legislation based on UNCITRAL texts by judges and legal practitioners (see *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 262 and annex II).

activities and on the other hand, an increased effort by the Secretariat to develop strategic partnerships and raise funds in order to structure and deliver a more focused and results-oriented technical assistance programme.

1. Priorities for technical assistance and promotion activities

46. Three elements play a role in establishing the relative priority of technical assistance activities: the type of activity; the region or country affected by the activity; and the specific subject matter. Since 2015, the Secretariat has a procedure in place for the systematic consideration and recording of technical assistance activities. This system has been further enhanced by integrating all activities (including those initiated at the UNCITRAL Regional Centre for Asia and the Pacific) into a single database. This will allow the Secretariat to keep track of past activities, the countries in which they took place and the subject matters covered and thereby facilitate better future planning.

47. The Secretariat will assign highest priority to developing a technical assistance programme to support States (directly or at the request of another international organization) in carrying out commercial law reform, in particular (although not exclusively) where it involves the drafting and adoption of legislation implementing a UNCITRAL instrument (in particular in areas or regions identified as short or medium-term priority). The second degree of priority will be assigned to capacity-building activities in connection with the implementation and application of UNCITRAL instruments or the development of new instruments. The Secretariat will support the implementation of both types of activity by the development of standard documentation and information materials, distance learning and on-line capacity-building tools. Accordingly, the Secretariat will scrutinize and more strictly prioritize participation in briefing missions, conferences, symposia, colloquia, seminars, courses or lectures without a direct connection to law reform or capacity-building, according to their potential impact and effectiveness for the purpose of promoting UNCITRAL instruments or a particular area of ongoing work.

2. Global and regional partners

48. Partners of UNCITRAL technical assistance activities have traditionally included organizations of the United Nations system, other international organizations, government institutions, academia, and international and domestic non-governmental organizations.

49. There has been progress towards integrating UNCITRAL activities within the context of initiatives led by other agencies, including activities of the World Bank in the area of insolvency and secured transactions; of the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Regional Economic Commission for Asia and the Pacific (ESCAP), in the area of electronic commerce; of the Asia-Pacific Economic Cooperation (APEC) and the Association of Southeast Asian Nations (ASEAN) in the area of secured transactions and online dispute resolution; of the European Bank for Reconstruction and Development (EBRD) and World Bank in the area of public procurement PPPs.

50. In some instances, regional channels have been instrumental to the implementation of UNCITRAL texts, as has been the case, for instance, in the adoption of UNCITRAL texts in the field of arbitration and electronic commerce by the States parties to the North American Free Trade Agreement (NAFTA), and by certain member States of the Association of Southeast Asian Nations (ASEAN). The Asia-Pacific Economic Cooperation (APEC) is also becoming an increasingly effective forum for the raising awareness about the importance of adopting UNCITRAL texts, for instance in the area of secured transactions.

51. The Secretariat intends therefore to expand and deepen its strategic partnerships both at the global as well as at the regional level. In doing so, the Secretariat has adopted a flexible approach consisting of weighing the benefits not only of institutional partnerships with international organizations, but also of offering a UNCITRAL component to country-led cooperation schemes capable of raising the

interest or need for trade law harmonization. Examples include the Trans-Pacific Partnership (TPP) and the Belt and Road Initiative.

52. It should be noted that UNCITRAL presence in the Asia-Pacific region through the UNCITRAL Regional Centre (RCAP) in Incheon City (Republic of Korea) has proven crucial to facilitate interaction with regional stakeholders and expand the range of technical assistance activities in the region. Although the Secretariat has not yet conducted a systematic evaluation of the activities of RCAP, it is obvious that RCAP has been very successful in raising awareness about UNCITRAL and its work in the region. RCAP plays a unique role in identifying needs for law reform and technical assistance in the Asia-Pacific region and in maintaining contacts with country focal points for UNCITRAL matters or promoting their establishment, in those countries where no focal point exists. RCAP also has an important role to play as a vehicle for testing the effectiveness of technical assistance by ITLD or the relevance of its work plan.

3. Means of delivery

53. An essential element of a more focused and responsive technical assistance programme is the tailoring of the means of delivery to the needs of the recipient, rather than to the internal considerations of the provider. In a demand-driven technical assistance programme, different tools and methods may need to be offered, depending on the type of assistance that is requested.

(a) Technical assistance to commercial law reform

54. The technical legislative assistance provided by the Secretariat has so far been predominantly geared at promoting the implementation of UNCITRAL texts. However, a reading of the mandate of UNCITRAL in the light of the Sustainable Development Goals would call for a broader assistance to support countries carrying out legal reform to pursue economic, human and social development. In order to be more fully responsive to requests for technical assistance, the Secretariat should devise programmes that enhance the impact of the implementation of an UNCITRAL instrument by modernizing other relevant areas of commercial law. Ideally, the role of the Secretariat in response to a specific demand for assistance should go beyond merely reviewing draft bills and should aim at:

(a) Identifying applicable internationally accepted commercial law standards and related readily available tools and expertise designed to facilitate their enactment;

(b) Identifying all stakeholders relevant to the commercial law reform, including domestic reform constituencies, international experts, various donors working in the same or a related field, etc., and appropriate focal points in each entity to coordinate a specific reform, in order to facilitate proper consultations with them, where necessary;

(c) Advising the recipient country, as appropriate, on additional legislative measures to accompany the adoption of a new law (e.g. other necessary laws, regulations, guidance and/or codes of conduct) and ensuring the proper expert assessment of the legislative package before the law is adopted.

55. To some extent, this expanded scope of activities would only be possible in the context of a sufficiently funded law reform program. However, the Secretariat is considering steps that can be made without additional resources.

(b) Promotion of adoption of UNCITRAL instruments

56. Most instances of technical legislative assistance provided by the Secretariat so far have taken the form of comments and suggestions on draft legislation implementing a UNCITRAL text. It is assumed that this type of desk review of instruments will continue to play a central role in the future. Nevertheless, with a view to increasing the effectiveness and impact of its assistance, the role of the Secretariat in response to a specific demand for assistance should go beyond merely reviewing draft bills.

57. The Secretariat should deepen its cooperation with other international organizations, particularly of the United Nations system (such as UNCTAD and UNIDO) that offer support and assistance in broader areas of economic development that have a discrete commercial law component for which the expertise of UNCITRAL may be relevant. When UNCITRAL joins specific programmes or projects of those organizations, it seizes an opportunity to ensure that the implementation of UNCITRAL instruments became an integral component of a broader policy package offered to developing countries to promote trade and investment.

58. The same rationale calls for closer cooperation to explore synergies with other private law formulating agencies. At the last tripartite meeting of UNCITRAL, Unidroit and the Hague Conference on Private International Law, the three organizations agreed on exploring common promotion and technical assistance programmes in the areas in which the three organizations have developed complementary instruments. The synergy between existing instruments on choice of law (Hague Conference), general contract law (Unidroit) and sales law (UNCITRAL), is already the object of an ongoing cooperation project. Further topics include, for instance, judicial cooperation (Hague Conference), dispute settlement (UNCITRAL) and civil procedure (Unidroit); or insolvency (UNCITRAL) and capital markets law (both Hague Conference and Unidroit).

(c) Capacity-building for uniform interpretation of UNCITRAL texts

59. The Secretariat is also considering measures to enhance its technical assistance, promotion and outreach activities, and deepen their impact. The Secretariat believes that its limited capacity-building capabilities could be expanded even without additional human resources by developing a toolkit consisting of various complementary components, such as:

(a) Information kits (for instance in the form of a series of video lectures) on UNCITRAL texts, including both general information materials to be posted on the UNCITRAL website (similarly to the Audiovisual Library of International Law developed by the Codification Division of the Office of Legal Affairs) [25] or on UNCITRAL social media, and materials to be used in long-distance learning; and

(b) Information materials grouping UNCITRAL instruments by broader areas (e.g. procurement and PPPs; sales law, electronic commerce and commercial fraud; secured transactions) and showing their relevance from the point of view of the Sustainable Development Goals, and international benchmarks and indicators (such as the World Bank Doing Business and Investment Competitiveness reports).

60. For the purposes of ensuring coherence and consistency, the Secretariat has developed standardized project documents capable of being fine-tuned to suit donor needs. The Secretariat has sought the support of other organs of the United Nations system involved in training and capacity-building to develop standardized evaluation questionnaires for technical assistance and promotion activities, in particular training-related.

4. Priorities for 2018/2019

61. The Secretariat has adopted two general criteria for setting priorities for the promotion of UNCITRAL texts. First, the Secretariat sees it as a priority to promote the adoption of newly adopted treaties, with a view to fostering their early entry into force. Second, the Secretariat promotes the universal adoption of fundamental treaties of international trade law, in particular, by those countries having yet to develop an international trade law framework, or having an obsolete one.

62. The treaties currently considered under this approach include, on the one hand, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency"), [26] and, on the other hand the Convention on the Recognition and Enforcement of Foreign

[25] Available at http://legal.un.org/avl/intro/welcome_avl.html.
[26] United Nations General Assembly, *Resolution 69/116* of 10 December 2014, Annex.

Arbitral Awards[27] (the New York Convention, a United Nations convention adopted prior to the establishment of the Commission, but actively promoted by the Commission), whose universal adoption has already been explicitly called for by the General Assembly, [28] and the United Nations Convention on Contracts for the International Sale of Goods (CISG).[29]

63. For the years 2018/2019 the UNCITRAL secretariat has identified the following priorities for promotion and technical assistance:

(a) Promotion of accession to the New York Convention within the year UNCITRAL celebrates the 60th anniversary of its adoption, and technical assistance in connection with its implementation;

(b) Promotion of ratification of the Mauritius Convention on Transparency and technical assistance in connection with its implementation;

(c) Promotion of accession to the CISG with a view to the celebration of the 40th anniversary of its adoption in the year 2020, and technical assistance in connection with its implementation.

B. Resources and funding

64. The technical assistance activities are almost entirely funded through voluntary contributions to the Trust Fund for UNCITRAL Symposia.

65. The Secretariat continues to explore alternatives for increasing resources for technical assistance activities, including through in-kind contribution. In particular, a number of missions have been funded, in full or in part, by the organizers.

66. As indicated in the relevant report (A/CN.9/947, para. 14) RCAP relies on the annual financial contribution from the Incheon Metropolitan City to the Trust Fund for UNCITRAL Symposia to meet the costs of its operation and programme (currently set at USD $450,000 per annum for the period 2017–2021). That contribution also includes an amount for travel and operational activity costs of RCAP that nearly matches the yearly allotment usually available from other sources under the UNCITRAL Trust Fund for UNCITRAL Symposia. The Commission may wish to express its appreciation to the Government of the Republic of Korea and to the Municipality of Incheon for their generous support to the regional centre.

[27] United Nations, *Treaty Series*, vol. 330, No. 4739.
[28] United Nations General Assembly, *Resolution 62/65* of 8 January 2008, para. 3.
[29] United Nations, *Treaty Series*, vol. 1489, No. 25567.

C. Note by the Secretariat on contractual networks and economic development: proposal by Italy for possible future work by UNCITRAL on alternative forms of organization to corporate-like models – advanced proposal

(A/CN.9/954)

[Original: English]

The Government of Italy has requested the Secretariat to transmit for consideration by the Commission at its fifty-first session an advanced proposal for possible future work by UNCITRAL on alternative forms of organization to corporate-like models (contractual networks). The text of the proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat. An earlier version of the proposal was before the Commission at its fiftieth session, in 2017 (A/CN.9/925).

Annex

Contractual networks and economic development: a proposal by Italy for possible future work by UNCITRAL on alternative forms of organization to corporate-like models – advanced proposal

I. Introduction

1. At the twenty-third session of Working Group I, held in Vienna from 17 to 21 November 2014, Italy and France submitted observations on Possible Alternative Legislative Models for Micro and Small Businesses (A/CN.9/WG.I/WP.87). At the twenty-eighth session of Working Group I, held in New York, from 1 to 9 May 2017 (A/CN.9/WG.I/WP.102), and then at the fiftieth session of the Commission, held in Vienna from 3 to 21 July 2017 (A/CN.9/925), Italy further submitted a more specific proposal for possible future work by UNCITRAL on alternative forms of organization to corporate-like models. Such observations and proposal by the Italian Republic aimed at presenting domestic legislative models applicable to micro and small businesses based on multiparty agreements that could organize cooperation and joint business, as well as eventually provide for the segregation of business assets without requiring the creation of a separate entity, but that could offer limited liability protection.

2. In particular, reference was made to cooperation among micro, small and medium-sized enterprises (MSMEs) through the so-called "contractual networks" (known and regulated under Italian law as "*contratto di rete*"). This model offers great flexibility in the organization of cooperation, as well as the possibility of segregation of assets and consequently limited liability protection. It facilitates internationalization of MSMEs and cross-border cooperation thanks to such flexibility and the range of different levels of cooperation it can offer. Moreover, it provides a tool to link MSMEs to larger companies by permitting MSMEs to be connected to the supply chain of such companies.

3. Working Group I is currently working on two separate instruments, one on business registration (A/CN.9/940 – Draft legislative guide on key principles of a business registry) and another on the statute of a limited liability organization (A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1 – Draft Legislative Guide on an UNCITRAL Limited Liability Organization, UNLLO). In the strong hope that the Draft legislative guide on key principles of a business registry be adopted by the Commission at its fifty-first session, and bearing in mind that the Italian proposal always meant to fill a gap between issues of business registration, on the one hand, and the establishment of a limited-liability organization, on the other hand, with a flexible contractual instrument, Italy is resubmitting its proposal for future work on contractual networks in the light of further insights, as it was agreed by the Commission at its fiftieth session (A/72/17, para. 455).

4. Work on contractual networks would be complementary to that on UNLLO. Both models would permit the strengthening of cooperation by regulating its organization. However, while UNLLO would require the establishment of an entity with legal personality [Recommendation 3 as in A/CN.9/WG.I/WP.99] and the sharing of a common activity, contractual networks in general would preserve the identity and autonomy of each member. Moreover, flexibility in contractual networks would even be greater than in the case of UNLLO, and permit also looser forms of cooperation, although keeping an element of organization by the very fact that contractual networks by definition require the sharing of a common project (so distinguishing contractual networks also from existing commercial agreements where elements of cooperation are present, as in the case of agency or distribution agreements).

5. The content of the present note delves into and articulates on the previous contributions submitted by the Italian Republic also in the light of individual requests

for clarification received from other delegations either in the course or after the Commission's fiftieth session. Moreover, at this stage Italy tries to abstract to the maximum possible extent from the specificities of its own domestic legislation to facilitate the employment of a functional approach.

II. Background

Contractual networks and cross-border cooperation

6. MSMEs constitute the skeleton of domestic industrial and agricultural production systems. However, they experience serious hurdles to access global trade and global supply chains. These hurdles concern in particular: (1) access to capital; (2) access to technology, intellectual property rights, and know how; and (3) access to a qualified and well-trained labour force. In order to ensure the participation of MSMEs in global trade, access to critical resources has to be facilitated by promoting appropriate common legal frameworks.

7. Contractual networks (i.e. multiparty contracts between MSMEs located in the same or in different jurisdictions) address such hurdles, can contribute to internationalization and facilitate access to foreign markets. They can also help to link networks of local enterprises with foreign networks and permit specialization according to the market where each operates. Since they are based on contracts, there is no need for establishment in a specific country among those in which participants are based, nor for ownership integration, while still permitting to various extents governance control over the partners. In this sense, contractual networks could be compared to contractual joint ventures, although in the case of networks cooperation can even be much looser.

Business environment

8. MSMEs' growth is driven, among other factors, by the adoption of an appropriate legal framework to promote their coordination in order to favour economic growth and specialization.

9. Such growth can occur through integration in corporate entities or via contractual collaboration in various degrees.

10. These two families of legal instruments are complementary. The corporate-like family (company, cooperative) supports the integration of existing different enterprises when the level of mutual trust and reciprocal knowledge is high and the industrial project is well defined from the very beginning. The contractual family provides a set-up for enterprises to start new collaborations, in particular when they might not otherwise enter into a demanding and burdensome common industrial project. Lack of steady availability of physical capital or uneven access to financial resources among potential partners may also discourage MSMEs from entering into corporate-like forms of integration. The complementarities between corporate-like and contractual modes might establish a process whereby MSMEs start with contractual collaboration and end with the creation of new companies that integrate some of their activities, although this is not a necessary outcome. Complementarities to this end should be seen in terms of the different alternatives offered by the legal system to organize cooperation according to the needs.

11. Collaboration is a process that might require various steps. The first is through contractual collaboration that may or may not translate into the creation of a company with a higher degree of ownership integration of different types of assets including both tangible and intangible ones. Hence, the evolution of a contractual collaboration over time should be compatible with dissolution, preservation or transformation of the contract into a corporate entity.

12. Contractual networks may provide such an instrument with a relatively low level of initial capital, low entry and exit costs, and a light governance infrastructure.

Multiparty contracts may facilitate access to capital by providing joint collateral to credit institutions; they can facilitate access to new technologies with the creation of common technological platforms, where common intellectual property rights may be used. Access to a qualified labour force may be enabled through the possibility of sharing employees who may rotate among the enterprises participating in the network, thus increasing specialization and the effective use of human capital.

13. Contractual networks include different existing forms of multiparty contracts ranging from joint ventures to consortia, franchises or patent pools; they can take the form of either a single contract with several parties, or of a set of interlinked bilateral contracts with high levels of coordination and interdependence. These contractual models include production and distribution and can be domestic or international. They can provide MSMEs with the legal infrastructure to trade (for example, through e-commerce platforms and payment systems). Legal frameworks exhibit a great degree of differentiation between jurisdictions that make international MSME collaboration very difficult. In addition, choice of law and forum rules are unclear for multiparty contracts; and even less clear for interlinked contracts.

14. Essentially two forms of contractual networks are currently in place. *Horizontal networks* are networks in which various SMEs contribute to a common project with their *products or services*, playing a similar role along the supply chain or having similar expectations from the network programme (e.g. new trade opportunities for the sale of final products). Horizontal networks partaken by micro- and SMEs may play an important role in capacity-building and technology development, so enhancing SMEs' ability to get access to Global Value Chains (GVCs) or upgrade their position along the chain. *Vertical networks* operate along supply chains that include different stages of production/distribution. Participants in vertical networks (e.g. suppliers) perform activities (e.g. production of intermediate goods, supply of services) to be incorporated into the activity of another chain participant (e.g. an assembler) and the network is aimed at coordinating their interdependent activity along the lines of a chain project, often developed by a chain leader. Transnational Corporations (TNCs) look for stable relationships that decrease coordination costs and increase the stability of the supply required by global markets. In order to stabilize the supply chain governance, they need stronger coordination between local suppliers of inputs and intermediate goods and chain leaders. This process is reinforced by the increasing number of regulatory requirements, as on safety, environmental and social protection, to be applied along the global chain. In order to facilitate access to global trade, cross-border contractual collaboration is necessary and specific legal forms tailored to SMEs are needed. Such forms may contribute to the process of the internationalization of SMEs through or independently from existing global chains.

15. Finally, creativity and innovation with intellectual property protection and management are among the key drivers of competitiveness, growth and development. This underscores the importance of network contracts in giving rise to platforms with a view to jointly exploit intellectual property rights. In particular, MSMEs can share existing technology provided by one or more platform members, directly co-produce new technology within the platform itself or acquire technology licensed/transferred by subjects that are not party to the platform. Network contracts may also ease the provision of technical assistance given to MSMEs related to intellectual property by business and government bodies, by facilitating the transfer of information and knowledge to a single collective subject and its subsequent dissemination among the network members.

The legal institution under Italian law

16. The "contractual network" ("*contratto di rete*") was first introduced into the Italian legal system in 2009. It is an agreement by which "*more entrepreneurs pursuing the objective of enhancing, individually and collectively, their innovative capacities and competitiveness in the market, undertake a joint program of collaboration in the forms and specific clusters as they agree in the network contract, or to exchange information or services of an industrial, commercial, technical or*

technological nature, or to engage in one or more common activities within the scope of their business". The scope of contractual networks can thus broadly differ, and kind and degree of cooperation are left to the free agreement of parties, as long as, through the determination of a common programme, strategic goals are shared that allow either the improvement of innovative capacity or the growth of competitiveness. Cooperation can range from a plain undertaking to exchange information or services, to the organization of cooperation, up to the joint conduct of economic activities. This leaves the door open to vertical (coordination of suppliers with shared standards of production, distribution or franchise chains), or horizontal integration (research and development, centralized point of sale or of acquisition). Under a recent amendment to the relevant legislation, business networks can also take part in public bids. The sole requirement to enter into a business network contract is to be an entrepreneur, irrespective of the nature and the activities performed. This includes sole ownership, companies of all kinds and enterprises owned by public entities, including those of a non-commercial nature, as well as for profit and non-profit entities (mixed networks do not seem to be precluded, where there are for-profit and non-profit participants). Business networks, although factually mainly used as a scheme for cooperation of MSMEs, are thus generally open to any businesses, including corporations and groups. Eventually, a very recent reform (as of 2017) has extended the use of mixed network contracts, partaken by businesses and professionals, when established for participating in public bids.

17. In order to carry out the programme of the contractual network, contracting parties may establish a common fund. This is a separate fund exclusively devoted to implement the programme of the network and the pursuit of its strategic objectives. Creditors of individual participants to the network cannot rely on the fund, which only serves to satisfy claims deriving from the activities performed within the scope of the network. Publicity is given by registration in the business registry.

18. Business networks do not normally have legal personality, nor necessarily need to be established as a separate entity. However, recent amendments to relevant legislation (as of 2012) permit these to also be established as a separate entity.[1]

19. Contractual networks under Italian law can be seen both as a form of aggregation around a project, as well as a tool to start a process of aggregation that can lead to more structured forms, such as more binding and articulated contractual network schemes, the constitution of new companies equipped with legal personality, up to business mergers.

20. This gradual approach can be possibly divided into three distinct situations (that can yet also be kept as a permanent arrangement):

- A "light" network of companies is created, which carries out an activity that is often only internal, that is, without involving subjects other than the members, which does not have a common fund, and whose common body (if established) is composed of the members themselves, who periodically meet to take decisions. In this first situation, the commitment of the participants is limited, a contract has been signed with specific rules of conduct before a notary, limited capital has been invested, meetings take place and joint activities are carried out using the respective companies' structures: a way to pursue a common project and test each other, without compromising the company's autonomy or investing large amounts of capital. The risk associated with the joint and several liability of the members is low, given that only activities within the network are carried out;

- The participants can decide to expand the network activity, which from "light" becomes "heavy", creating a common equity fund to support greater investments, equipping themselves with a structure dedicated to the management of the network programme. If the common body is established and the network carries out an activity, including commercial activity, towards third parties, assuming

[1] A more articulated description of the Italian law on contractual networks is contained in the annex to A/CN.9/WG.I/WP.87.

obligations towards the latter for the execution of the programme, the network can be subject to a special regime that limits the liability of the participants or network operators. This occurs by the segregation of assets produced by the constitution of the common equity fund;

- The network can also sign contracts and take on liabilities, i.e. to become an independent centre for the rights and obligations, and requires legal subjectivity by registering in the ordinary section of the business registry of the place where it is based. The common body is no longer a proxy for the participants in the network but an independent legal entity. Participants are now in a position to perform common external activities in an efficient and stable manner, for example by selling products designed or built together or by carrying out commercial or marketing actions coordinated on foreign markets. This activity will be carried out directly by the network following the request for legal subjectivity and consequent attribution of a VAT number.

21. The above illustration of a possible gradual approach only shows the role of these new legal institutions within the existing Italian business and legal context, since all described activities can be performed under any of the proposed schemes of cooperation, and each can be considered as a permanent instrument for cooperation according to the needs.

22. Flexibility and scalability are two features of this legal institution that make it exportable and of universal use.

23. To that end, as indicated above (para. 4), Italy refrains from making direct reference in the following parts of this Note to its own legal system. However, to help understand the concrete content of a possible international instrument and to anchor this exercise to existing regulated forms of organization of business cooperation, a few tables are included with main features of contractual networks in order to compare them with the most proximate existing legal institution in the Italian legal regime for the purposes of this Note.

III. Legal Framework

An integrated modular proposal of an international instrument on contractual network: also a means to look at sustainable development and the respect of corporate social governance

24. Whereas we believe that instruments for micro enterprises (MiEs) might differ from those for SMEs, we would envisage a modular legal instrument with common general principles and possibly specific sections addressing different needs, according to dimension and/or mission.

25. Moreover, these general principles might be drafted having in mind a multilevel system: i.e., whatever is not explicitly regulated would be supplemented by national legislation, leaving scope for a certain level of differentiation in legal architecture. The international instrument would define the specific principles and provide the relevant definitions but some aspects (for example, mistake, fraud, or avoidance) could be left to the applicable contract law.

26. Most importantly, the structure of such principles should identify the new roles of contract beyond pure exchange, focusing on organizational and regulatory functions in order to ensure that network contracts can also promote compliance with global standards related to environmental, social, and data protection requirements, and should be applicable to both domestic and transnational networks.

27. These rules should ensure both the stability and the flexibility of the contractual network, and distinguish between internal relationships among members and relationships between the network and third parties, in particular, with creditors. Such rules could provide for different degrees of complexity with increasingly structured forms of governance, which could take place inside the network or could use

companies controlled by the network to perform specific activities that require limited liability and asset partitioning.

28. *Contractual networks and the objective of the contract.* The distinctive feature of contractual networks should lie on their objective more than on their formal structure. Parties should agree on a specific set of actions for the achievement of one or more specific objectives which are of strategic relevance in respect of the business of each participant or for the network as such.

29. Though related with participants' nature and activity, the core object of the network activity does not need to be ancillary in respect of the participants' activity; several options should be available: from the mere organization of coordination of supply of goods, service or information among participants (e.g. through the establishment of a commercial platform) through collaboration into a strategic project (e.g. a Research and Development (R&D) project for the development of a new product) to the performance of a common activity (e.g. the production and distribution of a new product jointly designed).

30. Model rules should allow parties to tailor the network structure upon the network nature and objectives. Model rules should not define the possible contents of the common programme but, most importantly, require that objectives are clearly defined and that parties agree on modes for the subsequent specification of implementation measures, their assessment and adjustment along the network life.

31. Parties should be able to establish networks for the execution of a specific project or for the establishment of a cooperative platform able to run multiple projects. In multi-projects networks, parties should not be forced to partake to all projects but project participation should be tailored upon businesses' interest and capacity.

32. *Cooperation*. Cooperation shall remain the core element of contractual networks. In contractual networks cooperation implies willingness to combine individual and collective interests as well as ability to adapt choices in order to ensure that a network's objectives may be achieved.

33. Cooperation does not necessarily require equality of arms; powers and resources may be unevenly allocated as well as abilities and knowledge may differ from one participant to another.

34. Especially when these asymmetries are rather important, abuses should be discouraged through effective monitoring within the network and, when needed, through measures aimed at preserving the collective value generated by the network and its future functioning.

35. Specific investments made by participants should be preserved, especially when, also due to their size, network participants struggle to get alternative options out of the network.

36. *Duration*. Model rules should not require a specific duration.

37. However, parties should be encouraged to adapt duration in respect of the objectives pursued and the specific investments expected from participants.

38. *Entry and exit*. Model rules should require parties to clearly define whether a subsequent entry into the network is possible and upon which conditions. Parties should be able to complement the network's capacity through the entry of new participants as well as to limit this entry when it is not functional to the implementation of the network programme.

39. Parties should also be requested to clearly define whether and which conditions voluntary exit is allowed, taking into consideration the consequences of exit for both the exiting participant and the remaining ones.

40. Similarly, cases and procedures for exclusion should be clearly defined in the contract and due process guarantees should be established for a correct balancing between the network's participants who exclude one member and the member who is excluded from the network.

41. Abuses should be discouraged and measures for addressing post-contractual imbalances should be available, including cooperative, corrective and compensatory measures.

42. *Knowledge development and transfer*. When defining a uniform legal framework, strategic importance might be accorded to knowledge transfers and innovation among the enterprises of the network and between the network and third parties. Contract rules become extremely important when knowledge cannot be "propertized" (e.g., cannot be made proprietary) either because no legal devices are available, or because the benefits of sharing are such that individual or even collective ownership would be inappropriate.

43. In particular, two problems usually emerge within network governance: (1) proportionality between investments, contributions and revenues, since lack of proportionality often emerges between individual investments and profits, and opportunistic behaviour by some members of the network might arise; and (2) the interest of the contractual networks might require protection against behaviour such as unfair competition, violations of trade secrets, or unauthorized transfers to third parties external to the network.

44. A special regime concerning trade secrets and intellectual property rights might also need to be devised so as to maximize incentives to produce innovation inside the network, but, at the same time, to generate strong safeguards against knowledge leaking outside the network.

45. Since creation and use of intellectual property rights might be too expensive for individual MSMEs, forms of collective ownership and licensed use might be regulated by multiparty contracts making innovation also possible for firms with limited capital. A network contract may provide the legal infrastructure to manage the IPR platform

46. *Contractual networks and choice of legal forms*. Whereas the functional and cooperative features of contractual networks should be clearly defined in model rules, choice of legal forms should not be limited to a specific type of contract or organization.

47. From the point of view of the legal structure, options could include:

- (Bilateral or) multiparty contracts which are normally closed or open to the subsequent entry of new participants, subject to the requirements established in the contract;
- Multiparty contracts with or without a specific governance structure such as an administrative or governing body, representing the interests of the network's participants, also in the relation with third parties;
- Multiparty contracts where assets, including any possibly established fund, are owned individually or collectively by network participants or, when requirements consistent with applicable law are met, by the network as a separate entity;
- Multiparty contracts in which parties may enjoy limited liability to the extent that due guarantees are given in favour of creditors and third parties consistent with general principles and limitations established in applicable law.

48. Beyond the scope of this Note could stand other structures, including, e.g., linked bilateral contracts (along the lines of franchising or strategic subcontracting) as well as the link between a multiparty contract and a bilateral contract as, for example, happens when a contractual network is aimed at the execution of a construction contract in private or public procurement. Linked contracts feature strong functional interdependence so that one contract cannot exist without the other, e.g. when a production contract is linked to a financing contract.

49. *Contractual networks and the corporate frontier.* Depending on applicable law, the boundaries between corporate-like forms and contractual forms may be blurred.

50. Determinants of the distinction between contractual networks and corporate entities may include: the degree of organizational complexity, the extent of liability (limited or not limited), asset partitioning, the type of agency relations involved, the existence of a common business activity.

51. The development of modular legal instruments for networks, going from merely contractual ones to more complex forms, including limited liability and/or the establishment of a separate legal entity constituted under specific conditions, could fill an important gap.

52. Indeed, networks may benefit from the choice of legal forms that enable participants to run a common activity (e.g. a joint R&D department or the production of a co-designed new product), with a common administrative and representative body and a common fund, without other elements of corporate forms; e.g., decision-making mechanisms may depart from the usual correlation with capital investments, or limited liability for certain network activities may be combined with joint and several liability for others.

53. We intentionally avoid reference to legal personality, since it has different meanings across legal systems. However, a line could be drawn between segregation of assets, on the one side, and establishment of a separate legal entity, on the other. Whereas in the latter case the separate legal entity is an autonomous centre of rights and obligations, segregation of assets maintains the relevance of a plurality of legal actors but yet might permit – following adequate publicity – creditors of the network to only rely on the segregated assets.

54. *Asset partitioning*. Consideration should indeed be given to instruments that permit the segregation of assets and the establishment of limited liability protection for the activities covered by the contractual network (or parts thereof), in order to offer an additional instrument to MSMEs.

55. In correlation with general principles, rules and limitations provided by the applicable law, these instruments should be tailored on the nature of the network programme (e.g. its ability to generate revenues).

56. Moreover, the scheme should be defined taking into consideration the interests of creditors and third parties, with special regard to those harmed by network activity. For example, depending on the applicable law and on the legal form chosen, networks could benefit from limited liability regimes to the extent that they build up an adequate financial structure, preventing commingling between network assets and participants' assets, and adopt accounting rules enabling full transparency and clear reporting on the use of network funds.

57. Finally, safeguards should be in place to avoid exposure of those affected by the network activity on an extra-contractual basis, such as consumers, to any limitation of liability when claiming damages.

58. *Cross-border networks.* Legal entities are established under a specific legal system and cannot depart from its rules if not for limited aspects of their activities. In the case of contractual networks, flexibility is also ensured by the choice of the applicable law.

59. Specific rules concerning private international law might be appropriate in this context.[2] In multiparty contracts, when enterprises located in different jurisdictions want to collaborate there is a need to identify the applicable law to fill the gaps that are not explicitly regulated by the contract.

60. Freedom of choice of applicable law should be encouraged along the lines of other initiatives established at the international level.[3]

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[2] The above considerations are without any prejudice to the competence of The Hague Conference on Private International Law.

[3] See The Hague Conference on Private International Law, *Principles on choice of law in international commercial contracts* (approved on 19 March 2015), available at https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf.

61. The international dimension may also require forms of mutual recognition when enterprises are registered in national business registries with different requirements.

62. To this latter extent, it would be advisable that the proposed international instrument permit coordination among the different business registration regimes in the countries of the network's members.

Annex to the proposal

ELEMENTS TO BE REGULATED IN A CONTRACTUAL NETWORK UNDER ITALIAN LAW	
Identification of each participant	Needed for exact identification of the participants, in connection with the disclosure regime of the contract, that the law provides through its registration in the business registry.
Indication of the strategic objectives and the methods agreed between the participants to measure progress towards these objectives	The specification of the strategic objectives that the parties aim to achieve, must be accompanied by an indication of the manner in which they will measure, during the execution of the contract, the respective progress towards these goals.
Definition of a network program that contains the rights and obligations of each participant, and how to achieve the common objectives	The network programme and its implementation constitute the object of the contract. This programme must indicate: the rights and obligations of each participant or the specific arrangements allowing the performance of these obligations by the participants or the realization of the common purpose of all the participants.
Duration of the contract	The contractual network may not be concluded for an indefinite time. That does not mean that the parties may not proceed with its renewal, providing for automatic renewal in the absence of notice of cancellation by those who do not intend to keep the constraint of the network contract.
Methods of joining of other participants	The network contract must anticipate the possibility of subsequent adhesion of other entrepreneurs, it being understood that such a possibility must be governed by the original parties, which retain the right to define the network access requirements on the part of new participants and the modalities through which the original parties express their assent to the accession of the new entity.
Rules for taking decisions on every subject or aspect of common interest	The participants must define the mechanism by which decisions are taken regarding matters or issues of common interest.

THE AGREEMENT MAY OPTIONALLY INCLUDE:	
Appointment of a common body to manage the contract	The network contract may provide for the establishment of a common body, which can be made up of either a single or several persons, to manage the contract. The body receives a mandate for the direction and conduct of activities in the network agreement. It will represent the network if this is a separate entity, or the participants if this is not.
Establishment of a common fund	The optionally established fund has specific limitations as to its use, being finalized to the implementation of a network programme and then to

	the pursuit of strategic objectives. The contract must include the measurement and the evaluation criteria of its initial allocation and any subsequent contributions by the parties. Contributions may be in cash, in goods and services (provided they are capable of economic assessment).
Management rules of the fund	It would be appropriate to identify the subject to whom the management of the fund should be entrusted, or the modalities for the realization of investments and those for the use of common assets.

TEXT OF THE MAIN PROVISION OF ITALIAN LAW CONCERNING DEFINITION AND QUALITIES OF CONTRACTUAL NETWORKS

Article 3, paragraph 4-ter L.D. n. 5/2009 [as converted into law and further amended]

"*1. With the contractual network, entrepreneurs pursue the goal of increasing, individually and collectively, their innovative capacity and their competitiveness in the market and* ***to this end they are committed, on the basis of a common network program, to collaborate in forms and in areas predetermined*** *for the exercise of their companies or to exchange information or services of an industrial, commercial, technical or technological nature or to jointly exercise one or more activities falling within the scope of their business.*

2. The contract ***may also provide for the establishment of a joint equity fund and the appointment of a common body responsible for managing, in the name and on behalf of the participants****, the performance of the contract or of individual parts or phases of the same.*

3. ***The network contract that provides for the common body and the equity fund does not have legal personality, without prejudice to the faculty to purchase the same pursuant to paragraph 4-quater last part*** **[registration in the business registry of the network itself]**.

If the contract provides for the establishment of a common equity fund and a common body intended to carry out an activity, including commercial activity, with third parties:

1) (…abrogated)

2) the provisions of articles 2614 and 2615, second paragraph, of the Italian Civil Code apply to the mutual fund as compatible [on funds of consortia]; *in any case,* ***for the obligations contracted by the common body in relation to the network programme, third parties can assert their rights exclusively on the common fund****;*

3) within two months after the end of the financial year, the common body shall draw up a balance sheet, observing, as compatible, the provisions relating to the statutory financial statements of the public limited company, and file it with the business registry of the place where it is located; Article 2615-bis, third paragraph, of the Italian Civil Code applies as compatible.

4. For the purposes of compliance with the provisions of paragraph 4-quater, the contract must be drawn up by public deed or authenticated private deed, or by deed digitally signed in accordance with articles 24 or 25 of the code referred to in the legislative decree of 7 March 2005, n. 82, and subsequent modifications, by each entrepreneur or legal representative of the participants, transmitted to the competent offices of the business registry through the standard model typified by decree of the Minister of Justice, in agreement with the Minister for the Economy and Finance and with the Minister for Economic Development (…)."

Consortia (with external activities, not just for internal organization of members) under Italian law	**Contractual networks under Italian law**
The establishment of a Consortium provides for a common organization for the regulation and performance of certain phases of the respective companies.	*In the Network the common organization is aimed at collaborating in forms and in areas predetermined for the exercise of the companies, or to exchange information or services of an industrial, commercial, technical or technological nature or to jointly exercise one or more activities falling within the scope of their business, on the basis of a common network programme.*
The Consortium is a legal and tax entity independent of the member companies, has its VAT/TVA number and its registration with the business registry.	*In the Network the companies are independent and no new entity is in principle created, unless the network registers as a legal entity with the business registry.*
Precisely because of its individuality, the Consortium also provides for an external activity, with its own business registration or various attestations, and, in the cases of Consortia set up as Consortium companies with limited liability, also its own patrimonial autonomy, equating it to limited liability companies.	*The Network does not have its own autonomy or its own business registration, but is registered in the register of each participant in the Network and acquires effectiveness, only after having noted the same on all the participants at their registration in the business registry, unless the network registers as a legal entity with the business registry.*
The activity of the Consortium is instrumental to the activity of the consortium members, putting in place an essentially mutualistic function.	*The Network Contract allows the exercise in common of activities not only instrumental but strategic for the development of the participating enterprises.*
In the Consortium an object must always be identified, which is its typical activity.	*The Network contract provides a programme, a commitment to achieve certain objectives; within this, it specifies the main objectives pursued, the procedures that will allow the achievement of these objectives and the criteria for their evaluation.*
The Consortium provides, just like companies, an administration organized with a single director or, more frequently, through a board of directors.	*A wide choice of schemes may apply to Networks, depending on whether the model of an "exchange network" [where parties only exchange goods or services] is chosen, with a very simplified structure, or "light Networks", executing more articulated activities with a more organized structure, also through the establishment of a common body, or "heavy Networks" to the point that the Network may have its own legal personality by registering it with the business registry.*

***Società di persone* under Italian law (broadly paralleling partnership under common law)**	**Contractual networks under Italian law**
Two or more persons confer goods or services for the joint operation of an economic activity in order to divide the profits. [A partnership is an unincorporated association of two or more individuals to carry on a business for profit.]	*The common organization turns around a project [see above for definition of contractual networks]*
Unlimited liability.	*In case of establishment of a mutual fund, for the obligations contracted in relation to the network programme:* - *Third parties can assert their rights exclusively on the common fund;* - *Creditors of the members have no right whatsoever over such mutual fund.*
Flexibility in regulation of organization, but within the general scheme of società di persone. *Notwithstanding the flexibility and easiness of establishment,* società di persone *are included in the general category of "companies".*	*Much stronger flexibility since there is no limitation by the reference to a specific general category. Autonomy of contracts applies.*

D. Note by the Secretariat on possible future work: proposal by the Governments of Italy, Norway and Spain: future work for Working Group II

(A/CN.9/959)

[Original: English]

1. In preparation for the fifty-first session of the Commission, the Governments of Italy, Norway and Spain have submitted to the Secretariat a joint proposal in support of future work in the area of international commercial arbitration. The English version of that note was submitted to the Secretariat on 27 April 2018. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

Annex

Expedited Arbitration, emergency arbitrator and adoption of other instruments for the efficiency and quality of arbitral proceedings

1. Since its sixty-third session, in September 2015, Working Group II has been working on instruments for the enforcement of international commercial settlement agreements resulting from mediation. During its sixty-eighth session, in February 2018, the Working Group completed its work on this topic. The result of the Working Group's endeavors will be submitted to the Commission at its fifty-first session. At the same session, the Commission will also consider topics for possible future work of Working Group II. During its sixty-eighth session, Working Group II considered possible input for the discussion on future work.

Mediation: modernization of the terminology

2. During the sixty-eighth session of Working Group II, the Secretariat informed delegations that possible future work could consist in modernizing and refining the existing UNCITRAL instruments on mediation, as well as in developing notes on organizing mediation proceedings. As indicated in document A/CN.9/934, at para. 163, delegations supported those suggestions including that such work should be performed by the Secretariat itself, and then submitted for review and approval to the Commission.

Topics for the Working Group's future work

3. As regards topics for future work of Working Group II, a few proposals were presented at the sixty-eighth session. Among others, a joint proposal was presented by the delegations of Switzerland and of the United States of America ("the Swiss-USA proposal"), suggesting that the Working Group could work on the topics of expedited arbitration and adjudication. Particularly, the part of the Swiss-USA proposal relating to expedited arbitration received support. This part is also covered by the proposal that was presented by a number of delegations (Italy, Norway and Spain) and very likely supported by other delegations representing States both from and outside the European Union, as explained in this document.

4. The present proposal is not meant to be in alternative to the Swiss-USA Proposal but it aims to enhance aspects of that proposal that have a great relevance in the arbitration practice and a large potential for constructive use of the Working Group resources and competence. Therefore, it seems not only possible but also advisable to join the two proposals under the title "*Expedited Arbitration, emergency arbitrator and adoption of other instruments for the efficiency and quality of arbitral proceedings*".

5. The proposal explained in this document is based on the assumption that Working Group II should devote its expertise and capacity to the development of instruments that may contribute to the enhancement of arbitration as a method for settlement of international commercial disputes. Arbitration is increasingly under pressure and threatened to lose its role as preferred means for dispute resolution for commercial disputes. Arbitration is under a double pressure: on the one hand, arbitral proceedings are getting increasingly complicated, and they expand both in terms of time frame and in terms of volume of documentation. This challenges one of the traditional advantages of arbitration as opposed to court litigation, namely efficiency.

6. On the other hand, measures taken by arbitral tribunals or arbitral institutions are increasingly faced with court control. Possibly for the sake of preserving efficiency in a scenario where disputes get more complicated, steps may be taken that do not necessarily meet the quality criteria that arbitration is expected to meet. In order to render a valid arbitral award, and in order to obtain enforcement of the award, arbitration needs to comply with a series of fundamental principles, such as the principle of due process. The goal of ensuring efficient arbitration may lead to taking steps that compromise the quality of arbitration. This, in turn, may erode the trust in

arbitration as a method for settlement of disputes, a trust that is the very foundation of the success of arbitration.

7. The aim of the present proposal is to supply Working Group II with a basis to develop instruments that are meant to ensure a balance between efficiency and quality: "*Expedited Arbitration, emergency arbitrator and adoption of other instruments for the efficiency and quality of arbitral proceedings*".

8. The balance between efficiency and quality would be the overarching principle that inspires more specific topics, within which this balance may manifest itself. The subtopics would address specific issues that today negatively affect the development of commercial arbitration.

Why commercial arbitration

9. The proposed topic implies that the Working Group devotes its attention to arbitration, leaving the topic of meditation to be handled by the Secretariat as indicated above.

10. There are various reasons why we consider it advisable that the Working Group returns to the field of commercial arbitration.

11. Firstly, Working Group II has been mandated with a "double mission", focused on mediation and arbitration: a new round of sessions devoted to mediation will keep the Working Group away from one of its two missions for too long (realistically, 7 or 8 years).

12. Secondly, if Working Group II does not deal with commercial arbitration, there is a risk that arbitration be absorbed in Working Group III, that deals with investment arbitration. Working Group III has been constituted with a political and broader mandate, focused not only on arbitration itself (specifically, on investment arbitration), on its need to be improved and on the "corrections" to be adopted, but also on ISDS. It should be then kept in mind that the identified issues regarding investment arbitration are not common with commercial arbitration, being directly related to its features and its political implications. Commercial arbitration is a very private system, limited to the parties of the case – most of the time, private companies – and with no general or public interests involved. Therefore, there is no competition between the two Working Groups.

13. Furthermore, the merge of the two systems is very risky for commercial arbitration and its proximity with investment arbitration may pollute the many advantages of commercial arbitration.

14. Last but not least, it seems wiser – before dealing with mediation issues again – to wait for the impact of the new "mediation instruments" that will be submitted to the Commission (Convention and Model Law on enforcement of international commercial settlement agreements resulting from mediation) and see how their implementation may progress. Therefore, it is advisable to keep mediation on hold, focusing on arbitration for the next "round" of work of Working Group II.

Why efficiency and quality of arbitration

15. Today, commercial arbitration is increasingly criticized by users and practitioners, for different reasons (some of them grounded, others probably not).

16. One of the major criticisms is related to the excess of regulation and to the tendency of the arbitral process to look like a State court proceedings. This phenomenon leads to a lack of efficiency.

17. Furthermore, also the quality of arbitration (and of the arbitrators) seems to undermine the legitimacy of the system and the enforceability of the outcome.

18. As it has been properly highlighted in the Swiss-US proposal, there is a wide concern among practitioners "about rising costs and lengthier timelines making arbitration more burdensome and too similar to litigation".

19. For these reasons, an intervention by UNCITRAL, aimed at increasing the efficiency and the quality of arbitration, rendering the proceedings more expedite (quoting the Swiss-US proposal), is of fundamental importance for the future of commercial arbitration.

20. Trying to develop, under the umbrella of an organization such as UNCITRAL, instruments able to improve the efficiency and the quality of arbitration, seems the proper action to be taken today in order to increase the reliability of the system as a whole.

21. Working Group II looks particularly suited to meet the expectations in terms of competence and membership (representing all regions and including relevant organizations), inducing harmonization through persuasive authority.

22. Furthermore, Working Group II has the capacity not only to propose soft law interventions but also instruments of legislative character, where needed, balancing the need for efficient and quality arbitration proceedings, due process and party autonomy.

23. The topic proposed – starting from the one of the Swiss-US proposal – is a fertile basis for work aimed at improvement of the mechanism of arbitration as a tool for dispute resolution in commercial disputes. It will give UNCITRAL the possibility to meet the growing criticism that is facing arbitration and answer to the different demands that are present in practice and contributing to streamlining dispute resolution mechanisms. This fits perfectly with the Commission's functions and mission.

Focus on some topics of growing importance in the arbitration practice

24. Under the wide topic of "*Expedited Arbitration, emergency arbitrator and adoption of other instruments for the efficiency and quality of arbitral proceedings*", Working Group II may work on various specific topics with practical relevance, such as:

- Expedited arbitration (Swiss-US proposal)
- Basic uniform principles for arbitral institutions' rules
- Emergency arbitrator

25. Working Group II may develop instruments for each of these topics that will represent concrete tools able to reduce cost and time of the arbitral process, increasing its efficiency without compromising the quality.

26. Each of these topics may be dealt with independently, and in the next future new topics may be also added to the list (such as, for example, "Arbitration clauses and non-signatory parties", "Legal privileges and international arbitration"). The proposal is to use the overarching principles of efficiency and quality as a red thread for future work. Which specific topic the Working Group may work on, may be discussed from time to time. The discussion at the sixty-eighth session seemed to indicate that the topic of expedited arbitration is considered to be an appropriate topic by a vast number of delegations. This could be the first topic on which the Working Group could concentrate.

Expedited arbitration

27. The very first topic on which Working Group II should focus its work is the development of model rules – starting from the UNCITRAL Arbitration Rules – or contractual clauses (or similar tools) facilitating the use of expedited arbitration procedures and, doing so, reducing time and cost of an arbitration.

28. Expedited arbitration is a form of arbitration that is carried out in a shortened time frame and at a reduced cost. As it has been highlighted in the Swiss-US proposal, UNCITRAL may well assist users either modifying the UNCITRAL Arbitration Rules or incorporating them into contracts via arbitration clauses that provide for expedited procedures (for example, limiting the number of submissions that the parties can file, imposing shorter deadlines, referring the case to a sole arbitrator etc.). The work could

also consist in guidance to arbitral institutions adopting such procedures in order to provide for the right balance between speedy resolution of the process and respect of due process, as indicated below.

Basic uniform principles for Arbitral Institutions' Rules

29. This topic is strictly related to the previous subject (expedited arbitration).

30. Today, around the world, there are an indefinite number of arbitral institutions, of different nature, dimension, range of action, competence.

31. Many of them have proved to work well, others seem to be not very active and their existence is purely formalistic, few have a very poor level of efficiency and competence. Of course, this last group is very dangerous, and it risks to undermine the efforts put by all the other institutions for the promotion of a quality and reliable arbitration system.

32. We should keep in mind that arbitration is a means for resolution of disputes based on contractual will of the parties who have to be fully convinced of the competence, reputation and reliability of the institutions.

33. Working Group II may well develop an exchange of best practices among arbitral institutions and elaborate common principles and standards in administering arbitral procedures, not only related to the expedite proceedings as described above.

34. This process will give to the entrepreneurs the benefit of seeing applied homogenized criteria and guarantees whatever arbitral institution they choose on the basis of the characteristics of their case, finally increasing the trust of the parties in the system and in arbitration as a whole.

35. The aim of this work should not be the homogenization of arbitral institutions rules (that each centre should be free to adopt) but the development of common principles and the application of the highest international standards in the administration of arbitral proceedings by the Centres "*UNCITRAL's principles compliant*".

36. Working Group II may focus, among others, not only on speedy resolution of the dispute and due process (two major points of the above mentioned subtopic of expedited arbitration) but also on other principles, which are considered to be decisive for the "good" administration of arbitral proceedings, such as independence/impartiality and multi-party arbitration.

Emergency arbitrators

37. A relatively recent trend in international arbitration is the appointment of emergency arbitrators. The underlying idea is that, in cases of particular urgency, a party may need to seek preliminary measures even before the arbitral tribunal has been appointed. To meet this need for urgency, some institutions offer the services of an emergency arbitrator, who may render an interim order, without having to wait for the arbitral tribunal to be appointed.

38. The use of emergency arbitrators may give rise to a series of questions, of which the most important is the enforceability of the measures ordered by the emergency arbitrator.

39. There does not seem to be a uniform approach in this area. If the relief ordered by an emergency arbitrator is not enforceable, there is the risk that the party seeking relief has to apply an ordinary court for the same relief. This means a multiplication of the time and costs connected with the preliminary measure.

40. In order to ensure the effectiveness of emergency arbitrators, it would be necessary to regulate their enforceability in an international instrument. UNCITRAL is ideally positioned to propose such an instrument.

The instrument(s) to be adopted

41. Depending on the issues discussed, the Working Group may well work on different tools, addressing soft law principles, best practices, notes, recommendations

or legislative provisions. We believe that these sub-topics would give the possibility to issue uniform principles of soft law, either restating existing principles and best practices, or proposing normative interventions, as opposed to Notes (therefore, descriptive, alternatives and not as "best rules").

42. For all these reasons, we suggest that the Working Group be given by the Commission the mandate to start working on "*Expedited Arbitration, emergency arbitrator and adoption of other instruments for the efficiency and quality of arbitral proceedings*", starting with the topic on expedited proceedings as under the Swiss-US Proposal.

E. Note by the Secretariat on the work programme of the Commission: legal aspects of smart contracts and artificial intelligence: submission by the Czechia

(A/CN.9/960)

[Original: English]

The Government of Czechia submitted for consideration of the Commission at its fifty-first session a document on legal aspects of smart contracts and artificial intelligence. The document, as received by the Secretariat on 30 May 2018, is reproduced as an annex to this note.

Annex

Note submitted by Czechia on legal aspects of smart contracts and artificial intelligence

1. Czechia would like to bring to the attention of the United Nations Commission on International Trade Law (UNCITRAL) the desirability of closely monitoring legal developments in the field of smart contracts and artificial intelligence with a view to undertaking work in this field when appropriate.

Smart contracts

2. Recent years have seen an increase in the automation of contracts, i.e. in the possibility that certain contract-related actions are performed on the basis of pre-programmed code and without human review or other intervention. Automation may occur at different stages of the life cycle of the contract: conclusion, performance and execution. Smart contracts may allow significant benefits in terms of speed, execution costs and contract governance, including with respect to monitoring of contract performance.

3. UNCITRAL has already prepared provisions relevant to legally enable the use of smart contracts. In particular, article 12 of the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005, provides for the use of automated message systems for contract formation, and article 6 of the UNCITRAL Model Law on Electronic Transferable Records recognizes the possibility of inserting in an electronic transferable record information, including metadata, additional to that contained in a transferable document or instrument. However, awareness of those provisions seems limited. Moreover, emerging business practices may suggest the formulation of additional provisions or legal guidance. Those issues have been discussed at the UNCITRAL Congress "Modernizing International Trade Law to Support Innovation and Sustainable Development", held on 4–6 July 2017 in Vienna, to celebrate UNCITRAL fiftieth anniversary, whose proceedings are available.

Artificial Intelligence

4. The phenomenon of the artificial intelligence (AI) has been discussed in law and legal science already since 1960s. Since 2010, the interest of lawyers in AI has increased rapidly. The most probable reason for this shift lies not only in growing use of AI in everyday life, but especially in specific legal challenges imposed by the technology.

5. A number of definitions of AI exists. None of them, however, have been universally accepted. Generally speaking, AI is a science of developing systems capable of solving problems and performing tasks by means of simulating intellectual processes. AI can be taught to solve a problem but it can also study the problem and learn how to solve it by itself without human intervention. Different systems can reach different levels of autonomy and can act independently. In that regard, their functioning and its outcomes are unpredictable as those systems act as "black boxes".

6. Nowadays, AI plays an important role in the current trend of automation in the EU, called Industry 4.0. AI is presumed to change economic functioning of companies and have a huge impact on the society. Recent public debates have especially focused on the necessity to regulate the very field of AI and to set boundaries in order to prevent development of so called artificial general intelligence, i.e. an intelligent system comparable to or even exceeding human intellectual capacity. Moreover, the debates point out a necessity to teach AI systems ethics and incorporate in them values that are recognized in the society.

7. These debates are justified and should be taken into consideration. However, they are a part of a bigger problem relating to the insufficient approach to AI by the society. This includes non-uniform understanding of what AI is and how it should be used for our benefit. Moreover, current laws have not yet recognized the specific

features of AI that, in fact, significantly influence dynamics of legal relationships, such as business contracts, liability disputes and investments.

8. In the area of private law, several challenges may arise, which become even more complex when seen from the perspective of different jurisdictions. The first issue relates to contracts based on which services or systems with AI are provided. For instance, contracting parties need to deal with uncertainty about the scale of due diligence with regard to designing algorithms or possible liability for malfunction of the system, while being unable to predict future behaviour and having no control over its future use and data input that might importantly affect the AI system. From a technical point of view, it may be impossible to justify the reason for a particular decision of AI. Therefore, in case of damages, parties are in an evidentiary vacuum and may be unable to determine liability lacking specific provisions. The law needs to set up clear rules and balance obligations in order to protect both parties to a contract as well as third parties who need certainty on where to seek redress for damages.

9. Given the fact that AI technology and services based on AI often involve different jurisdictions, parties need efficient means to protect their interests. Without a coordinated international approach, some States might intentionally avoid adopting specific rules in order for companies to use their unfit laws for escaping liability. Given the capabilities of AI systems, for instance in data analysis, as well as the widespread use of adhesion contracts, this might negatively impact interests of various stakeholders.

10. Apart from predictive analytics, trend analysis, data mining or automation, AI is used also for assistance in everyday tasks and can facilitate transactions of different type for its users. The legal attribution of transactions performed by AI systems is also unclear. AI systems may be considered as electronic agents by which parties enter into legal transactions and are bound by them. However, some companies may test the legal system by creating AI applications that act on their own behalf and have own goals and purposes while the author remains concealed. Even more complicated situation arises when AI created by another AI system interacts with human beings. So far, there is no satisfactory legal solution.

11. The same is true for extra-contractual liability. As mentioned above, determining liability may be particularly challenging due to lack of evidence as well as involvement of a number of persons whose liability is hard to assess. Moreover, insurance may not cover all the situations in which damage occurs.

12. According to recent research, the business community is concerned about future legal developments in this field. Lack of rules and guidelines prevents companies from designing AI systems that would be accepted and trusted by business. Therefore, companies are reluctant to invest in AI systems development. Only solutions accepted at the international level may guarantee the safe and responsible development of AI while safeguarding both social and economic interests.

13. The international community should focus on all the mentioned issues as soon as possible before the problems related to artificial intelligence and its application, including robotics, will receive partial and non-systematic solutions at the national levels. Such partial solutions would prevent cross-border collaboration among companies or provision of services due to need to comply with various legal standards, increased rate of trade disputes, as well as increased uncertainty about return on investments. Therefore, liability issues, due diligence, contracts on AI systems as well as status of AI and attribution of its legally-relevant acts, to name a few relevant issues, should be analysed and addressed. Without systematic and international solutions, different approaches to common problems would hinder the global opportunity provided by the AI. Traditional methods of regulation are not fully applicable, therefore, a new approach should be found by the international community.

Future steps

14. In light of the above, it is submitted that UNCITRAL should require the UNCITRAL Secretariat, within existing resources, to monitor developments relating

to the legal aspects of smart contracting and artificial intelligence, and report to the Commission, in particular, by identifying areas that may warrant uniform legal treatment. This work should be done in coordination with other relevant organizations, namely the International Institute for the Unification of Private Law (Unidroit), the Hague Conference on Private International Law, and other entities. In that respect, it should be noted that the International Organization for Standardization has set up the Technical Committee ISO/TC 307, on "Blockchain and distributed ledger technologies".

15. In Czechia, The Institute of State and Law of the Czech Academy of Sciences started intensive public discussion of artificial intelligence, autonomous systems as well as self-driving cars in 2017. It intends to deepen societal understanding of these topics by organizing an international conference on artificial intelligence and law in Prague (5–6 September 2018). This event may offer a convenient opportunity for discussing the subject. Therefore we would like to invite experts in this field as well as other persons interested in this subject to participate in the conference.

F. Note by the Secretariat on possible future work: proposal by the Government of Belgium: future work for Working Group II

(A/CN.9/961)

[Original: English]

1. In preparation for the fifty-first session of the Commission, the Government of Belgium has submitted to the Secretariat a proposal in support of future work in the area of international commercial arbitration. The English version of that note was submitted to the Secretariat on 20 June 2018. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

Annex

Proposal by the Government of Belgium

During its 51st Session, the Commission should finalize and adopt two draft instruments on international commercial settlement agreements resulting from mediation, on which its Working Group II has been working since September 2015. This finalization and this adoption raise the question of the future work of the Working Group II.

The Belgian Government shares the opinion, expressed in the proposal of the Governments of Italy, Norway and Spain (document A/CN.9/959 of 30 April 2018), that the Working Group II should devote its attention to the ways to increase the efficiency and quality of arbitral proceedings.

Since its establishment in 1966, the Commission has played a crucial role in promoting arbitration and the numerous instruments it adopted in this field constitute as many references with no equivalent at the global level.

In addition, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted on 10 June 1958 during the United Nations Conference on International Commercial Arbitration and whose sixtieth anniversary will be commemorated during this session of the Commission, remains the most successful international convention of private law and is of vital and daily importance for the international trade.

In this context, it appears that the Commission should give due consideration to the new challenges that arbitration is currently facing.

It is especially outstanding that those challenges include concerns that were expressed within the Commission itself, at the launch of its new works related to investment arbitration.

It seems therefore natural that the Commission, as the reference body for arbitration at the global level, considers with all due attention those concerns as well as the means of satisfactorily remedying them.

In the continuity of the aforementioned proposal of Italy, Norway and Spain (in particular No. 36 and 17 of document A/CN.9/959 of 30 April 2018), the Belgian Government would like to draw the attention in particular to the concerns which have been expressed as to the independence and impartiality of the arbitrators.

In 2010, the Commission adopted a revised version of its Arbitration Rules, including the revised articles 11 to 13 on disclosures by and challenge of arbitrators and Model statements of independence.

It appears that, building on those achievements, the Commission could explore ways to consolidate and supplement those rules in order to associate arbitration with strong guarantees in this respect and enhance its status to the high level it deserves.

This could include the elaboration of additional legislative rules as to the composition of the arbitral tribunal and the arbitral proceedings and possibly, as far as this would be appropriate, as to the recourses against arbitral awards. As an example, the precise extent of the duty of the arbitrator to disclose circumstances and the legal status of the circumstances disclosed or not disclosed could probably be more elaborated.

In addition, this could also possibly take the form of rules on liability and of codes of conduct or guidelines for the arbitrators.

IX. TECHNICAL ASSISTANCE TO LAW REFORM

A. Note by the Secretariat on UNCITRAL regional presence: activities of the UNCITRAL Regional Centre for Asia and the Pacific

(A/CN.9/947)

[Original: English]

1. The General Assembly, in its resolutions 67/89 of 14 December 2012, 68/106 of 16 December 2013, 69/115 of 10 December 2014, 70/115 of 14 December 2015, 71/135 of 13 December 2016, and 72/113 of 7 December 2017, welcomed the activities of the United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific ("UNCITRAL-RCAP", "RCAP" or "Regional Centre"), in the Republic of Korea, towards providing capacity-building and technical assistance services to States in the Asia-Pacific region, including to international and regional organizations.

2. The Regional Centre has carried out its activities in accordance with the priority lines of action identified in the UNCITRAL Secretariat's strategic framework for technical assistance (A/66/17, para. 255 and A/CN.9/724, paras. 10–48), as well as with the specific mandate identified for the Regional Centre, which was revised in the 49th Commission session, namely as to (a) support public, private and civil society initiatives to enhance international trade and development by promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL; (b) provide capacity-building and technical assistance services to States in the region, including to international and regional organizations, and development banks; (c) build and participate in regionally-based international trade law partnerships and alliances, including with other appropriate United Nations funds, programmes and specialized agencies; (d) strengthen information, knowledge and statistics through briefings, workshops, seminars, publications, social media, and information and communication technologies, including in regional languages; and (e) function as a channel of communication between States and UNCITRAL for non-legislative activities of the Commission.

Flagship Activities

3. The Regional Centre has continued to deliver its flagship activities during the reporting period with the objective of streamlining activities to promote UNCITRAL texts and establishing regular opportunities for substantive regional contributions to support the present and possible future legislative work of UNCITRAL:

UNCITRAL Asia Pacific Judicial Summit

(a) The UNCITRAL Asia Pacific Judicial Summit (Hong Kong, China, 16–18 October 2017) (second edition), a biennial event jointly hosted with the Department of Justice of the Government of the Hong Kong Special Administrative Region of the People's Republic of China, the Judiciary of Hong Kong, China, and the Hong Kong International Arbitration Centre, supported by the Hague Conference of Private International Law and its Asia Pacific Regional Office. This summit is part of the Regional Centre's ongoing efforts to establish partnerships with judiciaries and judicial training institutions across the region to enhance the integration of capacity-building activities, widen the inclusion of UNCITRAL texts in training curricula and for the broader promotion of uniform interpretation of UNCITRAL texts. The summit featured a Judicial Roundtable and a Judicial Conference and was attended by 254 participants from 34 jurisdictions. The Judicial Roundtable was attended by judges invited from across the region with the purpose of facilitating uniform interpretation and application on the Convention on the Recognition and Enforcement

of Foreign Arbitral Awards and the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), and enhancing knowledge on the judicial *glocalization* of the sale of goods and e-commerce laws, including the duty of uniform interpretation under the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("CISG") and the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) ("e-CC"). The Judicial Conference on "Judicial Efficient Support to International Arbitration, and Emerging Topics in International Arbitration" was opened by the Under-Secretary-General for Legal Affairs and the United Nations Legal Counsel, Mr. Miguel Serpa Soares;

Asia Pacific ADR Conference

(b) The Asia Pacific ADR Conference (Seoul, 7–9 November 2017) (sixth edition), an annual regional conference, co-hosted with the Ministry of Justice of the Republic of Korea, the Korean Commercial Arbitration Board ("KCAB"), the Seoul International Dispute Resolution Centre and the International Chamber of Commerce ("ICC") – International Court of Arbitration. The Conference is designed to provide a regional platform for global legislative discussions, and to promote UNCITRAL standards on dispute settlement, aimed at officials, experts, practitioners, researchers, scholars, and representatives from arbitration centres. In 2017, the conference gathered 219 participants from 56 jurisdictions, who shared their opinions and research findings related to the conference themes. The 2017 conference had a special focus on "Access to Justice Innovations in Transnational Trade and Investment" addressing topics such as innovations by international arbitral institutions, prevention of abuse of process in international arbitration, new areas of international arbitration, investment dispute settlement, and sports arbitration in anticipation of the 2018 Olympic Winter Games which took place in PyeongChang, Republic of Korea. The conference featured a side event which included the Regional Capacity Building Workshop and the Regional Roundtable on 7 November. Delegates from Bangladesh, Cambodia, Fiji, India, Kyrgyzstan, Malaysia, Myanmar, Nepal, Paraguay, Thailand and Macau, China participated in the side event;

Asia Pacific Day

(c) The UNCITRAL Asia Pacific Day, held during the last quarter of 2017 (fourth edition), aimed at promoting awareness, encouraging the study, discussion and implementation of the UNCITRAL texts and celebrating the establishment of UNCITRAL. Every year, universities from across the region are invited to join the celebrations by proposing a special programme that can range from special lectures and seminars, to public conferences. In 2017, 6 universities joined the celebrations, namely:

(i) Centre for Transnational Commercial Law of the National Law University, Delhi, which co-organized in collaboration with the National Company Law Tribunal and the Insolvency & Bankruptcy Board of India an international conference on cross-border insolvency (New Delhi, 27–28 October 2017);

(ii) University of Western Australia, which organized a symposium featuring academics from Australia, South Africa, Denmark and the Chair of the UNCITRAL National Coordination Committee for Australia (Perth, Australia, 24 November 2017);

(iii) Beijing Normal University, which organized a seminar with a special focus on e-commerce in the cross-border and Chinese contexts (Beijing, 24 November 2017), within the framework of the joint programme on training and researching e-commerce law established by the Beijing Normal University Institute for the Internet Policy and Law and UNCITRAL-RCAP;

(iv) Wuhan University Institute of International Law and Wuhan University Center of Oversea Investment Law jointly organized a special lecture that focused on the use of UNCITRAL Arbitration Rules, including on ISDS, in the context of the Belt and Road Initiative (Wuhan, China, 15 December 2017);

(v) University of Hong Kong, which organized a public lecture focusing on private international law aspects of the CISG (Hong Kong, China, 18 December 2017);

(vi) Center for Asian Legal Exchange, Nagoya University, which organized a public lecture on international commercial arbitration. (Nagoya, Japan, 18 December 2017).

Promotion of the universal adoption of UNCITRAL instruments

4. In addition to the above events, RCAP has, during the reporting period, organized, supported, and either through Incheon or Vienna-based staff of the UNCITRAL secretariat, participated in the following public, private and civil society initiatives:

(a) On UNCITRAL's mandate generally or with cross-topics focus:

(i) "The Belt and Road, A Catalyst for Connectivity, Convergence and Collaboration", conference hosted by the Law Society of Hong Kong (Hong Kong, China, 12 May 2017);

(ii) "One Step Closer: Promoting ASEAN Integration through the Harmonization of Commercial Law", conference co-hosted with the Supreme Court of Thailand, ASEAN Law Association, the International Institute for Trade and Development, the Ministry of Foreign Affairs of Thailand and the Thailand Arbitration Centre (Bangkok, 4–5 September 2017);

(iii) Public lecture on "Legal harmonization: the importance of UNCITRAL standards" at the University of Tehran's Institute of Comparative Law (Tehran, 25 November 2017);

(iv) Public lecture on "UNCITRAL mandate and its key standards on dispute settlement and international sale of goods" at the Iran Central Bar Association (Tehran, 26 November 2017);

(v) Presentations on CISG and on the Model Law on International Commercial Arbitration at the seminar "Government to Government Export Contract" hosted by Korea Trade-Investment Promotion Agency (Seoul, 28 November 2017);

(vi) 2017 UNCITRAL-UM Joint Conference "Modernization of National Commercial Laws and the Role of Legal Harmonization in International Commerce" (Macau, China, 11–12 December 2017), co-organized with the University of Macau and with the institutional support of the World Trade Centre Macau. The conference gathered 150 participants who discussed a wide range of topics including dispute settlement along the Belt and Road Initiative, legal challenges faced by Micro, Small and Medium-sized Enterprises, UNCITRAL texts on e-commerce and their relevance to implement free trade agreements ("FTAs") and trade facilitation measures; and on sale of goods, security interests and insolvency in relation to cross-border supply chain management and financing;

(vii) Co-hosted and presented at the Macau International Legal Symposium on Promoting Economic and Trade Cooperation between China and Lusophone Countries (Macau, China, 13 December 2017);

(b) In the area of dispute settlement:

(i) Institutional support to the conference "The Impact of Digitalization on Arbitration", co-organized by KCAB, the German Arbitration Institute, and Korean Council for International Arbitration, and promoted the relevance of the e-CC in the context of the theme of the conference (Seoul, 3 April 2017);

(ii) Video message on an "Update on Enforcement of International Commercial Settlement Agreements Resulting from Conciliation", at the Global Mediation Forum, organized by the Thailand Arbitration Center (Bangkok, 24 May 2017);

(iii) Institutional support and presentations on the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the model laws on arbitration and conciliation in the region, including on jurisdictions within the Belt and Road Initiative, at the 3rd ICC-CIETAC Joint Conference on "International Arbitration Without Frontiers – Best Dispute Resolution Management for One Belt, One Road" (Shanghai, China, 27 June 2017);

(iv) Presentation at the Portuguese Arbitration Day, hosted by China International Economic and Trade Arbitration Commission ("CIETAC") (Beijing, 18 September 2017);

(v) Presentation at the China Arbitration Summit 2017, co-hosted by the Supreme People's Court of China, China Council for the Promotion of International Trade and CIETAC (Beijing, 20 September 2017);

(vi) Key note address at the 2017 Hong Kong Summit on Commercial Dispute Resolution in China, within the Hong Kong Arbitration Week, co-organized by the Beijing Arbitration Commission/Beijing International Arbitration Center ("BAC"), the Australian Centre for International Commercial Arbitration and Chartered Institute of Arbitrators (East Asia Branch) (Hong Kong, China, 14 October 2017);

(vii) Presentation at the International Seminar on "Indonesia and Development of International Arbitration", organized by the BANI Arbitration Center (Jakarta, 28 November 2017);

(viii) Jointly organized with the Shanghai International Economic and Trade Arbitration Commission ("SHIAC") the 1st Asia-Pacific International Arbitration Forum on "Belt and Road International Arbitration: Opportunity and Challenge in Asia and the Pacific" (Shanghai, China, 20 March 2018);

(ix) Support to the International Conference on "Online Dispute Resolution Mechanism" organized by the Construction Industry Arbitration Council with the Ministry of Law of India (New Delhi, 21 April 2018);

(x) Institutional support to the celebratory conference for the occasion of the third anniversary of the Center for International Investment and Commercial Arbitration (Lahore, Pakistan, 28 April 2018);

(c) In the area of electronic commerce, including by promoting the "UNCITRAL e-commerce law 2.0", which includes the e-CC and the Model Law on Electronic Transferrable Records ("MLETR"):

(i) Presentation at the International Conference on E-Commerce in China: Legislation and Development (Beijing, 3 June 2017);

(ii) Presentation at the 2nd Global Cross-Border E-Commerce Summit (Hangzhou, China, 27 October 2017);

(iii) Presentation on "UNCITRAL E-Commerce Law 2.0 for the implementation of FTAs and Trade Facilitation Measures" at the Regional International Arbitration Conference on "The Dawn of International Arbitration in the South Pacific" (Nadi, Fiji, 13 February 2018);

(iv) Presentation on "UNCITRAL E-Commerce Law 2.0: Paving the way to our digital future in Asia and the Pacific" at the Asia-Pacific Business Forum 2018 (Hong Kong, China, 10–11 April 2018), the flagship regional business Forum organized by the United Nations Economic and Social Commission for Asia and the Pacific ("UNESCAP");

(d) In the area of insolvency:

(i) Presentation at the 2017 Judicial Conference on Insolvency, hosted by the Seoul Bankruptcy Court (Seoul, 14–15 September 2017);

(ii) Presentation at the International Conference on "Cross-Border Insolvency and Maritime Matters", co-organized with the Hong Kong Centre for Maritime

and Transportation Law of City University of Hong Kong (Hong Kong, China, 21–22 November 2017);

(e) In the area of UNCITRAL standards on transparency in investor-State dispute settlement ("ISDS"):

(i) Presentation at the Inter-Pacific Bar Association 27th Annual Meeting and Conference (Auckland, New Zealand, 7 April 2017);

(ii) Institutional support and presented at the Asia FDI Forum III, organized by the Chinese University of Hong Kong (Hong Kong, China, 12–13 May 2017);

(iii) Presentation at the 7th South China In-House Counsel Forum, organized by the Shenzhen Court of International Arbitration titled "Belt & Road: Chinese Companies and Investment Arbitration", supported by the Supreme People's Court, Ministry of Commerce and other government departments of China (Shenzhen, China, 29 June 2017);

(iv) "ISDS & Japan: Prospective Seminar", jointly organized co-hosted with Nagoya University (Tokyo Office), the European Business Council and the European Union Mission in Japan (Tokyo, 8 September 2017);

(v) Presentation at the 7th Meeting of the Asia-Pacific Foreign Direct Investment Network (Bangkok, 2 November 2017);

(vi) Presentation at the Ministry of Justice-Seoul IDRC Workshop on "Investor-State Dispute Settlement" (Seoul, 10 November 2017);

(vii) Side Event on "Investor-State Dispute Resolution Roundtable", jointly organized with SHIAC during the first Asia-Pacific International Arbitration Forum (Shanghai, China, 21 March 2018);

(viii) Institutional support and presentation at the Asia FDI Forum IV on "Special Economic Zones: Issues and Implications for International Law & Policy", co-organized by Columbia Center on Sustainable Investment, the World Economic Forum, Shanghai Jiao Tong University and the Chinese University of Hong Kong (Hong Kong, China, 22–23 March 2018);

(f) In the area of procurement:

(i) Presentation at the "2017 Korea Public Procurement Expo and Concurrent Events in Public Procurement", organized by the Public Procurement Service of the Republic of Korea (Goyang, Republic of Korea, 19–20 April 2017);

(ii) Institutional support and expert input on the UNCITRAL Model Law on Public Procurement, at the ASEAN Legal Alliance's Legal Conference 2017 on "Mega Infrastructure Projects and the International Experience of Public Private Partnership (PPP)" (Bangkok, 5 October 2017);

(g) In the area of the international sale of goods: presentation on the development of the international sale of goods law and its influence during the session "Quarter Century of Civil and Commercial Laws in Asia: Mutual Influence and Legal Technical Assistance", at the 30th LAWASIA Conference (Tokyo, 21 September 2017);

(h) In the area of security interests: presentation on the UNCITRAL Model Law on Secured Transactions, at the 2nd UNCITRAL-JAIBL Academic Symposium (Tokyo, 17 March 2018) and at the 30th LAWASIA Conference (Tokyo, 21 September 2017);

(i) In the area of international transport of goods: presentation at the "Rotterdam Rules Roundtable" (Singapore, 28 November 2017).

Technical assistance and capacity-building

5. In consultation and with the support of Vienna-based staff of the UNCITRAL secretariat, UNCITRAL-RCAP has also been engaged in the following technical

assistance and capacity-building services, provided to States in the Asia-Pacific region, including to international and regional organizations, and development banks. Some of these activities are coordinated with various institutions referred to in paragraph 6 below:

(a) In the area of dispute settlement:

(i) Delivered two training sessions on the Model Law on International Commercial Arbitration at the New York University and Thailand Arbitration Commission Joint Arbitrator Training Workshop, aimed at capacity-building for local practitioners (Bangkok, 15–16 June 2017);

(ii) Presentation at the Beijing Arbitration Commission Summit, on "Opportunities and Challenges on Draft Instruments on Enforcement of International Commercial Settlement Agreements Resulting from Conciliation" (Beijing, 31 August 2017);

(iii) Co-organized with and presented on the Model Law at the Masterclass with the International Dispute Resolution Academy, the University of International Business and Economics, International Centre for Settlement of Investment Disputes and Centre for Effective Dispute Resolution (Beijing, 23–24 October 2017);

(iv) Co-hosted with the Ministry of Justice of the Republic of Korea a Regional Capacity Building Workshop on the Model Law aimed at officials from Bangladesh, Cambodia, Fiji, India, Kyrgyz Republic, Malaysia, Myanmar, Nepal, Paraguay, Thailand and Macau, China (Seoul, 7 November 2017);

(b) In the area of electronic commerce:

(i) Technical briefing on the e-CC to officials from the Department of Foreign Affairs, Department of Justice and Department of Trade and Industry of the Philippines and representatives from the Philippine Exporters Confederation (Manila, 23 May 2017);

(ii) Presentation at the "Capacity Building Workshop for Great Mekong Subregion on cross-border e-commerce", organized by the ASEAN Korea Centre with support from the Regional Centre (Seoul, 21–24 August 2017);

(iii) Technical briefing on "UNCITRAL e-Commerce Law 2.0" at the Working Group on E-Commerce in the context of the Regional Comprehensive Economic Partnership negotiating rounds (Incheon, Republic of Korea, 23 October 2017);

(c) In the area of international sale of goods:

(i) Technical briefing on CISG to the Department of Foreign Affairs, Department of Justice and Department of Trade and Industry of the Philippines, and representatives from the Philippine Exporters Confederation (Manila, 23 May 2017);

(ii) Technical briefing on CISG in a seminar organized by the Department of Justice of the Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong, China, 17 October 2017);

(d) In the area of security interests:

(i) Participation in workshops to discuss the draft secured transactions law of Bahrain (Manama, 11–14 September 2017);

(ii) Meetings with the Ministry of Commerce, relevant government agencies and the National People's Congress of China to introduce the Receivables Convention and the Model Law on Secured Transactions (Beijing, 25 September 2017);

(iii) Presentation on "Can China be a Leading Example of Secured Transactions Law Reforms?", at the Conference on Warehouse Finance and Collateral Management, organized by the China Banking Association and International Finance Corporation (Beijing, 26–27 September 2017);

(iv) Presentation on "Modern Secured Transactions Legal Framework", at a workshop held at Renmin University (Beijing, 27 September 2017).

Coordination

6. Following its systematic coordination and cooperation efforts with institutions active in trade law reforms, the Regional Centre has, during the reporting period, continued participation in regionally-based international trade law partnerships and alliances, including with other appropriate United Nations funds, programmes and specialized agencies, in their efforts in providing technical assistance and capacity-building in the region, including:

(a) United Nations Delivering as One:

(i) Under the Lao People's Democratic Republic-United Nations Partnership Framework 2017–2021, as a non-resident agency, being tasked to contribute in "Outcome 7: Institutions and policies at national and local level support the delivery of quality services that better respond to people's needs" and "Outcome 8: People enjoy improved access to justice and fulfilment of their human rights":

a. Briefing on CISG, attended by 77 government officials from across several departments, practitioners and in-house legal counsels from major Laotian corporations (Vientiane, Lao People's Democratic Republic, 25 April 2017);

b. Presentation at the International Seminar on "Law and Economic Dispute Resolution" at the Economic Dispute Resolution Center of Lao People's Democratic Republic (Vientiane, Lao People's Democratic Republic, 14 December 2017);

(ii) Joined the United Nations Development Assistance Framework ("UNDAF") Papua New Guinea (2018–2022), as a non-resident agency;

(b) United Nations Economic and Social Commission for Asia and the Pacific ("UNESCAP"): the Regional Centre has pursued its technical engagement with UNESCAP in the context of the promotion and implementation of the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific, namely in relation to the e-CC. The following activities were coordinated with UNESCAP:

(i) Presentation at the "Workshop on Facilitation on Trade in Northeast Asia through Paperless Trade", highlighting the nexus between technical interoperability, technology neutrality and the adoption of uniform laws, and the success of the close cooperation with UNESCAP in drafting the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific (Bangkok, 29–30 August 2017);

(ii) Participation in the Asia-Pacific Trade Facilitation Forum organized by UNESCAP, the Asian Development Bank and the Coordinating Ministry of Economic Affairs Indonesia (eighth edition, 2017) on: "Trade Facilitation Innovations for Sustainable Development in Asia and the Pacific". In addition to giving a presentation, the Regional Centre co-organized a half-day side event on "Taking FTA Electronic Commerce Chapters Seriously: UNCITRAL Texts for Mutual Recognition of Electronic Communications and Signatures" (Yogyakarta, Indonesia, 5–8 September 2017);

(iii) Presentation at the Regional Consultation on E-Commerce for Sustainable Development in Asia and the Pacific, during the 5th Asia-Pacific Trade and Investment Week, organized by UNESCAP (Bangkok, 30 October 2017);

(iv) Attended the UNESCAP Committee on Trade and Investment, and delivered two statements and as a result, the report of the Committee [E/ESCAP/CTI(5)/6] included references to the importance of UNCITRAL's

work in strengthening and harmonising trade laws and regulations and the need to strengthen cooperation with UNCITRAL (Bangkok, 31 October 2017);

(v) Attendance and presentation at the Fifth Meeting of Legal and Technical Working Groups on Cross-border Paperless Trade Facilitation (Bangkok, 20–21 March 2018);

(c) United Nations Conference on Trade and Development ("UNCTAD") and the Association of Southeast Asian Nations ("ASEAN"): presentation at the UNCTAD/ASEAN Workshop on e-commerce on "The Legal Challenges of E-Commerce" and "Roundtable – Assistance for E-Commerce Development in the Region", illustrating respectively, the relevance of UNCITRAL texts and UNCITRAL technical assistance activities (Manila, 8–9 November 2017);

(d) Asian Development Bank ("ADB"): ADB and UNCITRAL concluded an exchange of letters aimed at reforming arbitration laws in the South Pacific, focusing on accession to the New York Convention in January 2017. UNCITRAL, through RCAP, in coordination with ADB, will (a) assist States in the preparation and deposit of instruments of accession to the New York Convention; (b) review existing or draft new arbitration laws based on the Model Law, including ensuring conformity with the provisions of the New York Convention; and (c) deliver capacity-building through tailored training programmes for stakeholders (government and judicial officials, arbitration practitioners as well as scholars).

In that context, RCAP co-hosted with the Government of the Republic of Fiji and ADB, the South Pacific International Arbitration Conference. The conference discussed the positive developmental impact of international arbitration reform in the South Pacific. One hundred and twenty-three participants including Government officials, policymakers, development partners, judges, law practitioners and private sector representatives from 25 jurisdictions attended the conference (Nadi, Fiji, 12–13 February 2018).

(e) Asia-Pacific Economic Cooperation ("APEC"):

(i) Co-hosted and participated at the Friends of the Chair Group on Strengthening Economic and Legal Infrastructure Workshop on: "The Use of Modern Technology for Dispute Resolution and Electronic Agreement Management (particularly ODR)" (Port Moresby, 3–4 March 2018);

(ii) Took part in the Ease of Doing Business Project ("EoDB project") in collaboration with the Ministry of Justice of the Republic of Korea in Viet Nam:

a. Presented on enforcing contracts and the relevance of UNCITRAL texts, including CISG, e-CC, the New York Convention and the Model Law on International Commercial Arbitration at the 2017 Ease of Doing Business Workshop (Hanoi, 27 June 2017);

b. Met with the Central Institute for Economic Management under the Ministry of Planning and Investment, Ministry of Justice of Viet Nam, the Supreme People's Court of Viet Nam and Vietnam International Arbitration Centre to discuss the status and possible improvement in the field of enforcing contracts and dispute settlement (Hanoi, 26 June 2017);

c. Met with the Federal Court of Australia, Personal Property Securities Register under the Australia Financial Security (Sydney, Australia, 29 June 2017);

d. Presented on the Model Law on Secured Transactions at the APEC EoDB Wrap-up Seminar (Seoul, 22 November 2017);

(f) Greater Tumen Initiative ("GTI"): presented on UNCITRAL legal texts for e-commerce and paperless trade facilitation in Northeast Asia, highlighting the e-CC and the MLETR at the GTI Trade and Investment Cooperation Roundtable Meeting, co-organized by the GTI Secretariat, Jilin Provincial Government of China and Deutsche Gesellschaft für Internat. Zusammenarbeit GmbH. The roundtable aimed to bring diverse stakeholders such as government agencies, international organizations,

academics and the private sector to discuss the future direction and concerted actions of trade and investment cooperation in Northeast Asia (Changchun, China, 30–31 August 2017).

Supporting attendance of judges and government officials

7. The Regional Centre has supported attendance of government officials, legal officers and judges, from regional Least Developed Countries ("LDCs"), Landlocked Developing Countries ("LLDCs") and Small Island Developing States ("SIDCs"), to activities aimed at capacity-building:

(a) One delegate from the Attorney General's Department of Sri Lanka and one delegate from the Multilateral Trade Policy Division of the Foreign Trade Policy Department of Lao People's Democratic Republic, to attend the UNCITRAL Congress (Vienna, 4–6 July 2017);

(b) Two participants to attend the Annual Willem C. Vis (East) International Commercial Arbitration Moot, from the Royal University of Law and Economics, Cambodia and the Dagon University, Myanmar (Hong Kong, China, 11–18 March 2018).

Channel of communication between States

8. The Regional Centre has consolidated the function it serves on behalf of the UNCITRAL Secretariat as a channel of communication for non-legislative activities of the Commission between States in the region and UNCITRAL, setting up contact points within governments in the region and engaging in regular consultations with government officials from Australia, Bahrain, China (including the Special Administrative Regions of Hong Kong and Macau), Fiji, India, Iran (Islamic Republic of), Japan, Lao People's Democratic Republic, Papua New Guinea, the Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Timor-Leste, Thailand, Turkmenistan and Viet Nam.

New treaty action and enactment of model laws

9. The status of adoption of UNCITRAL texts is regularly updated and available on the UNCITRAL website. It is also compiled annually in a note by the Secretariat entitled "Status of conventions and model laws" (for the Commission's fifty-first session, see A/CN.9/950). RCAP has, during the reporting period, monitored the progress towards, and has also assisted States in, the adoption of the following UNCITRAL texts, in consultation and with the support of staff of the UNCITRAL secretariat:

(a) In the area of dispute resolution:

(i) United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014): Australia signed the Convention on 18 July 2017;

(ii) UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006: legislation based on the Model Law has been adopted in Fiji;

(iii) UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014): the following concluded agreements provide for investor-state arbitration under the UNCITRAL Arbitration Rules, including the Transparency Rules:

a. The Australia-Peru Free Trade Agreement was signed on 12 February 2018. The UNCITRAL Arbitration Rules (including Transparency Rules) were provided as an option for ISDS in Article 8.20;

b. The Agreement between Japan and the Republic of Armenia for the Liberalisation, Promotion and Protection of Investment was signed on 14 February 2018. The UNCITRAL Arbitration Rules (including Transparency Rules) were provided as an option for ISDS in Article 24.4;

(b) In the area of electronic commerce:

United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005):

(i) Fiji acceded to the Convention on 7 June 2017; and

(ii) Sri Lanka passed on 18 October 2017 legislation incorporating substantive provisions of the e-CC.

(c) In the area of international sale of goods:

United Nations Convention on Contracts for the International Sale of Goods, (Vienna, 1980): Fiji acceded to the Convention on 7 June 2017.

Strengthening information, knowledge and statistics

10. In order to fulfil its assigned objective of strengthening information, knowledge and statistics through briefings, workshops, seminars, publications, social media, and information and communication technologies, including in regional languages, the Regional Centre has concluded the following activities:

(a) The continued broadcasting of regional website in regional languages, namely in Japanese and Korean, including through social media. The regional website has 702 resource materials;

(b) Compilation of selected UNCITRAL texts in Korean and English, entitled "United Nations Standards Towards the Harmonization and Modernization of International Commercial Law", in cooperation with the Ministry of Justice, Republic of Korea, to be made available online and in hard copies;

(c) Publication of the 2017–2018 Annual Asia-Pacific Report on ISDS and Transparency, through the Investor-State Dispute Settlement Asia-Pacific Transparency Observatory established with the Seoul National University Asia-Pacific Law Institute and KCAB, which surveyed transparency provisions and the application of UNCITRAL standards on transparency in investor-State dispute settlement in international investment agreements concluded by states in the Asia-Pacific. The publication is made available online at the RCAP website and updates will be monitored;

(d) Incheon Trade Law Digest (Issue 2 2017) featuring 8 research papers prepared by experts from the Asia-Pacific region in relation to study on UNCITRAL and UNCITRAL texts. Similar to Issue 1, the publication is made available online at the RCAP website.

National Coordination Committees

11. RCAP has continued its support to the UNCITRAL National Coordination Committees for Australia ("UNCCA"), India, and the Global Private Law Forum of Japan. The UNCITRAL National Coordination Committees are private sector initiatives aimed at disseminating international trade norms and coordinating national promotional activities, allowing the Regional Centre to allocate more resources to the dissemination of UNCITRAL texts in LDCs, LLDCs, and SIDCs in the region.

12. During the reporting period, the Regional Centre held the Third Annual UNCITRAL Australia Seminar with the UNCCA on 19 May 2017 in Canberra, which focused on the draft convention on international settlement agreements resulting from mediation being developed in Working Group II, on the enforcement of alternative dispute resolution outcomes, and the impact of the Secured Transactions Model Law developed by Working Group VI and its implications for Australia's personal property

securities regime. A pre-recorded keynote address which focused on the adoption and implementation of existing UNCITRAL texts was delivered. The UNCCA signed a Memorandum of Understanding with the University of Canberra for the establishment of an executive office on its campus until 2020.

Outreach

13. To expand the reach of its mandate, both with the hosting community and with the regional academia, the Regional Centre continued its national outreach and regional educational programmes to maintain regular dialogue with non-governmental organizations, local and national political stakeholders, other international organizations, academia, the media and the general public on various aspects of the RCAP, to enhance cooperation and community support, and increase awareness of UNCITRAL activities:

(a) For the national outreach programme, the Regional Centre has opened its doors to various visitors, including representatives of the Incheon Municipal Council, local students and interns from the Ministry of Justice of the Republic of Korea. Various lectures have also been delivered to local students on UNCITRAL and its work, and attended various events coordinated with the United Nations offices in ROK;

(b) The Regional Centre has continued its support to international trade law moot competitions held in the region, namely:

(i) The 15th Vis East Moot, hosted by Vis East Moot Foundation Ltd. and the City University of Hong Kong (Hong Kong, China, 11–18 March 2018);

(ii) The 2nd ICC/KLRCA Vis Pre-Moot and AIAC YPG Conference through the Regional Centre's institutional support (Kuala Lumpur, 1–2 March 2018);

(c) Academic engagement was fostered by delivering public lectures at Universities in the region such as: the National University of Lao, Peking University, Beijing Normal University, Inha University, Incheon University, Kookmin University, the University of Macau, National Law University Delhi, the University of Western Australia, Wuhan University, the University of Hong Kong, the City University of Hong Kong, the Chinese University of Hong Kong, Nagoya University, University of International Business and Economics, and Renmin University.

Resources and Funding

14. The Regional Centre is staffed with one professional, one programme assistant, one team assistant and two legal experts. During this reporting period, 15 interns were hosted at the Regional Centre. The core project budget allows for the occasional employment of experts and consultants. The Regional Centre relies on the annual financial contribution from the Incheon Metropolitan City to the Trust Fund for UNCITRAL Symposia to meet the cost of operation and programme. It further relies on the contribution of two non-reimbursable loans of legal experts by the Ministry of Justice of the Republic of Korea and by the Government of the Hong Kong, Special Administrative Region of China, both of which were extended.

15. According to article 13.3 of the Memorandum of Understanding signed on 18 November 2011 between the United Nations, the Ministry of Justice and the Incheon Metropolitan City of the Republic of Korea regarding the operation and financial contribution to the UNCITRAL Regional Centre for Asia and the Pacific, the Incheon Metropolitan City extended its financial contribution over a 5-year period (2017–2021) for the operation of the Regional Centre, revising the annual contribution to USD $450,000.

16. It is expected that interest in UNCITRAL texts in the region will grow with additional requests for technical assistance. Such increase will call for a corresponding increase in available resources. Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals are actively

encouraged to make voluntary contributions to the United Nations Commission on International Trade Law Trust Fund for Symposia and, where appropriate, for the financing of special projects and otherwise to assist the UNCITRAL Secretariat in carrying out technical cooperation and assistance activities. Additional contributions to the RCAP project from member States, or from interested private and public entities recommended by member States, are required to further respond to regional expectations.

B. Note by the Secretariat on technical cooperation and assistance

(A/CN.9/958/Rev.1)

[Original: English]

Contents

I. Introduction

1. This note sets out the technical cooperation and assistance activities of the Secretariat subsequent to the date of the previous note submitted to the Commission at its fiftieth session (Vienna, 3–21 July 2017),[1] including those carried out in the region covered by the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) but not initiated by RCAP. Activities initiated and undertaken in the Asia-Pacific region by the UNCITRAL Regional Centre for Asia and the Pacific are set out in a separate document.[2]

2. A separate document on coordination activities[3] provides information on current activities of international organizations related to the harmonization and unification of international trade law and on the role of UNCITRAL in coordinating those activities.

II. Technical cooperation and assistance activities

A. General approaches

3. Technical cooperation and assistance activities undertaken by the Secretariat aim at promoting the adoption and uniform interpretation of UNCITRAL legislative texts. Such activities include providing advice to States considering signature, ratification or accession to an UNCITRAL convention, adoption of an UNCITRAL model law or use of an UNCITRAL legislative guide.

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[1] A/CN.9/905 of 18 April 2017.
[2] A/CN.9/947 of 10 April 2018.
[3] A/CN.9/948 of 2 April 2018.

4. Technical cooperation and assistance may involve: undertaking briefing missions and participating in seminars and conferences, organized at both regional and national levels; assisting countries in assessing their trade law reform needs, including by reviewing existing legislation; assisting with the drafting of domestic legislation to implement UNCITRAL texts; assisting multilateral and bilateral development agencies to use UNCITRAL texts in their law reform activities and projects; providing advice and assistance to international and other organizations, such as professional associations, organizations of attorneys, chambers of commerce and arbitration centres, on the use of UNCITRAL texts; and organizing training activities to facilitate the implementation and interpretation of legislation based on UNCITRAL texts by judges and legal practitioners.

5. Some of the key activities undertaken by the Secretariat in the relevant time period are described below. In the experience of the Secretariat, the demand for technical assistance is greater in those areas in which there is a high rate of adoption of UNCITRAL texts (in particular, dispute settlement and electronic commerce). It should be noted that due to lack of resources and time constraints, some of the activities were undertaken by experts on behalf of the Secretariat. Activities denoted with an asterisk were funded by the UNCITRAL Trust Fund for Symposia.

Promotion of the universal adoption of fundamental trade law instruments

6. The Secretariat has continued to engage in promoting the adoption of fundamental trade law instruments, i.e., those treaties that are already enjoying wide adoption and the universal participation in which would seem particularly desirable.

7. The Secretariat has jointly organized, participated in, or contributed to the following events which dealt with a number of areas to which UNCITRAL's work relates:

(a) International symposium "Soft law and international trade law" (Montreal, Canada, 11–12 May 2017);

(b) Hong Kong International Arbitration Centre Conference "The Belt and Road: A Catalyst for Connectivity, Convergence and Collaboration" (Hong Kong, China, 12 May 2017);

(c) Remote participation at the 20th Global Meeting of the Inter-Agency Cluster on Trade and Productive Capacity (Vienna, 17 November 2017).

Initiatives for a regional approach

8. The Secretariat continued its collaboration with the Asia-Pacific Economic Cooperation (APEC) and was granted a three-year guest status at its Economic Committee (EC) from 2017. During the reporting period, the Secretariat participated in meetings of the Economic Committee, Friends of the Chair Group on Strengthening Economic and Legal Infrastructure (SELI), Investment Experts Group (IEG) as well as three workshops organized under the auspices of the APEC Economic Committee and SELI:

(a) Workshop on Starting a Business: Simplified Business Registration and Incorporation according to International Best Practices (Ho Chi Minh City, Viet Nam, 24 August 2017);

(b) Workshop on the Use of Modern Technology for Dispute Resolution and Electronic Agreement Management (particularly Online Dispute Resolution) (Port Moresby, 3–4 March 2018);

(c) Workshop on Secured Transactions: Best Practices for Dynamic Business Growth (Mexico City, 21–22 March 2018).

9. The Secretariat's participation in the APEC meetings mentioned above was made possible through support from US-ATTARI and the Department of Justice, Hong Kong, China and the APEC Secretariat.

10. The Secretariat also continued its participation in the APEC Ease of Doing Business (EoDB) project on enforcing contracts and getting credit, which aims at

strengthening the legislative and institutional framework in APEC economies. In that context, UNCITRAL participated in the EoDB project for improving the getting credit environment in the Republic of Korea (Sydney, Australia, 26–30 June 2017 and Toronto, Canada, 18–20 October 2017); the EoDB project for improving the enforcing contract environment in Viet Nam (Hanoi, 26–30 June 2017); and the wrap-up International Conference on EoDB (Seoul, 22 November 2017). The Secretariat's participation in the EoDB project was made possible through voluntary contributions from the Government of the Republic of Korea.

11. It is expected that the Secretariat will continue to cooperate closely with China, including Hong Kong Special Administrative Region, Mexico, the Republic of Korea and the United States of America in implementing the second APEC EoDB Action Plan (2016–2018).

12. Further, the Secretariat continued to be a partner in the project implemented by the *Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH* by appointment of the German Federal Ministry for Economic Cooperation and Development (BMZ) within the Open Regional Fund – Legal Reform. This project entitled "International Dispute Resolution Instruments", comprises two main support pillars. The first of these aims to ensure that South-Eastern Europe as a region becomes more involved in the international discussion regarding dispute resolution and participate in the work of UNCITRAL, e.g. in the work of its Working Groups II and III. The second area of work aims at promoting the use of the UNCITRAL Transparency Standards.

B. Specific activities

Dispute settlement

13. The Secretariat has been engaged in the promotion of UNCITRAL texts in the field of dispute resolution (for example, the UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006,[4] UNCITRAL Model Law on International Commercial Conciliation,[5] and the United Nations Convention on Transparency in Treaty-based Investor State Arbitration[6]), including through a number of training activities and has supported the ongoing law reform process in various jurisdictions. The Secretariat has also developed soft law instruments and tools to provide information on the application and interpretation of those texts (reported in A/CN.9/906). The Secretariat has jointly organized, participated in, or contributed to number of events, including:

(a) 24th Vis International Commercial Arbitration Moot (Vienna, 7–10 April 2017);

(b) Kick-off meeting of the GIZ-UNCITRAL Project "Application of International Arbitration Standards in South East Europe" (Budva, Montenegro, 8–10 May 2017);

(c) Coordination meeting with the Organization for Security and Cooperation in Europe (OSCE) to provide information on arbitration instruments as applied by OSCE (Vienna, 16 May 2017);

(d) International Conference on "*La CNUDCI et l'Afrique*" (Yaounde 24–25 May 2017);*

(e) 44th meeting of experts preceding the *Conseil des Ministres* of OHADA (Conakry, 5–8 June 2017);*

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[4] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I; *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), annex I (revised articles only).

[5] General Assembly resolution 57/18, annex (model law only).

[6] General Assembly resolution 69/116.

(f) Beijing Arbitration Commission/Beijing International Arbitration Centre Arbitration Summit (Vienna, 21 June 2017);

(g) Meeting on the revision of the OHADA Uniform Act on arbitration (Abidjan, Côte d'Ivoire, 24–27 July 2017);

(h) ICC Caribbean Conference, judicial sensitization programme and launch of the Jamaica International Arbitration Centre (JAIAC) (Kingston, 28–30 August 2017);

(i) Eastern Economic Forum: "Arbitration at the Far East of Russia as the factor of investment attractiveness of the region" (Vladivostok, Russian Federation, 6–7 September 2017);*

(j) Ecuador ICC Arbitration Day (Quito, 13–14 September 2017);

(k) Workshop on International Arbitration (Algiers, 19–20 September 2017);

(l) New York Convention Guide Presentation (New York, United Sates, 11 September and Paris, France, 26 September 2017);

(m) Workshop on International Arbitration (Tblisi, 29–30 September 2017);

(n) Meeting of the International Institute for Conflict Prevention and Resolution (CPR) (Warsaw, 19 October 2017);

(o) Annual conference of the Chartered Institute of Arbitrators (CiArb): "Strengthening the Building Blocks of Arbitration in Africa" (Lagos, Nigeria, 2–3 November2017);

(p) Presentation at the Regional Cooperation Council Meeting (Vienna, 23 November 2017);

(q) The Fourth Conference for a Euro-Mediterranean Community of International Arbitration (Manama, 19 November 2017);

(r) Winter School on Alternative Dispute Resolution (ADR) followed by an Investment Pre-Moot (Durres, Albania, 20–24 November 2017);

(s) Regional judicial workshops organized by the Commercial Law Development Programme (CLDP), US Department of Commerce (Tunis and Casablanca, 6–14 December 2017);

(t) Celebratory conference for UNCITRAL 50th anniversary with regional arbitration centres (Cairo, 9–10 December 2017);

(u) International Seminar on the Law on Resolution of Economic Disputes and the Centre for Economic Dispute Resolution of the Lao People's Democratic Republic (Vientiane, 14–15 December 2017);

(v) Seminar on the possible reform of the Finnish Arbitration Act, organized by the Finland Arbitration Institute (Helsinki, 25 January 2018);

(w) Vienna Arbitration Days (Vienna, 26 January 2018);

(x) Briefings for non-signatory States to the New York Convention on the Recognition and enforcement of Foreign Arbitral Awards (New York, United States, 5–9 February 2018);

(y) GIZ Investment Round-table (Tirana, 13–16 February 2018);

(z) Participating in the pre-Moot and arbitrators training (Manama, 21–23 February 2018);

(aa) Investment Moot Frankfurt, including a Round-table "Avoiding War – Arbitration and Other Methods of Resolving International Disputes" (Frankfurt, Germany, 16 March 2018);

(bb) Joint UNCITRAL – Ljubljana Arbitration Centre Conference (Ljubljana, 20 March 2018);

(cc) 25th Vis International Commercial Arbitration Moot (Vienna, 23–29 March 2018);

(dd) International Conference on the New York Convention on the Recognition and enforcement of Foreign Arbitral Awards (Seville, Spain, 5 and 6 April 2018).

Institutional support

14. Institutional support was provided to a number of events, including "ISDS and Japan: prospective seminar", co-organized with Nagoya University (Tokyo Office) European Business Council and the European Union Mission (Tokyo, 8 September 2017).

Review of enacting legislation and assistance with legislative drafting

15. The Secretariat has reviewed or provided comments on legislation on arbitration and/or mediation of a number of jurisdiction including Australia (Capital Territory), Ecuador, Kazakhstan, Liechtenstein, Nigeria, Rwanda, South Africa and Uganda.

Lectures

16. A lecture on dispute resolution was provided to: Danube University Krems (Krems, Austria, 30 May 2017).

Electronic commerce

17. The Secretariat has continued promoting the adoption, use and uniform interpretation of UNCITRAL texts on electronic commerce (United Nations Convention on the use of Electronic Communications in International Contracts (e-CC),[7] UNCITRAL Model Law on Electronic Signatures[8] and UNCITRAL Model Law on Electronic Commerce[9]), including in cooperation with other organizations and emphasizing a regional approach. In that framework, the Secretariat has interacted with legislators and policymakers, including by providing comments on draft legislation. Activities included:

(a) Presentation on existing UNCITRAL texts relevant for cross-border recognition of e-signatures and identity management (IdM) and the ongoing work at Working Group IV. Coordination with work at UN/CEFACT (EFPE) (Geneva, Switzerland, 29 March 2017);

(b) Remote participation in IV *Congreso Internacional Sobre Derecho Uniforme del Comercio Internacional* (DUCI) (San José, 9–10 May 2017);

(c) Presentation on IdM and e-signatures at the WSIS 2017 Forum (Geneva, Switzerland, 12 June 2017);

(d) International Seminar on Identification and Digital Transformation (Lima, 1–4 August 2017);*

(e) Second meeting of the World Customs Organization (WCO) Working Group on E-Commerce (WGEC). (Brussels, 10–13 October 2017);

(f) Conference "Supply Chain Finance (SCF) and the Changing Landscape of International Trade" (Gothenburg, Sweden, 23–24 October 2017);

(g) 4th Summit of Electronic World Trade Platform (Hangzhou, China, 26–29 October 2017);

(h) UN ECE Working Party on Road Transport (SC.1) Special session (Geneva, Switzerland, 3–4 April 2018).

18. A number of related activities took place in the region covered by RCAP:

[7] General Assembly resolution 60/21, annex.
[8] General Assembly resolution 56/80, annex (model law only).
[9] General Assembly resolution 51/162, annex (model law only).

(a) Capacity-building Workshop on Cross-border Paperless Trade Facilitation: Implications of Emerging Technologies (Bangkok, 21–22 March 2018);

(b) Fourth Meeting of the Interim Intergovernmental Steering Group on Cross-Border Paperless Trade Facilitation (Bangkok, 22–23 March 2018).

Review of enacting legislation and assistance with legislative drafting

19. The Secretariat discussed with stakeholders in the legislative process of adoption of e-commerce texts in Bahrain (Manama, 16–19 May 2017). The Secretariat has reviewed or provided comments on legislation on electronic commerce of a number of jurisdiction including Sri Lanka and Haiti.

Lectures

20. A lecture on e-commerce at the ITC-ILO Master of Laws in International Trade Law (Turin, Italy, 11–12 May 2017).

Insolvency

21. The Secretariat has promoted the use and adoption of insolvency texts (UNCITRAL Model Law on Cross-Border Insolvency [10] and the UNCITRAL Legislative Guide on Insolvency Law[11]) by disseminating information about those texts to Government officials, legislators, judges, academics and practitioners and thus promoting their implementation and consulting with legislators and policymakers from various jurisdictions to review enacting legislation and assist with legislative drafting. Activities relating to the dissemination of information included:

(a) Conference new corporate insolvency regime (New Delhi, 28–29 April 2017);

(b) VII St. Petersburg International Legal Forum (St. Petersburg, 17–19 May);*

(c) International Insolvency Institute 17th annual session (III) (London, 18–20 June 2017);

(d) European Law Institute annual session (ELI) (Vienna, 6 September 2017);

(e) Eighth Africa Roundtable on Insolvency Reform (Port Louis, 9–10 November 2017).*

Lectures

22. The Secretariat has delivered a lecture on UNCITRAL development on secured transactions and insolvency law at the Academy of European Law (ERA) Conference on European Union Insolvency Law (Trier, Germany, 8–9 June 2017).

Procurement and infrastructure development

23. The Secretariat has continued cooperation with other international organizations active in public procurement reform to support the use of the UNCITRAL Model Law on Public Procurement (2011) (the "Procurement Model Law"),[12] its accompanying Guide to Enactment (2012), [13] and the UNCITRAL texts on Privately-Financed Infrastructure Projects.[14]

24. The aims of such cooperation are to ensure that reforming Governments and organizations are informed of the terms of and the policy considerations underlying

[10] General Assembly resolution 52/158, annex.
[11] United Nations publication, Sales No. E.05.V.10.
[12] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), annex I.
[13] Available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.
[14] The UNCITRAL Legislative Guide (with Legislative Recommendations) and its Model Legislative Provisions on Privately-Financed Infrastructure Projects, available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

those texts, including as regards regional requirements and circumstances, so as to promote a thorough understanding and appropriate use of these UNCITRAL texts.[15] The Secretariat is following a regional approach to this cooperation, engaging with the multilateral development banks and regional organizations, addressing the role of public procurement in sustainable development, trade facilitation, good governance and the avoidance of corruption and achieving value for money in government expenditure.

25. The main activities and international events in the year to April 2018, in which the Secretariat has participated as speaker/presenter include the following:

(a) Fifth Annual Conference of the South Asia Region Public Procurement Network (SARPPN) on "Public Procurement and Service Delivery" (New Delhi, 5–9 February 2018);

(b) Third workshop on Professionalization in Public Procurement (Zagreb, 28 April 2017);

(c) Thirteenth Procurement, Integrity, Management and Openness (PRIMO) Forum on Curbing Corruption in Public Procurement (Kiev, 23–24 May 2017);

(d) International conference: "Modernization of Infrastructure in Ukraine: New Opportunities for Private Business Participation" (remote participation) (Kiev, 27 May 2017);*

(e) Public Procurement: Global Revolution VIII Conference (Nottingham, United Kingdom of Great Britain and Northern Ireland, 12–14 June 2017);

(f) Colloquium on Suspension and Debarment (Washington, D.C., 14 September 2017);

(g) Seventh Conference of the States Parties to the United Nations Convention against Corruption (Vienna, 8 November 2017);

(h) GPA Academy on Promoting Trade, Good Governance and Inclusive Sustainable Development (Geneva, Switzerland, 20 November 2017);

(i) Workshop on "Prevention of Trafficking in Human Beings in Supply Chains through Government Practices and Measures" (Geneva, Switzerland, 23 November 2017);

(j) Contribution to "Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer", University of Greenwich/Olga Martin Ortega and Claire Methven O'Brien, 2019 (London, 5–7 April 2018).

Review of enacting legislation and assistance with legislative drafting

26. The Secretariat has provided advice to the Government of Azerbaijan on drafting a new law on public procurement, in the context of the implementation of the EBRD-UNCITRAL Public Procurement Initiative.

Lectures

27. The Secretariat participated as a lecturer in:

(a) Eleventh and 12th editions of ITC-ILO Master in Public Procurement for Sustainable Development (Turin, Italy, 30 May 2017, and 6 and 7 February 2018);

(b) Lecture at the International Anti-Corruption Academy (IACA) on UNCITRAL Model Law and the EBRD-UNCITRAL Initiative on Enhancing Public Procurement Regulation in the EAEU Countries (Laxenburg, Austria, 3 October 2017);

(c) Lecture at IACA on "Public Procurement-International Perspective" (Laxenburg, Austria, 17 November 2017);

[15] See documents A/CN.9/575, paras. 52 and 67, A/CN.9/615, para. 14, and A/66/17, paras. 186–189.

(d) Presentation at IACA during a workshop on public procurement to Kosovo senior government officials and UNDP (Laxenburg, Austria, 11 December 2017).

Sale of goods

28. The Secretariat has continued to promote broader adoption, use and uniform interpretation of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("CISG"),[16] and of the Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended (Vienna, 1980).[17]

29. It is in particular noteworthy the remote participation of the Secretariat in events on CISG at the Economic Commission of the Congress of Guatemala (Guatemala City, 28 June 2017).

Security interests

30. UNCITRAL has produced a number of complementary texts in the area of secured transactions: the United Nations Convention on the Assignment of Receivables in International Trade (2001),[18] the UNCITRAL Legislative Guide on Secured Transactions (2007),[19] its Supplement on Security Rights in Intellectual Property (2010), the UNCITRAL Guide on the Implementation of a Security Rights Registry (2013)[20] and the UNCITRAL Model Law on Secured Transactions (2016).[21]

31. The Secretariat is continuing its cooperation with the World Bank to support law reforms based on UNCITRAL texts on security interests.

Transport Law

32. The Secretariat has participated in a roundtable of key stakeholders to discuss advantages of ratification of the Rotterdam Rules (Singapore, 27 November 2017).

III. Dissemination of information

33. A number of publications and documents prepared by UNCITRAL serve as key resources for its technical cooperation and assistance activities, particularly with respect to dissemination of information on its work and texts.

A. Website

34. The UNCITRAL website, available in the six official languages of the United Nations, provides access to full-text UNCITRAL documentation and other materials relating to the work of UNCITRAL, such as publications, treaty status information, press releases, events and news. In line with the organizational policy for document distribution, official documents are provided, when available, via linking to the United Nations Official Document System (ODS).

35. In 2017, the website received over 1,000,000 unique visitors, an increase from 2016 (800,000 unique visitors). Of all sessions, roughly 63 per cent were directed to pages in English and 37 per cent to pages in Arabic, Chinese, French, Russian and Spanish. In this respect, it should be noted that, while the UNCITRAL website is among the most important electronic sources of information on international trade law in all languages, it may represent one of few available sources on this topic in some of the official languages.

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[16] United Nations, *Treaty Series*, vol. 1489, No. 25567.
[17] United Nations, *Treaty Series*, vol. 1511, No. 26121.
[18] General Assembly resolution 56/81, annex.
[19] United Nations publication, Sales No. E.09.V.12.
[20] General Assembly resolution 68/108.
[21] General Assembly resolution 71/136; *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), chap. III, sect. A.

36. The content of the website is updated and expanded on an ongoing basis in the framework of the activities of the UNCITRAL Law Library and therefore at no additional cost to the Secretariat. The General Assembly has welcomed "the continuous efforts of the Commission to maintain and improve its website, including by developing new social media features, in accordance with the applicable guidelines."[22] In this regard, in September 2015, a general UNCITRAL LinkedIn account was established that now has over 3,600 followers, an increase from 1,900 in the last year. This account supplements the Tumblr microblog ("What's new at UNCITRAL?") established in 2014. Both features are accessible from the UNCITRAL website.

B. Library

37. Since its establishment in 1979, the UNCITRAL Law Library has been serving the research needs of Secretariat staff and participants in intergovernmental meetings convened by UNCITRAL. It has also provided research assistance to staff of Permanent Missions, global staff of the United Nations, staff of other Vienna-based international organizations, external researchers and law students. In 2017, library staff responded to approximately 480 reference requests, originating from over 45 countries. Library visitors other than meeting participants, staff and interns included researchers from over 24 countries.

38. The collection of the UNCITRAL Law Library focuses primarily on international trade law and currently holds over 12,000 monographs, 100 active journal titles, legal and general reference material, including non-UNCITRAL United Nations documents, documents of other international organizations and electronic resources (restricted to in-house use only). Particular attention is given to expanding the holdings in all of the six United Nations official languages. While use of electronic resources has increased, resources on trade law from many countries are still only found in print, and circulation of print items has remained steady.

39. The UNCITRAL Law Library maintains an online public access catalogue (OPAC) jointly with the other United Nations libraries in Vienna. OPAC is available via the library page of the UNCITRAL website.[23]

40. The UNCITRAL Law Library staff prepare for the Commission an annual "Bibliography of recent writings related to the work of UNCITRAL". The bibliography includes references to books, articles and dissertations in a variety of languages, classified according to subject.[24] Individual records of the bibliography are entered into OPAC, and the full-text collection of all cited materials is maintained in the Library collection. Monthly updates from the date of the latest annual bibliography are available in the bibliography section of the UNCITRAL website.

41. The Library produces a consolidated bibliography of writings related to the work of UNCITRAL on the UNCITRAL website.[25] The consolidated bibliography aims to compile all entries of the bibliographical reports submitted to the Commission since 1968. It currently contains over 9,970 entries, reproduced in English and in the original language versions, verified and standardized to the extent possible.

C. Publications

42. In addition to official documents, UNCITRAL traditionally maintains two series of publications, namely the texts of all instruments developed by the Commission and the UNCITRAL Yearbook. Publications are regularly provided in support of technical cooperation and assistance activities undertaken by the

[22] General Assembly resolution 70/115.
[23] Available from www.uncitral.org/uncitral/en/publications/publications.html.
[24] For the fifty-first Commission session, see A/CN.9/949.
[25] Available from www.uncitral.org/uncitral/en/publications/publications.html.

Secretariat, as well as by other organizations where the work of UNCITRAL is discussed, and in the context of national law reform efforts.

43. The publications appeared in 2017: UNCITRAL Technical Notes on Online Dispute Resolution, [26] UNCITRAL Model Law on Electronic Transferable Records (2017),[27] Modernizing International Trade Law to Support Innovation and Sustainable Development: Proceedings of the Congress of the United Nations Commission on International Trade Law, Vienna, 4–6 July 2017 (vol. 4: Papers Presented at the Congress) [28] and UNCITRAL Model Law on Secured Transactions: Guide to enactment.[29] The 2014 UNCITRAL *Yearbook* was submitted for publication in 2017 and the 2015 *Yearbook* will be submitted in April 2018.

44. In light of budget and environmental concerns, the Secretariat has continued its efforts to use electronic media as a primary method to disseminate UNCITRAL texts. Thus, print runs for all publications have been reduced and the 2013 UNCITRAL *Yearbook* was published exclusively in electronic format (CD-ROM and e-book).

D. Press releases

45. Press releases are being regularly issued when treaty actions relating to UNCITRAL texts take place or information is received on the adoption of an UNCITRAL model law or other relevant text. Press releases are also issued with respect to information of particular importance and direct relevance to UNCITRAL. Those press releases are provided to interested parties by email and are posted on the UNCITRAL website, as well as on the website of the United Nations Information Service (UNIS) in Vienna or of the Department of Public Information, News and Media Division in New York, if applicable.

46. To improve the accuracy and timeliness of information received with respect to the adoption of UNCITRAL model laws, since such adoption does not require a formal action with the United Nations Secretariat, and to facilitate the dissemination of related information, the Commission may wish to request Member States to advise the Secretariat when enacting legislation implementing an UNCITRAL model law.

E. General enquiries

47. The Secretariat currently addresses approximately 2,000 general enquiries per year concerning, inter alia, technical aspects and availability of UNCITRAL texts, working papers, Commission documents and related matters. Increasingly, these enquiries are answered by reference to the UNCITRAL website.

F. Information lectures in Vienna

48. Upon request, the Secretariat provides information lectures in-house on the work of UNCITRAL to visiting university students and academics, members of the bar and Government officials, including judges. Since the last report, the Secretariat offered 14 lectures to visitors from Austria, France, Germany, Hungary, the Netherland, Poland, Turkey and the United Kingdom.

IV. Resources and funding

49. The costs of most technical cooperation and assistance activities are not covered by the regular budget. The ability of the Secretariat to implement the technical

[26] Available from www.uncitral.org/uncitral/en/publications/publications.html.
[27] Available from www.uncitral.org/uncitral/en/publications/publications.html.
[28] Available from www.uncitral.org/uncitral/en/publications/publications.html.
[29] Available from www.uncitral.org/uncitral/en/publications/publications.html.

cooperation and assistance component of the UNCITRAL work programme is therefore contingent upon the availability of extrabudgetary funding.

50. The Secretariat has explored a variety of ways to increase resources for technical assistance activities, including through in-kind contributions. In particular, a number of missions have been funded, in full or in part, by the organizers. Additional potential sources of funding could be available if trade law reform activities could be mainstreamed more regularly in broader international development assistance programmes. In this respect, the Commission may wish to provide guidance on possible future steps.

A. UNCITRAL Trust Fund for symposia

51. The UNCITRAL Trust Fund for symposia supports technical cooperation and assistance activities for the members of the legal community in developing countries, funding the participation of UNCITRAL staff or other experts at seminars where UNCITRAL texts are presented for examination and possible adoption and fact-finding missions for law reform assessments in order to review existing domestic legislation and assess country needs for law reform in the commercial field.

52. For 2017, the released budget amounted to US$ 100,005.00 and the total expenditure was US$ 50,036.14. During the period, the Government of the Republic of Korea made a contribution of US$ 23,211.77 for the participation of the UNCITRAL Secretariat in the APEC EoDB project (see para. 11).

53. At its 49th Session (New York, 27 June–15 July 2016), the Commission appealed to all States, international organizations and other interested entities to consider making contributions to the Trust Fund for UNCITRAL symposia, if possible, in the form of multi-year contributions, or as specific-purpose contributions, so as to facilitate planning and enable the Secretariat to meet the increasing requests from developing countries and countries with economies in transition for training and technical legislative assistance (A/71/17, paras. 249–251). Potential donors have also been approached on an individual basis.

54. The Commission may wish to note that, in spite of efforts by the Secretariat to solicit new donations, funds available in the Trust Fund are sufficient only for a very small number of future technical cooperation and assistance activities. Efforts to organize the requested activities at the lowest cost and with co-funding and cost sharing whenever possible are ongoing. However, once current funds are exhausted, requests for technical cooperation and assistance involving the expenditure of funds for travel or to meet other costs will have to be declined unless new donations to the Trust Fund are received or alternative sources of funds can be found.

55. The Commission may once again wish to appeal to all States, relevant United Nations Agencies and bodies, international organizations and other interested entities to make contributions to the Trust Fund, if possible in the form of multi-year contributions, so as to facilitate planning and to enable the Secretariat to meet the demand for technical cooperation and assistance activities and to develop a more sustainable technical assistance programme. The Commission may also wish to request Member States to assist the Secretariat in identifying sources of funding within their Governments.

B. UNCITRAL Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL

56. The Commission may wish to recall that, in accordance with General Assembly resolution 48/32 of 9 December 1993, the Secretary-General was requested to establish a Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL. The Trust Fund so established is open to voluntary financial contributions from States, intergovernmental organizations, regional economic

integration organizations, national institutions and non-governmental organizations, as well as to natural and juridical persons.

57. During the same reporting period, the available Trust Fund resources were used to facilitate participation at the 50th session of UNCITRAL in Vienna (3–21 July 2017) for one delegate from Honduras. Owing to the limited resources, only partial assistance could be provided.

58. Resources have been made available by the European Union and the Swiss Agency for Development and Cooperation (SDC) to provide financial support for the participation of developing countries at UNCITRAL Working Group III "Investor-State Dispute Settlement reform" which have been used to facilitate participation at the 35th session of Working Group III in New York (23–27 April 2018) for delegates from El Salvador and Sri Lanka, as the agreement between the United Nations and the European Union also covers the funding of travel to States that are not currently members of UNCITRAL.

59. In order to ensure participation of all Member States in the sessions of UNCITRAL and its Working Groups, the Commission may wish to reiterate its appeal to relevant bodies in the United Nations system, organizations, institutions and individuals to make voluntary contributions to the Trust Fund established to provide travel assistance to developing countries that are members of the Commission.

60. It is recalled that in its resolution 51/161 of 16 December 1996, the General Assembly decided to include the Trust Funds for UNCITRAL symposia and travel assistance in the list of funds and programmes that are dealt with at the United Nations Pledging Conference for Development Activities.

X. CASE LAW ON UNCITRAL TEXTS (CLOUT)

Note by the Secretariat on promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts

(A/CN.9/946)

[Original: English]

Contents

I. Case Law on UNCITRAL Texts (CLOUT)

Background

1. CLOUT continues to be one of the Secretariat's tools to promote the uniform interpretation and application of UNCITRAL texts, as it facilitates access to decisions and awards from many different jurisdictions. Furthermore, it contributes to the promotion of UNCITRAL legal texts since it demonstrates that the texts are being used and applied in many different countries and that judges and arbitrators at different latitudes are contributing to their interpretation. CLOUT also provides the basis for the analysis of interpretation trends that is a key part of the case law Digests. Background information on CLOUT and the Digests, is provided in the Provisional Agenda of the fifty-first session of the Commission (A/CN.9/927/Rev.1, para. 55).

2. At present, case law on the following texts is reported in the system:

- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention);[1]
- Convention on the Limitation Period in the International Sale of Goods, 1974 and Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol amending the Convention on the Limitation Period in the International Sale of Goods, 1980 (Limitation Convention);
- United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules);
- United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG);
- UNCITRAL Model Law on International Credit Transfers, 1992 (MLICT);
- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 1995 (UNLOC);

[1] The Commission may recall that at its forty-first session, in 2008, it agreed that, resources permitting, the Secretariat could collect and disseminate information on the judicial interpretation of the New York Convention (see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), para. 360. A comprehensive database of case law on the New York Convention complementing CLOUT can be found at www.newyorkconvention1958.org (see paras. 16–19 below and *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 134–140).

- UNCITRAL Model Law on International Commercial Arbitration, 1985, as amended in 2006 (MAL);
- UNCITRAL Model Law on Electronic Commerce, 1996 (MLEC);
- UNCITRAL Model Law on Cross-Border Insolvency, 1997 (MLCBI);
- UNCITRAL Model Law on Electronic Signatures, 2001 (MLES); and
- United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (ECC).

3. Case law to be reported in CLOUT is provided by a network of national correspondents that, either as individuals or a specific organ or body, monitor and collect court decisions and arbitral awards and prepare abstracts of those considered relevant in one of the six official languages of the United Nations. The Secretariat collects the full texts of the decisions and awards in their original language and publishes them. The abstracts are edited and translated by the Secretariat into the official United Nations languages and published in all such languages as part of the regular documentation of UNCITRAL (under the identifying symbol: http://undocs.org/A/CN.9/SER.C/ABSTRACTS/...)A/CN.9/SER.C/ABSTRACTS/...).

4. While the national correspondents are the principal support of the system, in agreement with the correspondents, contributions from scholars or institutions who are not appointed as national correspondents are also accepted, subject to control and prior notification to the relevant national correspondent, if appointed. This practice is consistent with the Commission's recommendation of utilizing all available sources of information to supplement the information provided by the national correspondents.[2] National correspondents meet every two years, when the Commission is in session in Vienna, to take stock of the latest developments and challenges of CLOUT maintenance and improvement.

Abstracts published and received

5. As at the date of this note, 190 issues of CLOUT had been prepared for publication, dealing with 1,752 cases from 69 jurisdictions.[3] The table below provides a breakdown by legislative text of those cases.

Legislative text	*Number of published cases*
CISG	904
CISG and Limitation Convention	4
CISG and Limitation Convention (amended text)	4
CISG and MLICT	1
CISG and MAL	1
MAL	455
New York Convention	210
New York Convention and MAL	4
MLCBI	112
MLEC	33

[2] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 371.

[3] The jurisdictions include: Albania, Argentina, Australia, Austria, Belarus, Belgium, Benin, Bermuda, Bosnia and Herzegovina, Brazil, Burkina Faso, Cameroon, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Cuba, Czechia, Denmark, Egypt, El Salvador, European Union, Finland, France, Georgia, Germany, Greece, Hong Kong, China, Hungary, India, Iraq, Ireland, Israel, Italy, Japan, Kenya, Liechtenstein, Lithuania, Luxembourg, Mexico, Montenegro, Netherlands, New Zealand, Nigeria, Norway, Paraguay, Philippines, Poland, Portugal, Republic of Korea, Russian Federation, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Zimbabwe.

Limitation Convention	13 (Six cases relate to the Limitation Convention amended text)
Limitation Convention and MLEC	1
EEC	3
EEC and MLEC	1
Hamburg Rules	3
MLES	1
MLICT	1
UNLOC	1

6. With regard to the jurisdictions providing the abstracts, no meaningful changes can be recorded in respect of the figures provided last year (see para. 6, A/CN.9/906). The majority of the abstracts published referred to Western European and other States (63 per cent, approximately), while the other regional groups were represented as follows (all figures are approximate): Asian States (17 per cent), Eastern European States (13 per cent), Latin American and Caribbean States (3 per cent) and African States (3 per cent). A few abstracts pertained to awards of the International Chamber of Commerce and one abstract related to a decision of the European Union Court of Justice.

7. Since its last Note to the Commission, the Secretariat received 129 new abstracts from national correspondents and voluntary contributors. The table below reflects the breakdown by text.

Legislative text	*Number of abstracts received*
CISG	55
CISG and Limitation Convention	3
CISG and Limitation Convention (amended text)	1
CISG and MAL	1
New York Convention	38
New York Convention and MAL	4
MAL	15
MLCBI	8
MLEC	2
Limitation Convention	2 (One case relates to the Limitation Convention, amended text)

The court decisions and the arbitral awards to which the abstracts refer were rendered in 28 jurisdictions.[4]

8. In the period under review, 91 abstracts were also published:

Legislative text	*Number of abstracts published*
CISG	35
CISG and Limitation Convention (amended text)	2
New York Convention	37

[4] The jurisdictions providing abstracts were as follows: Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, China, Colombia, Croatia, European Union Court of Justice, France, Germany, Greece, Hong Kong, China, India, Italy, Kenya, Mexico, New Zealand, Paraguay, Peru, Poland, Republic of Korea, South Africa, Spain, Switzerland, Ukraine, United Kingdom and United States of America.

New York Convention and MAL	4
MAL	9
EEC	1
Limitation Convention	2 (One case relates to the Limitation Convention, amended text)
MLEC	1

For the first time, the Secretariat published abstracts from Greece, the European Union Court of Justice, Ireland and Paraguay.[5]

The network of national correspondents

9. The network of national correspondents was renewed in 2017[6]. The current network is composed of 84 national correspondents representing 34 States.[7] States that have not yet appointed national correspondents are encouraged to do so. Their term will be the same as for the correspondents appointed in 2017 and will thus expire in 2022.

10. As to the abstracts provided by the national correspondents since the Secretariat's last Note to the Commission, they represented approximately 33 per cent of the abstracts published. The remaining abstracts were received from voluntary contributors or prepared by the Secretariat.

Maintenance of the database

11. The Secretariat continued making available to users the full text decisions stored in the database's archives, while full texts of new case law received by the Secretariat were regularly uploaded upon receipt, providing there were no copyright or other restrictions by reason of the law of the State where the court decisions were rendered.

12. In the period under review, the CLOUT database received over 33,000 visitors. According to data provided by free web analytics services, most of the users would be located in China, United States of America, India, United Kingdom, Mexico, Spain, Egypt, Colombia, Australia and France.

13. At their meeting in 2017 (see para. 304, A/72/17), several national correspondents suggested improvements to the user-friendliness of the CLOUT database, in particular its search functions were said to be rather cumbersome. The Secretariat has looked into possible solutions, however they require resources (human and financial) currently not available to the Secretariat.

Information on CLOUT

14. The Secretariat continued posting information on CLOUT's latest releases on the UNCITRAL blog (under the "What's new at UNCITRAL?" pages) and the UNCITRAL LinkedIn account in order to provide an "alert" feature to CLOUT users and raise the visibility of the system at the same time. A Facebook page of the Commission being set up recently, the Secretariat also used that social media to share information about CLOUT.

15. In collaboration with the national correspondents the Secretariat finalized a third revision of the CLOUT User Guide and made it available in the six official

[5] The Secretariat also published abstracts from the following jurisdictions: Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, China, Colombia, Croatia, France, Germany, India, Italy, Kenya, Mexico, Poland, Republic of Korea, Russian Federation, South Africa, Spain, Ukraine, United Kingdom and United States of America.

[6] See A/CN.9/906, para. 8.

[7] States that have appointed national correspondents are: Algeria, Armenia, Austria, Bosnia and Herzegovina, Canada, Denmark, Ecuador, El Salvador, Finland, France, Gabon, Germany, Indonesia, Italy, Ivory Coast, Japan, Luxembourg, Mexico, Montenegro, New Zealand, Norway, Poland, Qatar, Republic of Korea, Serbia, Singapore, Spain, Switzerland, Sweden, Thailand, Turkey, Ukraine, United Kingdom and United States of America.

languages of the United Nations on the UNCITRAL web-site. This new revision of the Guide is intended to provide more detailed guidance for the preparation of the abstracts. The User Guide is for the use of both national correspondents and voluntary contributors.

II. The Digests

16. At its fiftieth session, the Secretariat informed the Commission that the 2016 edition of the CISG Digest had been published as an e-book, in English, on the UNCITRAL website and that translation in the other official languages was ongoing (see para. 14, A/CN.9/906). The translation was finalized and the Digest is now available in all six official languages of the United Nations on the UNCITRAL website. Work to update the current edition of the MAL Digest progressed slowly in the period under review due to limited resources available to the Secretariat. Finalization of the MLCBI Digest was also ongoing.

III. A way forward for CLOUT

17. At its fiftieth session, the Secretariat drew the Commission's attention to the purpose and implementation of the CLOUT system and their currency at a time in which a wealth of well-established commercial and non-commercial legal resources, both online and on paper, greatly facilitated access to domestic and international case law, including case law that applied UNCITRAL texts (see para. 303, A/72/17). In this regard, the Commission noted that the Secretariat in consultation with CLOUT national correspondents, might provide more detailed information on possible ways to approach that matter for the Commission's consideration at its future sessions. Since in 2019 the biennial meeting of national correspondents will take place, the Commission might wish to consider a possible discussion on CLOUT's way forward at its fifty-second session, which might benefit from the participation of national correspondents.

IV. Promotion of uniform interpretation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention)

18. The newyorkconvention1958.org website continued to expand, not only by way of increasing the volume of case law published on the application of the Convention, but also by way of adding information about the jurisdictions which have adopted the Convention.

19. In the period under review, the website reached a significant milestone with more than 2,000 decisions from 58 common law and civil law jurisdictions now publicly accessible online. Over the past few months, new jurisdictions were added to the website, including Algeria, Bolivia, Bulgaria, Ireland, Lebanon, Mauritius, Mexico, Morocco, the Netherlands, Nigeria, Paraguay, Qatar, Singapore, Slovenia, Spain and Turkey. For each jurisdiction, the website now provides direct links to specific national legal databases accessible to all users.

20. More specifically, at the date of this Secretariat's Note the database included concise background notes on 47 Contracting States, 2,024 original-language decisions, 129 English-language translations, 1,148 summaries of cases, the *travaux préparatoires* and a bibliography on the New York Convention which consists of the most comprehensive directory of publications relating to the application and interpretation of such text (listing 884 books and articles from more than 76 countries in 11 different languages; 236 of such publications are directly accessible through hyperlinks).

21. The website has a new page dedicated to the events on the UNCITRAL Secretariat Guide on the New York Convention which have taken place over the past

months (including in Hong Kong, New York, Nigeria and Paris, of which videos are accessible online).

22. As in previous years, close coordination between the website and the CLOUT system continued to be maintained. Several cases on the application of the New York Convention were published in both systems, which allowed for such cases to be available in the six official languages of the United Nations.

23. Finally, hardback special editions of the UNCITRAL Secretariat Guide on the New York Convention are now available in French and in English.

XI. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS

Note by the Secretariat on the status of conventions and model laws

(A/CN.9/950)

[Original: English]

1. At its thirteenth session, in 1980, the United Nations Commission on International Trade Law (UNCITRAL) decided[1] that it would consider, at each of its sessions, the status of conventions that were the outcome of work carried out by it.

2. The present note sets forth the status of the conventions and model laws emanating from the work of the Commission. It also shows the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958),[2] which, although adopted prior to the establishment of the Commission, is closely related to the work of the Commission in the area of international commercial arbitration.

3. Technical cooperation and assistance activities aimed at promoting the use and adoption of its texts are priorities for UNCITRAL pursuant to a decision taken at its twentieth session (1987).[3] The Secretariat monitors adoption of model laws and conventions.

4. This note indicates the changes since 24 April 2017, when the last annual report in this series (A/CN.9/909) was issued. The information contained herein is current up to 20 April 2018. Authoritative information on the status of the treaties deposited with the Secretary-General of the United Nations, including historical status information, may be obtained by consulting the United Nations Treaty Collection (http://treaties.un.org), and the information on conventions in this note and on the UNCITRAL website (www.uncitral.org) is based on that information. Readers may also wish to contact the Treaty Section of the Office of Legal Affairs of the United Nations (tel.: (+1-212) 963-5047; fax: (+1-212) 963-3693; email: treaty@un.org). Information on the status of model laws is updated on the website whenever the Secretariat is informed of a new enactment.

5. This note covers the following texts, incorporating as indicated new treaty actions (the term "action" is used generically to denote the deposit of an instrument of ratification, approval, acceptance, accession, or signature in respect of a treaty, or participation in a treaty as a result of an action to a related treaty, or the withdrawal or modification of a declaration or of a reservation) and enactments of Model Laws based on information received since the last report:

(a) In the area of sale of goods:

Convention on the Limitation Period in the International Sale of Goods (New York, 1974),[4] as amended by the Protocol of 11 April 1980 (Vienna).[5] New action by Czechia (withdrawal of declaration) 23 States parties; unamended: 30 States parties;

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[1] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 163.

[2] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3.

[3] *Official Records of the General Assembly, Forty-second Session, Supplement No. 17* (A/42/17), para. 335.

[4] United Nations, *Treaty Series*, vol. 1511, No. 26119, p. 3. For the complete status of this text, see part I, sect. A.

[5] United Nations, *Treaty Series*, vol. 1511, No. 26121, p. 99. For the complete status of this text, see part I, sect. A.

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).[6] New actions by Costa Rica (accession), Cameroon (accession), Fiji (accession), State of Palestine (accession), and Czechia (withdrawal of declaration); 89 States parties;

(b) In the area of dispute resolution:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).[7] New actions by Cabo Verde (accession) and Sudan (accession); 159 States parties;

UNCITRAL Model Law on International Commercial Arbitration (1985),[8] with amendments as adopted in 2006.[9] New legislation based on the Model Law has been adopted in Liechtenstein (2010), Qatar (2017) and Saudi Arabia (2012). New legislation based on the Model Law as amended in 2006 has been adopted in Jamaica (2017), South Africa (2017), and Fiji (2017);

UNCITRAL Model Law on International Commercial Conciliation (2002).[10] New legislation based on the Model Law has been adopted in Benin (2017), Burkina Faso (2017), Cameroon (2017), Central African Republic (2017), Chad (2017), Comoros (2017), Congo (2017), Côte d'Ivoire (2017), Democratic Republic of the Congo (2017), Equatorial Guinea (2017), Gabon (2017), Guinea (2017), Guinea-Bissau (2017), Mali (2017), Niger (2017), Senegal (2017), and Togo (2017);

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014).[11] New actions by Benin (signature), Bolivia (Plurinational State of) (signature), Australia (signature) and Gambia (signature); 3 States parties;

(c) In the area of government contracting:

UNCITRAL Model Law on Public Procurement (2011);[12]

(d) In the area of banking and payments:

United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988).[13] Five States parties;

UNCITRAL Model Law on International Credit Transfers (1992);[14]

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995).[15] Eight States parties;

(e) In the area of security interests:

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[6] United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3. For the complete status of this text, see part I, sect. C.

[7] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3. For the complete status of this text, see part I, sect. K.

[8] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I. For the complete status of this text, see part II, sect. A.

[9] United Nations publication, Sales No. E.08.V.4. For the complete status of this text, see part II, sect. A.

[10] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), annex I. For the complete status of this text, see part II, sect. F.

[11] General Assembly resolution 69/116, annex. For the complete status of this text, see part I, sect. J.

[12] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), annex I. For the complete status of this text, see part II, sect. G.

[13] General Assembly resolution 43/165, annex. The Convention has not yet entered into force; it requires 10 States parties for entry into force. For the complete status of this text, see part I, sect. D.

[14] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), annex I. For the complete status of this text, see part II, sect. B.

[15] United Nations, *Treaty Series*, vol. 2169, No. 38030, p. 163. For the complete status of this text, see part I, sect. F.

United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001).[16] One State party;

UNCITRAL Model Law on Secured Transactions (2016);[17]

(f) In the area of insolvency:

UNCITRAL Model Law on Cross-Border Insolvency (1997);[18]

(g) In the area of transport:

United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978).[19] Thirty-four States parties;

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991).[20] Four States parties;

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008).[21] New action by Cameroon (ratification), 4 States parties;

(h) In the area of electronic commerce:

UNCITRAL Model Law on Electronic Commerce (1996).[22] New legislation based on the Model Law has been adopted in Haiti (2015) and Sri Lanka (2017);

UNCITRAL Model Law on Electronic Signatures (2001). New legislation based on the Model Law has been adopted in Peru (signature);[23]

UNCITRAL Model Law on Electronic Transferable Records (2017);[24]

United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005).[25] New actions by Cameroon (accession) and Fiji (accession), 9 States parties.

6. Previous annual reports in this series also included chronological tables of actions for conventions. To avoid redundancy, this information can now be found on the UNCITRAL website.

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[16] General Assembly resolution 56/81, annex. The Convention has not yet entered into force; it requires five States parties for entry into force. For the complete status of this text, see part I, sect. G.

[17] General Assembly resolution 71/136.

[18] General Assembly resolution 52/158, annex. For the complete status of this text, see part II, sect. D.

[19] United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3. For the complete status of this text, see part I, sect. B.

[20] *Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Vienna, 2–19 April 1991* (United Nations publication, Sales No. E.93.XI.3), part I, annex. The Convention has not yet entered into force; it requires five States parties for entry into force. For the complete status of this text, see part I, sect. E.

[21] General Assembly resolution 63/122, annex. The Convention has not yet entered into force; it requires 20 States parties for entry into force. For the complete status of this text, see part I, sect. I.

[22] United Nations publication, Sales No. E.99.V.4. For the complete status of this text, see part II, sect. C.

[23] General Assembly resolution 56/80, annex. For the complete status of this text, see part II, sect. E.

[24] United Nations publication, Sales No. E.17.V.5.

[25] General Assembly resolution 60/21, annex. For the complete status of this text, see part I, sect. H.

I. Participation in conventions

A. Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended by the Protocol of 11 April 1980 (Vienna)

State	*Signature*	*Ratification, Accession(*), Succession(§) or Participation under Article VIII or X of the Protocol of 11 April 1980(†)*	*Entry into force*
Argentina		19 July 1983(*)	1 August 1988
Belarus	14 June 1974	23 January 1997(*)	1 August 1997
Belgium		1 August 2008(*)	1 March 2009
Benin[a]		29 July 2011(*)	1 February 2012
Bosnia and Herzegovina[a]		12 January 1994(§)	6 March 1992
Brazil	14 June 1974		
Bulgaria	24 February 1975		
Burundi[a]		4 September 1998(*)	1 April 1999
Costa Rica	30 August 1974		
Côte d'Ivoire		1 February 2016(†)	1 September 2016
Cuba		2 November 1994(*)	1 June 1995
Czechia		30 September 1993(§)	1 January 1993
Dominican Republic[d]		30 July 2010(*)	1 February 2011
Egypt		6 December 1982(*)	1 August 1988
Ghana[a]	5 December 1974	7 October 1975	1 August 1988
Guinea		23 January 1991(*)	1 August 1991
Hungary	14 June 1974	16 June 1983(*)	1 August 1988
Liberia		16 September 2005(†)	1 April 2006
Mexico		21 January 1988(*)	1 August 1988
Mongolia	14 June 1974		
Montenegro[e]		6 August 2012(*)	1 March 2013
Nicaragua	13 May 1975		
Norway[a,c]	11 December 1975	20 March 1980	1 August 1988
Paraguay		18 August 2003(*)	1 March 2004
Poland	14 June 1974	19 May 1995(†)	1 December 1995
Republic of Moldova		28 August 1997(*)	1 March 1998
Romania		23 April 1992(†)	1 November 1992
Russian Federation	14 June 1974		
Serbia[a]		12 March 2001(§)	27 April 1992
Slovakia[b]		28 May 1993(§)	1 January 1993
Slovenia		2 August 1995(†)	1 March 1996
Uganda		12 February 1992(†)	1 September 1992
Ukraine[a]	14 June 1974	13 September 1993	1 April 1994

State	Signature	Ratification, Accession(*), Succession(§) or Participation under Article VIII or X of the Protocol of 11 April 1980(†)	Entry into force
United States of America[b]		5 May 1994(†)	1 December 1994
Uruguay		1 April 1997(†)	1 November 1997
Zambia		6 June 1986(*)	1 August 1988

Parties (as amended by the Protocol of 1980): 23
Parties (unamended): 30

For information on which States listed above are Parties to the 1980 amending Protocol, consult the United Nations Treaty Collection, http://treaties.un.org.

[a] Party only to the unamended Convention.
[b] Upon accession to the Protocol, Czechoslovakia and the United States declared that, pursuant to article XII of the Protocol, they did not consider themselves bound by article I of the Protocol.
[c] Upon signature, Norway declared, and confirmed upon ratification, that, in accordance with article 34, the Convention would not govern contracts of sale where the seller and the buyer both had their relevant places of business within the territories of the Nordic States (i.e. Denmark, Finland, Iceland, Norway and Sweden).
[d] From 1 August 1988 to 31 January 2011, the Dominican Republic was a Party to the unamended Convention.
[e] From 3 June 2006 to 28 February 2013, Montenegro was a Party to the unamended Convention.

B. United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)

State	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)	Entry into force
Albania		20 July 2006(*)	1 August 2007
Austria	30 April 1979	29 July 1993	1 August 1994
Barbados		2 February 1981(*)	1 November 1992
Botswana		16 February 1988(*)	1 November 1992
Brazil	31 March 1978		
Burkina Faso		14 August 1989(*)	1 November 1992
Burundi		4 September 1998(*)	1 October 1999
Cameroon		21 October 1993(*)	1 November 1994
Chile	31 March 1978	9 July 1982	1 November 1992
Czechia[a]	2 June 1993	23 June 1995	1 July 1996
Democratic Republic of the Congo	19 April 1979		
Denmark	18 April 1979		
Dominican Republic		28 September 2007(*)	1 October 2008
Ecuador	31 March 1978		
Egypt	31 March 1978	23 April 1979	1 November 1992
Finland	18 April 1979		
France	18 April 1979		

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Gambia		7 February 1996(*)	1 March 1997
Georgia		21 March 1996(*)	1 April 1997
Germany	31 March 1978		
Ghana	31 March 1978		
Guinea		23 January 1991(*)	1 November 1992
Holy See	31 March 1978		
Hungary	23 April 1979	5 July 1984	1 November 1992
Jordan		10 May 2001(*)	1 June 2002
Kazakhstan		18 June 2008(*)	1 July 2009
Kenya		31 July 1989(*)	1 November 1992
Lebanon		4 April 1983(*)	1 November 1992
Lesotho		26 October 1989(*)	1 November 1992
Liberia		16 September 2005(*)	1 October 2006
Madagascar	31 March 1978		
Malawi		18 March 1991(*)	1 November 1992
Mexico	31 March 1978		
Morocco		12 June 1981(*)	1 November 1992
Nigeria		7 November 1988(*)	1 November 1992
Norway	18 April 1979		
Pakistan	8 March 1979		
Panama	31 March 1978		
Paraguay		19 July 2005(*)	1 August 2006
Philippines	14 June 1978		
Portugal	31 March 1978		
Romania		7 January 1982(*)	1 November 1992
Saint Vincent and the Grenadines		12 September 2000(*)	1 October 2001
Senegal	31 March 1978	17 March 1986	1 November 1992
Sierra Leone	15 August 1978	7 October 1988	1 November 1992
Singapore	31 March 1978		
Slovakia	28 May 1993		
Sweden	18 April 1979		
Syrian Arab Republic		16 October 2002(*)	1 November 2003
Tunisia		15 September 1980(*)	1 November 1992
Uganda		6 July 1979(*)	1 November 1992
United Republic of Tanzania		24 July 1979(*)	1 November 1992
United States of America	30 April 1979		

State	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)	Entry into force
Venezuela (Bolivarian Republic of)	31 March 1978		
Zambia		7 October 1991(*)	1 November 1992

Parties: 34

[a] Czechia declared that limits of carrier's liability in the territory of Czechia adhered to the provision of article 6 of the Convention.

C. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

State	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)	Entry into force
Albania		13 May 2009(*)	1 June 2010
Argentina[a]		19 July 1983(*)	1 January 1988
Armenia[a,b]		2 December 2008(*)	1 January 2010
Australia		17 March 1988(*)	1 April 1989
Austria	11 April 1980	29 December 1987	1 January 1989
Azerbaijan		3 May 2016(*)	1 June 2017
Bahrain		25 September 2013	1 October 2014
Belarus[a]		9 October 1989(*)	1 November 1990
Belgium		31 October 1996(*)	1 November 1997
Benin		29 July 2011(*)	1 August 2012
Bosnia and Herzegovina		12 January 1994(§)	6 March 1992
Brazil		4 March 2013(*)	1 April 2014
Bulgaria		9 July 1990(*)	1 August 1991
Burundi		4 September 1998(*)	1 October 1999
Cameroon		11 October 2017(*)	1 November 2018
Canada[c]		23 April 1991(*)	1 May 1992
Chile[a]	11 April 1980	7 February 1990	1 March 1991
China[a,b]	30 September 1981	11 December 1986(†)	1 January 1988
Colombia		10 July 2001(*)	1 August 2002
Congo		11 June 2014(*)	1 July 2015
Costa Rica		12 July 2017(*)	1 August 2018
Croatia		8 June 1998(§)	8 October 1991
Cuba		2 November 1994(*)	1 December 1995
Cyprus		7 March 2005(*)	1 April 2006
Czechia		30 September 1993(§)	1 January 1993
Denmark[d]	26 May 1981	14 February 1989	1 March 1990
Dominican Republic		7 June 2010(*)	1 July 2011

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Ecuador		27 January 1992(*)	1 February 1993
Egypt		6 December 1982(*)	1 January 1988
El Salvador		27 November 2006(*)	1 December 2007
Estonia		20 September 1993(*)	1 October 1994
Fiji		7 June 2017(*)	1 July 2018
Finland[d]	26 May 1981	15 December 1987	1 January 1989
France	27 August 1981	6 August 1982(†)	1 January 1988
Gabon		15 December 2004(*)	1 January 2006
Georgia		16 August 1994(*)	1 September 1995
Germany[e]	26 May 1981	21 December 1989	1 January 1991
Ghana	11 April 1980		
Greece		12 January 1998(*)	1 February 1999
Guinea		23 January 1991(*)	1 February 1992
Guyana		25 September 2014(*)	1 October 2015
Honduras		10 October 2002(*)	1 November 2003
Hungary	11 April 1980	16 June 1983	1 January 1988
Iceland[d]		10 May 2001(*)	1 June 2002
Iraq		5 March 1990(*)	1 April 1991
Israel		22 January 2002(*)	1 February 2003
Italy	30 September 1981	11 December 1986	1 January 1988
Japan		1 July 2008(*)	1 August 2009
Kyrgyzstan		11 May 1999(*)	1 June 2000
Latvia[a]		31 July 1997(*)	1 August 1998
Lebanon		21 November 2008(*)	1 December 2009
Lesotho	18 June 1981	18 June 1981	1 January 1988
Liberia		16 September 2005(*)	1 October 2006
Lithuania		18 January 1995(*)	1 February 1996
Luxembourg		30 January 1997(*)	1 February 1998
Madagascar		24 September 2014(*)	1 October 2015
Mauritania		20 August 1999(*)	1 September 2000
Mexico		29 December 1987(*)	1 January 1989
Mongolia		31 December 1997(*)	1 January 1999
Montenegro		23 October 2006(§)	3 June 2006
Netherlands	29 May 1981	13 December 1990(‡)	1 January 1992
New Zealand		22 September 1994(*)	1 October 1995
Norway[d]	26 May 1981	20 July 1988	1 August 1989
Paraguay[a]		13 January 2006(*)	1 February 2007
Peru		25 March 1999(*)	1 April 2000

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Poland	28 September 1981	19 May 1995	1 June 1996
Republic of Korea		17 February 2004(*)	1 March 2005
Republic of Moldova		13 October 1994(*)	1 November 1995
Romania		22 May 1991(*)	1 June 1992
Russian Federation[a]		16 August 1990(*)	1 September 1991
Saint Vincent and the Grenadines[b]		12 September 2000(*)	1 October 2001
San Marino		22 February 2012(*)	1 March 2013
Serbia		12 March 2001(§)	27 April 1992
Singapore[b]	11 April 1980	16 February 1995	1 March 1996
Slovakia[b]		28 May 1993(§)	1 January 1993
Slovenia		7 January 1994(§)	25 June 1991
Spain		24 July 1990(*)	1 August 1991
State of Palestine		29 December 2017(*)	1 January 2019
Sweden[d]	26 May 1981	15 December 1987	1 January 1989
Switzerland		21 February 1990(*)	1 March 1991
Syrian Arab Republic		19 October 1982(*)	1 January 1988
The former Yugoslav Republic of Macedonia		22 November 2006(§)	17 November 1991
Turkey		7 July 2010(*)	1 August 2011
Uganda		12 February 1992(*)	1 March 1993
Ukraine[a]		3 January 1990(*)	1 February 1991
United States of America[b]	31 August 1981	11 December 1986	1 January 1988
Uruguay		25 January 1999(*)	1 February 2000
Uzbekistan		27 November 1996(*)	1 December 1997
Venezuela (Bolivarian Republic of)	28 September 1981		
Viet Nam[a]		18 December 2015(*)	1 January 2017
Zambia		6 June 1986(*)	1 January 1988

Parties: 89

[a] This State declared, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or Part II of the Convention that allowed a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing, would not apply where any party had his place of business in its territory.

[b] This State declared that it would not be bound by paragraph 1 (b) of article 1.

[c] Upon accession, Canada declared that, in accordance with article 93 of the Convention, the Convention would extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories. In a declaration received on 9 April 1992, Canada extended the application of the Convention to Quebec and Saskatchewan. In a notification received on 29 June 1992, Canada extended the application of the Convention to the Yukon Territory. In a notification received

on 18 June 2003, Canada extended the application of the Convention to the Territory of Nunavut.

[d] Denmark, Finland, Iceland, Norway and Sweden declared that the Convention would not apply to contracts of sale or to their formation where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden.

[e] Upon ratifying the Convention, Germany declared that it would not apply article 1, paragraph 1 (b) in respect of any State that had made a declaration that that State would not apply article 1, paragraph 1 (b).

D. United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*
Canada	7 December 1989	
Gabon		15 December 2004(*)
Guinea		23 January 1991(*)
Honduras		8 August 2001(*)
Liberia		16 September 2005(*)
Mexico		11 September 1992(*)
Russian Federation	30 June 1990	
United States of America	29 June 1990	

Parties: 5

E. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*
Egypt		6 April 1999(*)
France	15 October 1991	
Gabon		15 December 2004(*)
Georgia		21 March 1996(*)
Mexico	19 April 1991	
Paraguay		19 July 2005(*)
Philippines	19 April 1991	
Spain	19 April 1991	
United States of America	30 April 1992	

Parties: 4

F. United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Belarus	3 December 1996	23 January 2002	1 February 2003
Ecuador		18 June 1997(*)	1 January 2000

State	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)	Entry into force
El Salvador	5 September 1997	31 July 1998	1 January 2000
Gabon		15 December 2004(*)	1 January 2006
Kuwait		28 October 1998(*)	1 January 2000
Liberia		16 September 2005(*)	1 October 2006
Panama	9 July 1997	21 May 1998	1 January 2000
Tunisia		8 December 1998(*)	1 January 2000
United States of America	11 December 1997		

Parties: 8

G. United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)

State	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)
Liberia		16 September 2005(*)
Luxembourg[a]	12 June 2002	
Madagascar	24 September 2003	
United States of America	30 December 2003	

Party: 1

It should be noted that the principles of the Convention were incorporated into the UNCITRAL Legislative Guide on Secured Transactions (2007).[26] Thus, States that substantially implement the recommendations of the Guide have, at the same time, introduced the principles of the Convention into their domestic law.

[a] Upon signature, Luxembourg lodged the following declaration:
"Pursuant to article 39 of the Convention, the Grand Duchy of Luxembourg declares that it does not wish to be bound by chapter V, which contains autonomous conflict-of-laws rules that allow too wide an application to laws other than those of the assignor and that moreover are difficult to reconcile with the Rome Convention. The Grand Duchy of Luxembourg, pursuant to article 42, paragraph 1 (c), of the Convention, will be bound by the priority rules set forth in section III of the annex, namely those based on the time of the contract of assignment."

H. United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)

State	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)	Entry into force
Cameroon		11 October 2017(*)	1 May 2018
Central African Republic	27 February 2006		
China	6 July 2006		
Colombia	27 September 2007		

[26] United Nations publication, Sales No. E.09.V.12.

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Congo		28 January 2014(*)	1 August 2014
Dominican Republic		2 August 2012(*)	1 March 2013
Fiji		7 June 2017(*)	1 January 2018
Honduras	16 January 2008	15 June 2010	1 March 2013
Iran (Islamic Republic of)	26 September 2007		
Lebanon	22 May 2006		
Madagascar	19 September 2006		
Montenegro	27 September 2007	23 September 2014	1 April 2015
Panama	25 September 2007		
Paraguay	26 March 2007		
Philippines	25 September 2007		
Republic of Korea	15 January 2008		
Russian Federation[b]	25 April 2007	6 January 2014(‡)	1 August 2014
Saudi Arabia	12 November 2007		
Senegal	7 April 2006		
Sierra Leone	21 September 2006		
Singapore[a]	6 July 2006	7 July 2010	1 March 2013
Sri Lanka[c]	6 July 2006	7 July 2015	1 February 2016

Parties: 9

Information on jurisdictions enacting at the national level substantive provisions of the Convention is included in the status information for the UNCITRAL Model Law on Electronic Commerce (1996) (see part II, sect. C).

[a] Upon ratification, Singapore declared: The Convention shall not apply to electronic communications relating to any contract for the sale or other disposition of immovable property, or any interest in such property. The Convention shall also not apply in respect of (i) the creation or execution of a will; or (ii) the creation, performance or enforcement of an indenture, declaration of trust or power of attorney, that may be contracted for in any contract governed by the Convention.

[b] Upon acceptance, the Russian Federation declared:
1. In accordance with article 19, paragraph 1, of the Convention, the Russian Federation will apply the Convention when the parties to the international contract have agreed that it applies;
2. In accordance with article 19, paragraph 2, of the Convention, the Russian Federation will not apply the Convention to transactions for which a notarized form or State registration is required under Russian law or to transactions for the sale of goods whose transfer across the Customs Union border is either prohibited or restricted;
3. The Russian Federation understands the international contracts covered by the Convention to mean civil law contracts involving foreign citizens or legal entities, or a foreign element.

[c] Upon ratification, Sri Lanka declared: In accordance with Articles 21 and 19 (para. 2) of the United Nations Convention on the Use of Electronic Communications in International Contracts, the Convention shall not apply to electronic communications or transactions specifically excluded under Section 23 of the Electronic Transactions Act No. 19 of 2006, of Sri Lanka.

I. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*
Armenia	29 September 2009	
Cameroon	29 September 2009	11 October 2017
Congo	23 September 2009	28 January 2014
Democratic Republic of the Congo	23 September 2010	
Denmark	23 September 2009	
France	23 September 2009	
Gabon	23 September 2009	
Ghana	23 September 2009	
Greece	23 September 2009	
Guinea	23 September 2009	
Guinea-Bissau	24 September 2013	
Luxembourg	31 August 2010	
Madagascar	25 September 2009	
Mali	26 October 2009	
Netherlands	23 September 2009	
Niger	22 October 2009	
Nigeria	23 September 2009	
Norway	23 September 2009	
Poland	23 September 2009	
Senegal	23 September 2009	
Spain	23 September 2009	19 January 2011
Sweden	20 July 2011	
Switzerland	23 September 2009	
Togo	23 September 2009	17 July 2012
United States of America	23 September 2009	

Parties: 4

J. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into Force*
Australia	18 July 2017		
Belgium	15 September 2015		
Benin	10 July 2017		
Bolivia (Plurinational State of)	16 April 2018		

State	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)	Entry into Force
Canada	17 March 2015	12 December 2016	18 October 2017
Congo	30 September 2015		
Finland	17 March 2015		
France	17 March 2015		
Gabon	29 September 2015		
Gambia	20 September 2017		
Germany	17 March 2015		
Iraq	13 February 2017		
Italy	19 May 2015		
Luxembourg	15 September 2015		
Madagascar	1 October 2016		
Mauritius	17 March 2015	5 June 2015	18 October 2017
Sweden	17 March 2015		
Switzerland	27 March 2015	18 April 2017	18 October 2017
Syrian Arab Republic	24 March 2015		
United Kingdom of Great Britain and Northern Ireland	17 March 2015		
United States of America	17 March 2015		

Parties: 3

K. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

State	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)	Entry into force
Afghanistan[a,c]		30 November 2004(*)	28 February 2005
Albania		27 June 2001(*)	25 September 2001
Algeria[a,c]		7 February 1989(*)	8 May 1989
Andorra		19 June 2015	17 September 2015
Angola		6 March 2017	4 June 2017
Antigua and Barbuda[a,c]		2 February 1989(*)	3 May 1989
Argentina[a,c]	26 August 1958	14 March 1989	12 June 1989
Armenia[a,c]		29 December 1997(*)	29 March 1998
Australia		26 March 1975(*)	24 June 1975
Austria		2 May 1961(*)	31 July 1961
Azerbaijan		29 February 2000(*)	29 May 2000
Bahamas		20 December 2006(*)	20 March 2007
Bahrain[a,c]		6 April 1988(*)	5 July 1988
Bangladesh		6 May 1992(*)	4 August 1992
Barbados[a,c]		16 March 1993(*)	14 June 1993
Belarus[b]	29 December 1958	15 November 1960	13 February 1961

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Belgium[a]	10 June 1958	18 August 1975	16 November 1975
Benin		16 May 1974(*)	14 August 1974
Bhutan[a,c]		25 September 2014(*)	24 December 2014
Bolivia (Plurinational State of)		28 April 1995(*)	27 July 1995
Bosnia and Herzegovina[a,c,i]		1 September 1993(§)	6 March 1992
Botswana[a,c]		20 December 1971(*)	19 March 1972
Brazil		7 June 2002(*)	5 September 2002
Brunei Darussalam[a]		25 July 1996(*)	23 October 1996
Bulgaria[a,b]	17 December 1958	10 October 1961	8 January 1962
Burkina Faso		23 March 1987(*)	21 June 1987
Burundi[c]		23 June 2014(*)	21 September 2014
Cabo Verde		22 March 2018(*)	20 June 2018
Cambodia		5 January 1960(*)	4 April 1960
Cameroon		19 February 1988(*)	19 May 1988
Canada[d]		12 May 1986(*)	10 August 1986
Central African Republic[a,c]		15 October 1962(*)	13 January 1963
Chile		4 September 1975(*)	3 December 1975
China[a,c,h]		22 January 1987(*)	22 April 1987
Colombia		25 September 1979(*)	24 December 1979
Comoros		28 April 2015	27 July 2015
Cook Islands		12 January 2009(*)	12 April 2009
Costa Rica	10 June 1958	26 October 1987	24 January 1988
Côte d'Ivoire		1 February 1991(*)	2 May 1991
Croatia[a,c,i]		26 July 1993(§)	8 October 1991
Cuba[a,c]		30 December 1974(*)	30 March 1975
Cyprus[a,c]		29 December 1980(*)	29 March 1981
Czechia[a,b]		30 September 1993(§)	1 January 1993
Democratic Republic of the Congo		5 November 2014(*)	3 February 2015
Denmark[a,c,f]		22 December 1972(*)	22 March 1973
Djibouti[a,c]		14 June 1983(§)	27 June 1977
Dominica		28 October 1988(*)	26 January 1989
Dominican Republic		11 April 2002(*)	10 July 2002
Ecuador[a,c]	17 December 1958	3 January 1962	3 April 1962
Egypt		9 March 1959(*)	7 June 1959
El Salvador	10 June 1958	26 February 1998	27 May 1998
Estonia		30 August 1993(*)	28 November 1993

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Fiji		27 September 2010(*)	26 December 2010
Finland	29 December 1958	19 January 1962	19 April 1962
France[a]	25 November 1958	26 June 1959	24 September 1959
Gabon		15 December 2006(*)	15 March 2007
Georgia		2 June 1994(*)	31 August 1994
Germany	10 June 1958	30 June 1961	28 September 1961
Ghana		9 April 1968(*)	8 July 1968
Greece[a,c]		16 July 1962(*)	14 October 1962
Guatemala[a,c]		21 March 1984(*)	19 June 1984
Guinea		23 January 1991(*)	23 April 1991
Guyana		25 September 2014(*)	24 December 2014
Haiti		5 December 1983(*)	4 March 1984
Holy See[a,c]		14 May 1975(*)	12 August 1975
Honduras		3 October 2000(*)	1 January 2001
Hungary[a,c]		5 March 1962(*)	3 June 1962
Iceland		24 January 2002(*)	24 April 2002
India[a,c]	10 June 1958	13 July 1960	11 October 1960
Indonesia[a,c]		7 October 1981(*)	5 January 1982
Iran (Islamic Republic of)[a,c]		15 October 2001(*)	13 January 2002
Ireland[a]		12 May 1981(*)	10 August 1981
Israel	10 June 1958	5 January 1959	7 June 1959
Italy		31 January 1969(*)	1 May 1969
Jamaica[a,c]		10 July 2002(*)	8 October 2002
Japan[a]		20 June 1961(*)	18 September 1961
Jordan	10 June 1958	15 November 1979	13 February 1980
Kazakhstan		20 November 1995(*)	18 February 1996
Kenya[a]		10 February 1989(*)	11 May 1989
Kuwait[a]		28 April 1978(*)	27 July 1978
Kyrgyzstan		18 December 1996(*)	18 March 1997
Lao People's Democratic Republic		17 June 1998(*)	15 September 1998
Latvia		14 April 1992(*)	13 July 1992
Lebanon[a]		11 August 1998(*)	9 November 1998
Lesotho		13 June 1989(*)	11 September 1989
Liberia		16 September 2005(*)	15 December 2005
Liechtenstein[a]		7 July 2011(*)	5 October 2011
Lithuania[b]		14 March 1995(*)	12 June 1995
Luxembourg[a]	11 November 1958	9 September 1983	8 December 1983

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Madagascar[a,c]		16 July 1962(*)	14 October 1962
Malaysia[a,c]		5 November 1985(*)	3 February 1986
Mali		8 September 1994(*)	7 December 1994
Malta[a,i]		22 June 2000(*)	20 September 2000
Marshall Islands		21 December 2006(*)	21 March 2007
Mauritania		30 January 1997(*)	30 April 1997
Mauritius		19 June 1996(*)	17 September 1996
Mexico		14 April 1971(*)	13 July 1971
Monaco[a,c]	31 December 1958	2 June 1982	31 August 1982
Mongolia[a,c]		24 October 1994(*)	22 January 1995
Montenegro[a,c,i]		23 October 2006(§)	3 June 2006
Morocco[a]		12 February 1959(*)	7 June 1959
Mozambique[a]		11 June 1998(*)	9 September 1998
Myanmar		16 April 2013(*)	15 July 2013
Nepal[a,c]		4 March 1998(*)	2 June 1998
Netherlands[a,e]	10 June 1958	24 April 1964	23 July 1964
New Zealand[a]		6 January 1983(*)	6 April 1983
Nicaragua		24 September 2003(*)	23 December 2003
Niger		14 October 1964(*)	12 January 1965
Nigeria[a,c]		17 March 1970(*)	15 June 1970
Norway[a,j]		14 March 1961(*)	12 June 1961
Oman		25 February 1999(*)	26 May 1999
Pakistan[a]	30 December 1958	14 July 2005	12 October 2005
Panama		10 October 1984(*)	8 January 1985
Paraguay		8 October 1997(*)	6 January 1998
Peru		7 July 1988(*)	5 October 1988
Philippines[a,c]	10 June 1958	6 July 1967	4 October 1967
Poland[a,c]	10 June 1958	3 October 1961	1 January 1962
Portugal[a]		18 October 1994(*)	16 January 1995
Qatar		30 December 2002(*)	30 March 2003
Republic of Korea[a,c]		8 February 1973(*)	9 May 1973
Republic of Moldova[a,i]		18 September 1998(*)	17 December 1998
Romania[a,b,c]		13 September 1961(*)	12 December 1961
Russian Federation[b]	29 December 1958	24 August 1960	22 November 1960
Rwanda		31 October 2008	29 January 2009
Saint Vincent and the Grenadines[a,c]		12 September 2000(*)	11 December 2000
San Marino		17 May 1979(*)	15 August 1979

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Sao Tome and Principe		20 November 2012(*)	18 February 2013
Saudi Arabia[a]		19 April 1994(*)	18 July 1994
Senegal		17 October 1994(*)	15 January 1995
Serbia[a,c,i]		12 March 2001(§)	27 April 1992
Singapore[a]		21 August 1986(*)	19 November 1986
Slovakia[a,b]		28 May 1993(§)	1 January 1993
Slovenia[i]		6 July 1992(§)	25 June 1991
South Africa		3 May 1976(*)	1 August 1976
Spain		12 May 1977(*)	10 August 1977
Sri Lanka	30 December 1958	9 April 1962	8 July 1962
State of Palestine		2 January 2015(*)	2 April 2015
Sudan		26 March 2018(*)	24 June 2018
Sweden	23 December 1958	28 January 1972	27 April 1972
Switzerland	29 December 1958	1 June 1965	30 August 1965
Syrian Arab Republic		9 March 1959(*)	7 June 1959
Tajikistan[a,i,j]		14 August 2012(*)	12 November 2012
Thailand		21 December 1959(*)	20 March 1960
The former Yugoslav Republic of Macedonia[c,i]		10 March 1994(§)	17 November 1991
Trinidad and Tobago[a,c]		14 February 1966(*)	15 May 1966
Tunisia[a,c]		17 July 1967(*)	15 October 1967
Turkey[a,c]		2 July 1992(*)	30 September 1992
Uganda[a]		12 February 1992(*)	12 May 1992
Ukraine[b]	29 December 1958	10 October 1960	8 January 1961
United Arab Emirates		21 August 2006(*)	19 November 2006
United Kingdom of Great Britain and Northern Ireland[a,g]		24 September 1975(*)	23 December 1975
United Republic of Tanzania[a]		13 October 1964(*)	11 January 1965
United States of America[a,c]		30 September 1970(*)	29 December 1970
Uruguay		30 March 1983(*)	28 June 1983
Uzbekistan		7 February 1996(*)	7 May 1996
Venezuela (Bolivarian Republic of)[a,c]		8 February 1995(*)	9 May 1995
Viet Nam[a,b,c]		12 September 1995(*)	11 December 1995
Zambia		14 March 2002(*)	12 June 2002
Zimbabwe		29 September 1994(*)	28 December 1994

Parties: 159

Declarations or other notifications pursuant to article I(3) and article X(1)

[a] This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State.
[b] With regard to awards made in the territory of non-contracting States, this State will apply the Convention only to the extent to which those States grant reciprocal treatment.
[c] This State will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.
[d] Canada declared that it would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that were considered commercial under the laws of Canada, except in the case of the Province of Quebec, where the law did not provide for such limitation.
[e] On 24 April 1964, the Netherlands declared that the Convention shall apply to the Netherlands Antilles.
[f] On 10 February 1976, Denmark declared that the Convention shall apply to the Faroe Islands and Greenland.
[g] On 24 February 2014, the United Kingdom submitted a notification to extend territorial application of the Convention to the British Virgin Islands. For the following territories, the United Kingdom has submitted notifications extending territorial application and declaring that the Convention shall apply only to the recognition and enforcement of awards made in the territory of another Contracting State: Gibraltar (24 September 1975), Isle of Man (22 February 1979), Bermuda (14 November 1979), Cayman Islands (26 November 1980), Guernsey (19 April 1985), Bailiwick of Jersey (28 May 2002).
[h] Upon resumption of sovereignty over Hong Kong on 1 July 1997, the Government of China extended the territorial application of the Convention to Hong Kong, Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention. On 19 July 2005, China declared that the Convention shall apply to the Macao Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention.

Reservations or other notifications

[i] This State formulated a reservation with regards to retroactive application of the Convention.
[j] This State formulated a reservation with regards to the application of the Convention in cases concerning immovable property.

II. Enactments of model laws[27]

A. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006

7. Legislation based on the Model Law has been adopted in 80 States in a total of 111 jurisdictions:

Armenia (2006); Australia (2010[a,c]), in Australian Capital Territory (2017[a]), New South Wales (2010[a]), Northern Territory (2011[a]), Queensland (2013[a]), South Australia (2011[a]), Tasmania (2011[a]), Victoria (2011[a]), and Western Australia (2012[a]); Austria (2006); Azerbaijan (1999); Bahrain (2015); Bangladesh (2001); Belarus (1999); Belgium (2013[a]); Bhutan (2013[a]); Brunei Darussalam (2009[a]); Bulgaria (2002[c]); Cambodia (2006); Canada (1986), in Alberta (1986), British Columbia (1986), Manitoba (1986), New Brunswick (1986), Newfoundland and Labrador (1986), Northwest Territories (1986), Nova Scotia (1986), Nunavut (1999), Ontario (1987), Prince Edward Island (1986), Quebec (1986), Saskatchewan (1988), and Yukon (1986); Chile (2004); China, in Hong Kong, China (2010[a,c]) and Macao, China (1998);

[27] Since States enacting legislation based upon a model law have the flexibility to depart from the text, these lists are only indicative of the enactments that were made known to the UNCITRAL Secretariat. The legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted. The year of enactment provided in this note is the year the legislation was passed by the relevant legislative body, as indicated to the UNCITRAL Secretariat; it does not address the date of entry into force of that piece of legislation, the procedures for which vary from State to State, and could result in entry into force sometime after enactment. In addition, there may be subsequent amending or repealing legislation that has not been made known to the UNCITRAL Secretariat.

Costa Rica (2011[a]); Croatia (2001); Cyprus (1987); Denmark (2005); Dominican Republic (2008); Egypt (1994); Estonia (2006); Fiji (2017[a]); Georgia (2009[a]); Germany (1998); Greece (1999); Guatemala (1995); Honduras (2000); Hungary (1994); India (1996); Iran (Islamic Republic of) (1997); Ireland (2010[a,c]); Jamaica (2017[a]); Japan (2003); Jordan (2001); Kenya (1995); Liechtenstein (2010); Lithuania (2012[a,c]); Madagascar (1998); Malaysia (2005); Maldives (2013); Malta (1996); Mauritius (2008[a]); Mexico (1993); Mongolia (2017[a]); Montenegro (2015); Myanmar (2016); New Zealand (2007[a,c]); Nicaragua (2005); Nigeria (1990); Norway (2004); Oman (1997); Paraguay (2002); Peru (2008[a,c]); Philippines (2004); Poland (2005); Qatar (2017); Republic of Korea (2016[a,c]); Russian Federation (1993); Rwanda (2008[a]); Saudi Arabia (2017); Serbia (2006); Singapore (1994[d]); Slovakia (2014); Slovenia (2008[a]); South Africa (2017[a]); Spain (2003); Sri Lanka (1995); Thailand (2002); the former Yugoslav Republic of Macedonia (2006); Tunisia (1993); Turkey (2001); Turkmenistan (2016); Uganda (2000); Ukraine (1994); United Kingdom, in Bermuda (1993[b]), British Virgin Islands (2013[a,b]), and Scotland (1990); United States, in California (1988), Connecticut (1989), Florida (2010[a]), Georgia (2012), Illinois (1998), Louisiana (2006), Oregon (1991), and Texas (1989); Venezuela (Bolivarian Republic of) (1998); Zambia (2000); and Zimbabwe (1996).

[a] Indicates legislation based on the text of the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006.
[b] Overseas territory of the United Kingdom.
[c] The legislation amends previous legislation based on the Model Law.
[d] The legislation has been further amended in 2001, 2003, 2005 and 2009.

B. UNCITRAL Model Law on International Credit Transfers (1992)

8. A directive of the European Parliament and of the Council of the European Union based on the principles of the UNCITRAL Model Law on International Credit Transfers was issued on 27 January 1997.

C. UNCITRAL Model Law on Electronic Commerce (1996)

9. Legislation based on or influenced by the Model Law has been adopted in 71 States in a total of 150 jurisdictions:

Antigua and Barbuda (2006[d]); Australia (2011[e,h]), in Australian Capital Territory (2012[e,h]), New South Wales (2010[e,h]), Northern Territory (2011[e, h]), Queensland (2013[e,h]), South Australia (2011[e,h]), Tasmania (2010[e,h]), Victoria (2011[e,h]), and Western Australia (2011[e,h]); Bahamas (2003); Bahrain (2002); Bangladesh (2006[a,d]); Barbados (2001); Belize (2003); Bhutan (2006); Brunei Darussalam (2000); Canada, in Alberta (2001[b]), British Columbia (2001[b]), Manitoba (2000[b]), New Brunswick (2001[b]), Newfoundland and Labrador (2001[b]), Northwest Territories (2011[b]), Nova Scotia (2000[b]), Nunavut (2004[b]), Ontario (2001[b]), Prince Edward Island (2001[b]), Quebec (2001[d]), Saskatchewan (2000[b]), and Yukon (2000[b]); Cabo Verde (2003); China (2004), in Hong Kong, China (2000), and Macao, China (2005[d, h]); Colombia (1999[a]); Dominica (2013[e]); Dominican Republic (2002[a]); Ecuador (2002[a]); El Salvador (2015[d]); Fiji (2017[e]); France (2000); Gambia (2009[e]); Ghana (2008[e]); Grenada (2008); Guatemala (2008[e]); Haiti (2017[a]); Honduras (2015); India (2000[a]); Iran (Islamic Republic of) (2004); Ireland (2000); Jamaica (2006); Jordan (2001); Kuwait (2014[a,d]); Lao People's Democratic Republic (2012[a]); Liberia (2002[a]); Madagascar (2014[e]); Malawi (2016[e]); Malaysia (2006); Malta (2002); Mauritius (2000); Mexico (2000); Mozambique (2017[e]); New Zealand (2002); Oman (2008[a]); Pakistan (2002); Panama (2001[a]); Paraguay (2010); Philippines (2000); Qatar (2010[e]); Republic of Korea (1999); Rwanda (2010[e]); Saint Kitts and Nevis (2011[e]); Saint Lucia (2011); Saint Vincent and the Grenadines (2007); Samoa (2008); San Marino (2013[e]); Saudi Arabia (2007); Seychelles (2001[a]); Singapore (2010[e,h]); Slovenia (2000); South Africa (2002[a]); Sri Lanka (2017[e, h]); Syrian Arab Republic (2014[a,d]); Thailand (2002); Trinidad and Tobago (2011[e]); United Arab Emirates (2006); United Kingdom, in Bailiwick of Guernsey (2000[f]), Bailiwick of Jersey (2000[f]), Bermuda (1999[g]), Cayman Islands (2000[g]), Isle of Man (2000[f]), Montserrat (2009[g]), and the Turks and

Caicos Islands (2000[g]); United Republic of Tanzania (2015[e]); United States, in Alabama (2001[c]), Alaska (2004[c]), Arizona (2000[c]), Arkansas (2001[c]), California (1999[c]), Colorado (2002[c]), Connecticut (2002[c]), Delaware (2000[c]), District of Columbia (2001[c]), Florida (2000[c]), Georgia (2009[c]), Guam (2015[c]), Hawaii (2000[c]), Idaho (2000[c]), Illinois (1998), Indiana (2000[c]), Iowa (2000[c]), Kansas (2000[c]), Kentucky (2000[c]), Louisiana (2001[c]), Maine (2000[c]), Maryland (2000[c]), Massachusetts (2003[c]), Michigan (2000[c]), Minnesota (2000[c]), Mississippi (2001[c]), Missouri (2003[c]), Montana (2001[c]), Nebraska (2000[c]), Nevada (2001[c]), New Hampshire (2001[c]), New Jersey (2000[c]), New Mexico (2001[c]), North Carolina (2000[c]), North Dakota (2001[c]), Ohio (2000[c]), Oklahoma (2000[c]), Oregon (2001[c]), Pennsylvania (1999[c]), Puerto Rico (2006[c]), Rhode Island (2000[c]), South Carolina (2004[c]), South Dakota (2000[c]), Tennessee (2001[c]), Texas (2001[c]), United States Virgin Islands (2003[c]), Utah (2000[c]), Vermont (2003[c]), Virginia (2000[c]), West Virginia (2001[c]), Wisconsin (2004[c]), and Wyoming (2001[c]); Vanuatu (2000); Venezuela (Bolivarian Republic of) (2001); Viet Nam (2005[e]); and Zambia (2009[e]).

[a] Except for the provisions on electronic signatures.
[b] The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform Electronic Commerce Act, adopted in 1999 by the Uniform Law Conference of Canada.
[c] The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law.
[d] The legislation is influenced by the Model Law and the principles on which it is based.
[e] The legislation also includes substantive provisions of the United Nations Convention on the Use of Electronic Communications in International Contracts, the status of which can be found in part I, sect. H.
[f] Crown Dependency of the United Kingdom.
[g] Overseas territory of the United Kingdom.
[h] The legislation amends previous legislation based on the Model Law.

D. UNCITRAL Model Law on Cross-Border Insolvency (1997)

10. Legislation based on the Model Law has been adopted in 43 States in a total of 45 jurisdictions:

Australia (2008); Benin (2015[b]); Burkina Faso (2015[b]); Cameroon (2015[b]); Canada (2005); Central African Republic (2015[b]); Chad (2015[b]); Chile (2014); Colombia (2006); Comoros (2015[b]); Congo (2015[b]); Côte d'Ivoire (2015[b]); Democratic Republic of the Congo (2015[b]); Dominican Republic (2015); Equatorial Guinea (2015[b]); Gabon (2015[b]); Greece (2010); Guinea (2015[b]); Guinea-Bissau (2015[b]); Japan (2000); Kenya (2015); Malawi (2015); Mali (2015[b]); Mauritius (2009); Mexico (2000); Montenegro (2002); New Zealand (2006); Niger (2015[b]); Philippines (2010); Poland (2003); Republic of Korea (2006); Romania (2002); Senegal (2015[b]); Serbia (2004); Seychelles (2013); Singapore (2017); Slovenia (2007); South Africa (2000); Togo (2015[b]); Uganda (2011); United Kingdom, in Great Britain (2006), Gibraltar (2014[a]), and the British Virgin Islands (2003[a]); United States (2005); and Vanuatu (2013).

[a] Overseas territory of the United Kingdom.
[b] Enacting the *Acte uniforme portant organisation des procédures collectives d'apurement du passif* (OHADA), adopted on 10 September 2015 at Grand-Bassam, Côte d'Ivoire.

E. UNCITRAL Model Law on Electronic Signatures (2001)

11. Legislation based on or influenced by the Model Law has been adopted in 32 States:

Antigua and Barbuda (2006); Barbados (2001); Bhutan (2006); Cabo Verde (2003); China (2004); Colombia (2012); Costa Rica (2005[a]); Gambia (2009); Ghana (2008); Grenada (2008); Guatemala (2008); Honduras (2013); India (2009[a]); Jamaica (2006); Madagascar (2014); Mexico (2003); Nicaragua (2010[a]); Oman (2008[a]); Paraguay (2010); Peru (2000); Qatar (2010); Rwanda (2010); Saint Kitts and Nevis (2011);

Saint Lucia (2011); Saint Vincent and the Grenadines (2007); San Marino (2013); Saudi Arabia (2007[a]); Thailand (2001); Trinidad and Tobago (2011); United Arab Emirates (2006); United Kingdom, in Montserrat (2009[b]); Viet Nam (2005); and Zambia (2009).

[a] The legislation is influenced by the Model Law and the principles on which it is based.
[b] Overseas territory of the United Kingdom.

F. UNCITRAL Model Law on International Commercial Conciliation (2002)

12. Legislation based on or influenced by the Model Law has been adopted in 33 States in a total of 45 jurisdictions:

Albania (2011[d]); Belgium (2005); Benin (2017[e]); Bhutan (2013); Burkina Faso (2017[e]); Cameroon (2017[e]); Canada, in Nova Scotia (2005[b]), and Ontario (2010[b]); Central African Republic (2017[e]); Chad (2017[e]); Comoros (2017[e]); Congo (2017[e]); Côte d'Ivoire (2017[e]); Croatia (2003); Democratic Republic of the Congo (2017[e]); Equatorial Guinea (2017[e]), France (2011[c]); Gabon (2017[e]); Guinea (2017[e]); Guinea-Bissau (2017[e]); Honduras (2000); Hungary (2002); Luxembourg (2012); Malaysia (2012); Mali (2017[e]); Montenegro (2005[c]); Nicaragua (2005); Niger (2017[e]); Senegal (2017[e]); Slovenia (2008); Switzerland (2008[c]); Togo (2017[e]); the former Yugoslav Republic of Macedonia (2009); and United States, in District of Columbia (2006[a]), Hawaii (2013[a]); Idaho (2008[a]), Illinois (2004[a]), Iowa (2005[a]), Nebraska (2003[a]), New Jersey (2004[a]), Ohio (2005[a]), South Dakota (2007[a]), Utah (2006[a]), Vermont (2005[a]), and Washington (2005[a]).

[a] The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform Mediation Act, adopted in 2001 (amended in 2003) by the National Conference of Commissioners on Uniform State Laws.
[b] The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform [International] Commercial Mediation Act, adopted in 2005 by the Uniform Law Conference of Canada.
[c] The legislation is influenced by the Model Law and the principles on which it is based.
[d] The legislation amends previous legislation based on the Model Law.
[e] Enacting the *Acte uniforme relatif à la médiation (OHADA), adopted on 11 November 2017 at Conakry, Guinea*.

G. UNCITRAL Model Law on Public Procurement (2011)[28]

13. The UNCITRAL Model Law on Public Procurement as adopted in 2011 forms the basis of or is reflected in the public procurement laws and regulations in the following States, though the extent to which the resulting regulatory framework incorporates the provisions of the Model Law varies, as that framework also reflects legal traditions, domestic policy and other objectives:

Afghanistan, Armenia, Azerbaijan, Belarus, Egypt, Ghana, India, Jamaica, Kazakhstan, Kenya, Kyrgyzstan, Mexico, Mongolia, Myanmar, Russian Federation, Rwanda, Tajikistan, Thailand, Trinidad and Tobago, Tunisia, Uganda, Ukraine, United Republic of Tanzania, Uzbekistan and Zambia.

14. The following organizations use the Model Law and accompanying Guide to Enactment as a benchmark for public procurement law reform in countries of their operation:

[28] The UNCITRAL Model Law on Public Procurement (2011) is a revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994), *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I. Historical status information on the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) is available on the UNCITRAL website, www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, Organization for Economic Cooperation and Development and the World Bank.

III. Status of other UNCITRAL texts

A. UNCITRAL Arbitration Rules

15. Previous annual reports in this series also presented a non-exhaustive list of arbitration centres which (i) have institutional rules based on, or inspired by, the UNCITRAL Arbitration Rules, (ii) administer arbitral proceedings or provide administrative services under the Rules, and/or (iii) act as an appointing authority under the Rules. No changes have been made to the table since the last annual report in this series (A/CN.9/909) was issued.

B. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014)

16. The following table presents a non-exhaustive list of investment treaties reviewed since 24 April 2017, when the last annual report in this series (A/CN.9/909) was issued, where the Rules on Transparency, or provisions modelled on the Rules on Transparency, are applicable in some instances of investor-State dispute resolution. The list is based on the database of international investment agreements maintained by the United Nations Conference on Trade and Development (UNCTAD).[29]

Treaty	*Signature*	*Entry into force*	*Relevant articles*
CPTPP Comprehensive and Progressive Agreement for Trans-Pacific Partnership	4 February 2016		Article 9.19.4(c), Article 9.24, Additional elements of transparency in 9.23
Rwanda-United Arab Emirate BIT Agreement between the Republic of Rwanda and the United Arab Emirates on the Promotion and Reciprocal Protection of Investments	1 November 2017		Article 14.1(c)**
Argentina-Chile BIT Free Trade Agreement between Argentina and Chile	2 November 2017		Article 8.24.4(b), Article 8.32*

* Specific treaty provision on transparency.
** Application of the Rules of Transparency, unless otherwise decided by the disputing parties.

[29] International Investment Agreements Navigator, available from http://investmentpolicyhub.unctad.org/IIA.

XII. COORDINATION AND COOPERATION

A. Note by the Secretariat on coordination activities

(A/CN.9/948)

[Original: English]

Contents

I. Introduction

1. In resolution 34/142 of 17 December 1979, the General Assembly requested the Secretary-General to place before the United Nations Commission on International Trade Law a report on the legal activities of international organizations in the field of international trade law, together with recommendations as to the steps to be taken by the Commission to fulfil its mandate of coordinating the activities of other organizations in the field.

2. In resolution 36/32 of 13 November 1981, the General Assembly endorsed various suggestions by the Commission to implement further its coordinating role in the field of international trade law.[1] Those suggestions included presenting, in addition to a general report of activities of international organizations, reports on specific areas of activity focusing on work already under way and areas where unification work was not under way but could appropriately be undertaken.[2]

3. This report, prepared in response to resolution 34/142 and in accordance with UNCITRAL's mandate,[3] provides information on the activities of other international organizations active in the field of international trade law in which the UNCITRAL secretariat has participated. Most of those activities have included provision of comments on documents drafted by those organizations and participation in various meetings (e.g. working groups, expert groups and plenary meetings) and conferences. The purpose of that participation has been to ensure coordination of the related legislative and rule-making activities of the different organizations, to share information and expertise and avoid duplication of work and of the texts resulting from that work.

II. Coordination activities

A. The International Institute for the Unification of Private Law and the Hague Conference on Private International Law

International Institute for the Unification of Private Law (Unidroit)

4. The Secretariat attended the Unidroit Governing Council (Rome, 10–12 May 2017).

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[1] *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17* (A/36/17), paras. 93–101.

[2] Ibid., para. 100.

[3] See General Assembly resolution 2205 (XXI), sect. II, para. 8.

Hague Conference on Private International Law (HccH)

5. The Secretariat attended the Council on General Affairs and Policy (The Hague, the Netherlands, 13–15 March 2018) and participated in the third meeting of the Special Commission on the Judgments Project for the purposes of coordinating the work being undertaken by UNCITRAL firstly on recognition and enforcement of insolvency-related judgments, which draws on work being done by the HccH, and secondly on international settlement agreements resulting from mediation (The Hague, the Netherlands, 13–17 November 2016). The purpose of the participation was to ensure that there was no overlap or duplication in the instruments being developed by UNCITRAL and the HccH draft convention. The most recent drafts of the HccH draft convention were made available to UNCITRAL's working groups for the information of delegates.

Joint activities with Unidroit and HccH

6. The Commission will recall the report provided to its fiftieth session (A/72/17, paras. 333–335) concerning the preparation of a guidance document in the area of international commercial contract law (with a focus on sales) approved by the Commission at its forty-ninth session.[4]

7. Individuals with expertise in the fields of international commercial contract law and private international law were approached to carry out the project; five experts have agreed to undertake the work. A first meeting was held in October 2017 to formally launch the project and the table of contents was agreed with chapters on the following topics: introduction; determination of the law applicable to international commercial contracts; substantive law of sales; recurring legal issues arising in connection with sales contracts; guidance for specific business sectors (optional).

8. The three secretariats have agreed to coordinate consultation with relevant stakeholders on the draft text before seeking comments from States and formal approval from their respective governing bodies.

9. The agreed timeline requires a first draft of the text to be available by the end of March 2018; circulation of the first draft to stakeholders by the end of May 2018; submission of a revised draft to the Unidroit Governing Council in March 2019 for consideration in May 2019; submission of a further revised draft to the HccH Council in March 2020 for approval; a further submission to the Unidroit Governing Council in May 2020 for formal approval; and formal adoption in the framework of the CISG 40th anniversary celebrations at UNCITRAL's fifty-third session in July 2020.

10. Further details of the project will be provided in an oral report to the Commission at the fifty-first session.

B. Other organizations

11. In addition to its participation in initiatives of Unidroit and HccH, the Secretariat undertook coordination activities with various other international organizations.

1. General

12. The Secretariat continued its participation in the Inter-Agency Cluster on Trade and Productive Capacity and took part (remote participation) in the annual meeting of the Cluster (Geneva, 17 November 2017) at which the main activities implemented by the Cluster in 2017 in the context of the United Nations "Delivering as One approach" were reviewed. Moreover, the discussion on follow-up actions in relation to the establishment of a Global Multi Donor Trust Fund on Trade and Productive Capacity, in particular actions concerning an appropriate communication strategy to approach potential donors, further progressed (see also A/CN.9/908, para. 11).

[4] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 281.

13. The Secretariat was represented at the annual meeting of the United States State Department Advisory Committee on Private International Law (Washington, D.C., 31 October 2017).

Rule of Law

14. The UNCITRAL secretariat remained engaged in the Inter-Agency Task Force (IATF) on Financing for Development (FfD), convened by the Secretary-General to: (a) review progress in implementing the Addis Ababa Action Agenda (AAAA); and (b) advise the intergovernmental follow-up process thereon. In this context, the Secretariat contributed to tracking the progress of the implementation of the AAAA sustainable development goals as they are relevant to the work of UNCITRAL through provision of material for inclusion in the Annex to the 2018 IATF report.[5]

15. The UNCITRAL secretariat contributed to the 2017 report of the Secretary-General on strengthening and coordinating United Nations rule of law activities.[6]

2. APEC-related

16. The Secretariat continued its cooperation with APEC and was granted a three-year guest status at its Economic Committee (EC) in 2017. The Secretariat participated in the following meetings:

(a) The EC and the Friends of the Chair (FoTC) on Strengthening Economic Legal Infrastructure (SELI);

(b) APEC Workshop on Starting a Business: Simplified Business Registration and Incorporation according to International Best Practices (Ho Chi Minh City, Viet Nam, 24 August 2017);

(c) APEC Workshop on the Use of Modern Technology for Dispute Resolution and Electronic Agreement Management (particularly Online Dispute Resolution) (Port Moresby, Papua New Guinea, 3–4 March 2018);

(d) APEC Workshop on Secured Transactions: Best Practices for Dynamic Business Growth (21–22 March 2018); and

(e) First Investment Experts' Group Meeting (IEG1, 2018) (Port Moresby, Papua New Guinea, 1–2 March 2018).

3. Subject-specific activities

(a) Micro, small and medium-sized enterprises (MSMEs)

17. The Secretariat continued to encourage participation and dialogue in respect of UNCITRAL's work on micro, small and medium-sized enterprises (MSMEs, Working Group I) through:

(a) Participation at a joint conference of the European Commerce Registers' Forum (ECRF) and the Corporate Registers' Forum (CRF), presenting the latest developments in UNCITRAL work on business registration (Cardiff, United Kingdom of Great Britain and Northern Ireland, 10–13 May 2017); and

(b) A presentation on the deliberations of Working Group I at an academic conference on simplified business registration and at a workshop for International Business Law students (Tilburg University, Tilburg, Netherlands, 24–25 November 2017).

(b) Procurement

18. The Secretariat reviewed or provided comments on:

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[5] https://developmentfinance.un.org/iatf-2018-report.

[6] See document A/72/268 and paras. 4 and 44 therein as related to UNCITRAL.

(a) The Organization for Economic Cooperation and Development (OECD) survey of procurement regimes of four ASEAN countries against international best practices using the OECD Government procurement Taxonomy;

(b) A draft European Commission Recommendation on the professionalization of public procurement[7] and a draft of the European Commission's staff working document on a toolbox of good practices accompanying the Recommendation;[8] and

(c) IACA reference materials related to training on anticorruption safeguards in the UNCITRAL Model Law on Public Procurement.

(c) Dispute settlement

19. At its fiftieth session, in 2017, the Commission emphasized the need for the work of Working Group III on Investor-State Dispute Settlement Reform to include engagement with diverse stakeholders, including intergovernmental organs and organizations such as the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization, OECD, the International Centre for Settlement of Investment Disputes and the Permanent Court of Arbitration.[9] In addition, the Commission agreed that the ongoing work of relevant international organizations in investment treaty reform should be taken into account.[10]

20. Accordingly, the Secretariat has engaged in consultations with the above organizations on an ongoing basis, and has participated in a number of events, including:

(a) World Economic Forum (WEF) conference on multilateral investment treaties (Bern, Switzerland, 19 June 2017);

(b) 7th South China In-house Counsel Forum organized by Shenzhen Court of International Arbitration (SCIA), theme: "Belt & Road: Chinese Companies and Investment Arbitration" (29 June 2017, Shenzhen, China);

(c) UNCTAD High-level IIA Conference (9–11 October 2017, Geneva);

(d) OECD Freedom of Investment Roundtable 27 (17 October 2017, Paris);

(e) International Chamber of Commerce-UNCITRAL-CIDS consultation with investors on Investor-State Dispute Settlement Reform (16 November 2017, Paris);

(f) OECD conference on International investment agreements and investor-State dispute settlement (12 March 2018, Paris); and

(g) 4th Asia FDI Forum, on Special Economic Zones and Investment Policy, organised by the Columbia Center on Sustainable Investment, WEF and the Chinese University of Hong Kong (22–23 March 2018, Hong Kong SAR, China).

(d) Electronic commerce

21. The Secretariat attended a Special session on operationalising the e-CMR Protocol convened by the United Nations Economic Commission for Europe (UNECE) Working Party on Road Transport to illustrate the possible relevance of the Model Law on Electronic Transferable Records for the implementation of electronic consignment notes issued under the e-CMR protocol (Geneva, 4 April 2018).

(e) Privately financed infrastructure projects

22. In light of the Commission's decision, at its forty-ninth session (2016), that the Secretariat should consider updating where necessary all or parts of the UNCITRAL

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[7] Available in the final form at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017H1805.

[8] Available in the final form at http://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-327-F1-EN-MAIN-PART-1.PDF.

[9] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), para. 251.

[10] Ibid, para. 264.

Legislative Guide on Privately Financed Infrastructure Projects, involving experts,[11] the Secretariat has engaged in consultations with the World Bank and regional development banks, UNECE and the Organization for Economic Cooperation and Development, among others, on an ongoing basis, and has provided written commentary on draft policy texts, including:

(a) UNECE draft "Standard on Zero Tolerance to Corruption in PPP Procurement" prepared for the "International Forum Implementing the United Nations 2030 Agenda for Sustainable Development through effective, people-first Public-Private Partnerships", during the year since the Commission's fiftieth session; and

(b) World Bank Draft Guidelines for the Development of a Policy for Managing Unsolicited Proposals in Infrastructure Projects (June 2017).

(f) Security interests

23. The Secretariat continued its coordination and cooperation with a number of international and regional organizations active in the area of security interests. It continued its collaboration with the World Bank in providing legislative technical assistance to States undertaking secured transactions reform (Saint Kitts and Nevis and Saint Lucia, 26–30 June 2017 and Bahrain, 11–14 September 2017). It also met with representatives of the European Commission and took part in a joint expert teleconference with a view to ensuring a coordinated approach to the law applicable to the third-party effects of transactions in receivables and securities.

24. In response to a request by Working Group VI, which is currently preparing a draft Practice Guide to the Model Law on Secured Transactions, the Secretariat is in contact with the Basel Committee on Banking Supervision, as well as other relevant international organizations, to share information about the Model Law and to seek coordination with respect to regulatory aspects, particularly financial regulations, in the implementation of the Model Law.

(g) Insolvency

25. The Secretariat participated on a panel to discuss a report on rescue of business in insolvency law and its relationship to the UNCITRAL Legislative Guide on Insolvency Law, which was launched at the European Law Institute's Annual Conference (Vienna, 6 September 2017).

[11] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 359–362.

B. Note by the Secretariat on coordination and cooperation: international governmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups

(A/CN.9/951)

[Original: English]

1. The Commission may wish to recall that from its forty-fourth session to fiftieth session, in 2011 to 2017, it heard oral reports by the Secretariat about intergovernmental and non-governmental organizations invited to sessions of UNCITRAL.[1] At its forty-eighth session, in 2015, it requested the Secretariat, when presenting its oral report on the topic of organizations invited to sessions of UNCITRAL, to provide comments on the manner in which invited organizations fulfilled the criteria applied by the Secretariat in making its decision to invite non-governmental organizations.[2] At its forty-ninth session, in 2016, the Commission welcomed the detailed and informative report presented by the Secretariat pursuant to that request.[3] At its fiftieth session, in 2017, the Commission requested the Secretariat to provide information about intergovernmental and non-governmental organizations invited to sessions of UNCITRAL in writing for future sessions.[4] This note is presented pursuant to that request and covers the period since the start of the fiftieth session of UNCITRAL (Vienna, 3–21 July 2017) up to the date of this note.

2. Criteria and procedures for inviting intergovernmental and non-governmental organizations to sessions of UNCITRAL and its working groups may be found on the UNCITRAL website at http://www.uncitral.org/uncitral/en/about/methods_faq.html.

3. Since the Commission's fiftieth session, in 2017, the following intergovernmental organizations (IGOs) have been added in the list of IGOs invited to sessions of UNCITRAL and its working groups: the African Legal Support Facility (ALSF, www.aflsf.org); Association of Southeast Asian Nations (ASEAN, https://asean.org); Central African Economic and Monetary Community (CEMAC, www.cemac.int); Sistema Económico Latinoamericano y del Caribe (SELA, www.sela.org); South Centre (www.southcentre.int); and Unión de Naciones Suramericanas (UNASUR, www.unasursg.org).

4. The following non-governmental organization (NGO) that applied to the UNCITRAL secretariat with the request to be invited to sessions of UNCITRAL and its working groups was found meeting the eligibility criteria and was added in the list of NGOs invited to sessions of UNCITRAL: World Economic Forum (WEF; www.weforum.org).

5. The following NGOs that applied to the UNCITRAL secretariat with the request to be invited to sessions of UNCITRAL and its working groups were found not meeting the eligibility criteria and their requests were thus not granted (listed in the chronological order of their application):

(a) International Association for Contract and Commercial Management (IACCM, www.iaccm.com) was interested in participating as an observer in sessions of UNCITRAL in general. Legal or commercial experience to be reported upon by the organization was found not relevant to the current legislative work programme of UNCITRAL;

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

[2] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 280.

[3] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 290.

[4] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), para. 364.

(b) International Institute for Environment and Development (IIED, www.iied.org) was interested in participating as an observer in sessions of Working Group III (ISDS Reform). Legal or commercial experience to be reported upon by the organization was found represented by other organizations already invited to Working Group III's sessions that were held during the period covered by this note. The organization might be considered for invitation to future sessions of the Working Group;

(c) Singapore International Dispute Resolution Academy (SIDRA, www.sidra.academy) was interested in participating as an observer in sessions of Working Group II (Dispute Settlement). It was found that acceptance of that NGO as an observer would not contribute to achieving a balanced representation at the sessions of the Working Group of the major viewpoints or interests in the relevant field in all areas and regions of the world since a similar NGO from the same jurisdiction is already invited to the Working Group. In addition, the application was considered submitted late taking into account that the current work of the Working Group was nearing completion. The list of NGOs invited to future sessions of Working Group II would be compiled in the light of a new area of work or topic to be assigned to that Working Group;

(d) Public Citizen (www.citizen.org) was interested in participating as an observer in sessions of Working Group III (ISDS Reform). That NGO was not found to be international in membership and focus and with a demonstrated international expertise in the area of work currently dealt with by Working Group III. Public Citizen requested the Secretariat to reconsider that decision and was advised by the Secretariat that the request for reconsideration would be brought to the attention of the Commission for final determination;

(e) Mainland-Hong Kong Joint Mediation Center (http://mhjmc.org/tc/index.php) was interested in participating in sessions of Working Group III (ISDS Reform). Legal or commercial experience to be reported upon by the organization was not found relevant to subjects currently discussed in that Working Group.

6. The following NGO was removed from the list because it had ceased to exist: the Council of the Scientific Consultative Centre for Private Law of the CIS.[5]

7. The following NGOs and other entities are expected, in the assessment of the Secretariat, to make useful contributions to the work of Working Group III (ISDS Reform) at the current stage of deliberations in that Working Group. They were put on an ad hoc list of additional NGOs and other entities invited to that Working Group. The need for inviting them to future sessions of the Working Group will be assessed by the Secretariat according to the needs of the Working Group at a given time:

#	*Acronym*	*Full name of the organization*	*Website*
1.	ACILP	African Center of International Law Practice	www.acilp.org
2.	BIICL	British Institute of International and Comparative Law	www.biicl.org
3.	ClientEarth	ClientEarth	www.clientearth.org
4.	CCSI	Columbia Center on Sustainable Investment	ccsi.columbia.edu
5.	CUTS International	Consumer Unity and Trust Society	www.cuts-international.org
6.	EFILA	European Federation for Investment Law and Arbitration	efila.org
7.	T&E	European Federation for Transport & Environment	www.transportenvironment.org
8.	ETUC	European Trade Union Confederation	www.etuc.org

[5] The decision on its liquidation may be found at http://cis.minsk.by/reestr/ru/index.html#reestr/view/text?doc=1968 (in Russian).

#	*Acronym*	*Full name of the organization*	*Website*
9.	FOEI	Friends of the Earth International	www.foei.org
10.	IAM	Institut Afrique Monde	www.institutafriquemonde.org
11.	IEA	Institutio Ecuatoriano de Arbitraje	www.iea.ec
12.	ICTSD	International Centre for Trade and Sustainable Development	www.ictsd.org
13.	ITUC	International Trade Union Confederation	www.ituc-csi.org
14.	CAIL/ITA	The Center for American and International Law • Institute for Transnational Arbitration	www.cailaw.org
15.	USCIB	United States Council for International Business	www.uscib.org

8. The NGOs and other entities listed immediately above are not invited to annual sessions of UNCITRAL or considered for invitation to other UNCITRAL working groups. UNCITRAL may decide to invite some or all of them to its annual sessions when instruments related to ISDS reform will be considered. Alternatively, it might decide to move some or all of them to the general list of NGOs invited to sessions of UNCITRAL and its working groups.

XIII. OTHER MATTERS

Note by the Secretariat on relevant General Assembly resolutions

(A/CN.9/953)

[Original: English]

1. At its fiftieth session, in 2017, the Commission requested the Secretariat to replace an oral report by the Secretariat to the Commission on relevant General Assembly resolutions with written reports to be issued before the session.[1] Pursuant to that request, the Secretariat submits the present note summarizing the content of operative paragraphs of General Assembly resolutions 72/113 on the report of UNCITRAL on the work of its fiftieth session and 72/114 on the UNCITRAL Model Law on Electronic Transferable Records. Both resolutions were adopted by the General Assembly on 7 December 2017 on the recommendation of the Sixth Committee (A/72/458).

2. By paragraph 4 of resolution 72/113, the General Assembly congratulated UNCITRAL on its fiftieth anniversary and noted with satisfaction the outcomes of Congress 2017. It requested the Secretary-General to ensure publication of the Congress 2017 proceedings to the extent permitted by available resources.

3. By other paragraphs of that resolution, the General Assembly took note of progress made by UNCITRAL in all areas of its legislative and non-legislative work (including coordination, cooperation and technical assistance activities, CLOUT, digests and the UNCITRAL website) (paras. 1 to 11, 13, 19 and 26 to 29). It in particular commended the Commission for the texts adopted at its fiftieth session (paras. 2 and 3), requested the publication of the Guide to Enactment of the Model Law on Secured Transactions (para. 3) and noted the endorsement by the Commission of the ICC Uniform Rules for Forfaiting (para. 26). It also noted a broad mandate given to Working Group III to work on the possible reform of investor-State dispute settlement (para. 8) and the mandate to Working Group IV to take up work on the topics of identity management and trust services, as well as cloud computing (para. 9).

4. As usual, the General Assembly recognized and endorsed the efforts and initiatives of the Commission aimed at increasing coordination in the field of international trade law, providing technical cooperation and assistance to States with international trade law reform and development and promoting the rule of law and the implementation of the international development agenda. It appealed to all relevant stakeholders to support the Commission in those efforts and initiatives, including by making voluntary contributions to the UNCITRAL Trust Fund for Symposia and to the Trust Fund established to provide travel assistance to developing countries that are members of UNCITRAL to attend Commission sessions (paras. 10, 11 and 16 to 21). The General Assembly noted developments related to UNCITRAL regional presence and requested the Secretary-General to keep the General Assembly further informed about that matter (paras. 13–15).

5. The General Assembly requested the Secretary-General to continue to operate the transparency repository, through the UNCITRAL secretariat, and noted with satisfaction continued contributions from OPEC OFID and the European Commission that would allow the Secretary-General to do so until the end of 2020 (paras. 5 and 6).

6. The General Assembly recalled the importance of adherence to the rules of procedure and methods of work of the Commission and relevant requests to the Secretariat, including as regards the length of Commission documentation, continued publication of Commission standards and provision of summary and digital records.

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[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), para. 480.

It recalled its decision on the rotation scheme of Commission meetings between New York and Vienna (paras. 12, 22 to 24).

7. The General Assembly stressed the importance of promoting UNCITRAL texts and to this end urged States to use them (para. 25). In the final paragraph of the resolution (para. 30), the General Assembly expressed its appreciation to Mr. Renaud Sorieul, the retired Secretary of UNCITRAL, for his contribution to the unification and harmonization of international trade law and to the Commission.

8. By resolution 72/114, the General Assembly expressed its appreciation to the Commission for the adoption of the Model Law on Electronic Transferable Records and requested the Secretary-General to publish the Model Law together with an explanatory note. It recommended the text for use by all States revising or adopting legislation relevant to electronic commerce and invited them to advise the Commission accordingly. It also recommended that States continue to consider using other texts of UNCITRAL in the area of electronic commerce when revising or adopting legislation on electronic commerce. The General Assembly appealed to the relevant bodies of the United Nations system and other relevant international and regional organizations to coordinate their legal activities in the area of electronic commerce, including paperless trade facilitation, with those of the Commission.

Part Three

ANNEXES

I. SUMMARY RECORDS OF THE MEETINGS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Summary record of the 1069th meeting
held at Headquarters, New York, on Monday, 25 June 2018, at 10.30 a.m.

[A/CN.9/1069]

Temporary Chair: Mr. Martonyi (Hungary)
Chair: Ms. Czerwenka (Germany)
later: Ms. Morris-Sharma (Chair of Working Group II) (Singapore)

The meeting was called to order at 10.40 a.m.

Agenda item 1: Opening of the session

1. **The Temporary Chair** welcomed participants to the fifty-first session of the United Nations Commission on International Trade Law.

2. **Mr. de Serpa Soares** (Under-Secretary-General for Legal Affairs, The Legal Counsel), opening the session, introduced the new Secretary of the Commission, Ms. Joubin-Bret and said that during the current session, the Commission would have before it a draft convention on enforcement of international commercial settlement agreements resulting from mediation and a draft model law on international commercial mediation and international settlement agreements resulting from mediation. He hoped that, once adopted and open for signature, the two new instruments would have the same success as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and become the cornerstone of the international framework on mediation.

3. Mediation offered many advantages, including that it enabled parties to keep their business relationships, facilitated the conduct of international transactions, and entailed savings for the administration of justice by States. Mediation was becoming important in a number of jurisdictions where it offered a credible alternative to litigation or even a mandatory means of settling certain types of disputes. In other regions, it had always been a means of dispute settlement long before arbitration had been known and used. The important element lacking in the international mediation framework, however, was cross-border enforcement. Upon the adoption of the two instruments, a mediated settlement agreement would be enforceable in all States parties to the convention and could be invoked to prove that the matter had been resolved.

4. The Commission would also have before it a draft legislative guide on key principles of a business registry, which was the first stage of an ambitious project to promote an enabling legal environment for the operation of micro, small and medium-sized enterprises (MSMEs). Despite the need of such enterprises for a formal status to enter into contracts, obtain financing and grow, 90 per cent of them operated in developing countries in the informal sector, thus accounting for 60 per cent of the world's workers employed by that sector. Noting the important role of MSMEs in the achievement of the Sustainable Development Goals, he said that the Commission would be seeking through that project to contribute to the global effort called for by the General Assembly in its resolution 71/135 aimed at promoting the rule of law in commercial relations as an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels. He looked forward in that connection to the development of further instruments and texts on contracting across borders, enforcing contracts, securing financing and resolving insolvency for MSMEs throughout the world.

5. Moreover, to complete the legal framework for international insolvency law, the Commission would be finalizing and adopting two further instruments, namely, a model law on cross-border recognition and enforcement of insolvency-related judgments and its guide to enactment. At a time when insolvency procedures against transnational corporations generally affected several jurisdictions across the world, the model law reflected a need to establish greater certainty with regard to rights and remedies in such procedures and ensure judicial cooperation between insolvency courts and insolvency authorities across regions.

6. The Commission would also hear at the current session progress reports from Working Group III on investor-State dispute settlement reform and Working Group IV on electronic commerce. He encouraged the participants to give special attention to the results of the work of Working Group IV on cloud computing and progress made in defining the scope of work on identity management and trust services in view of the major challenges arising in the future from the exponential growth of the digital economy. Not only was there a need for legal norms for the recognition of different approaches to the regulation of digital trade to avoid new barriers to international trade, but it was also essential to bridge the digital gap, which was particularly threatening to the weaker economies.

7. Working Group VI on security interests would give an update of its work on a practice guide to the UNCITRAL Model Law on Secured Transactions and the Secretariat would present its work on revising UNCITRAL texts on privately financed infrastructure projects that were gaining momentum in many regions and for which it had been found necessary to update existing instruments. In that connection, he looked forward to an in-depth debate and counted on the Commission's support for the Secretariat's role in the adoption, implementation and interpretation of UNCITRAL instruments.

Agenda item 2: Election of officers

8. **Ms. Joubin-Bret** (Secretary of the Commission) said that it was the turn of the Group of Western European and other States to nominate a candidate for the office of Chair of the Commission and that the Secretariat had received a letter from that Group nominating Ms. Czerwenka (Germany) for the position.

9. *Ms. Czerwenka (Germany) was elected Chair by acclamation.*

10. *Ms. Czerwenka took the Chair.*

11. **Ms. Uludong** (Observer for Palau), speaking on behalf of the Asia-Pacific States, said that those States wished to nominate Ms. Morris-Sharma (Singapore) for the office of Vice-Chair of the Commission.

12. *Ms. Morris-Sharma (Singapore) was elected Vice-Chair by acclamation.*

13. **Ms. Joubin-Bret** (Secretary of the Commission) said that the Secretariat had received a letter from the Eastern European Group nominating Mr. Nemessányi (Hungary) for the position of Vice-Chair of the Commission.

14. *Mr. Nemessányi (Hungary) was elected Vice-Chair by acclamation.*

15. **The Chair** said that the other members of the Bureau would be elected later during the session.

Agenda item 3: Adoption of the agenda (A/CN.9/927/Rev.1)

16. *The agenda was adopted.*

Agenda item 4: Finalization and adoption of instruments on international commercial settlement agreements resulting from mediation (A/CN.9/929, A/CN.9/934, A/CN.9/942, A/CN.9/943 and A/CN.9/945)

17. **The Chair** said that, in accordance with established practice, the Chair of Working Group II would be chairing the meeting under the current agenda item.

18. *Ms. Morris-Sharma (Singapore), Chair of Working Group II, took the Chair.*

19. **The Chair** invited the Commission to consider the texts of two draft instruments, a draft convention on international settlement agreements resulting from mediation, and a draft model law on international commercial mediation and international settlement agreements resulting from mediation, with a view to their adoption. She suggested addressing each instrument in turn and article by article, with the Secretariat presenting any outstanding issues, on which participants could make brief comments. She said that it should be borne in mind that the text was the result of a consensus in the Working Group. Consequently, any suggested amendment should likewise be supported by a consensus for it to be adopted.

Draft convention on international settlement agreements resulting from mediation

Terminology

20. **The Chair** invited the Commission to consider the note by the Secretariat on a draft convention on international settlement agreements resulting from mediation (A/CN.9/942).

Terminology

21. **The Chair** drew attention to the decision of the Working Group to replace the term "conciliation" with "mediation" throughout the two draft instruments, for the reasons given in paragraph 5 of the note by the Secretariat (A/CN.9/942). The Working Group had also decided to refer to "a party to the Convention" or "parties to the Convention" rather than to "Contracting State(s)", as explained in paragraph 7 of the Note. She took it that the Commission agreed with those two choices.

22. *It was so decided.*

Title and preamble

23. *The title and preamble were approved.*

Article 1

24. **The Chair** drew attention to the use of the term "settlement agreement" and the exclusions listed in paragraphs 2 and 3 of the article, aimed at avoiding possible overlap with existing and future conventions. She took it that the Commission wished to approve the article accordingly.

25. *It was so decided.*

Article 2

26. **The Chair** said that the first issue to be addressed was whether the definition of the terms "electronic communication" and "data message"

could be deleted from paragraph 2. The definitions had been drawn from other UNCITRAL instruments and might not hold up against future technological developments.

27. **Mr. Apter** (Israel), supported by Ms. Dostie (Canada) and **Mr. Rosner** (Observer for the European Union), said that he agreed with the proposal by the Secretariat to delete the definitions in question, to guard against any need for future updates of the Convention, it being understood that, in the interests of interpretation, accompanying materials and future reports would specify the UNCITRAL instruments in which the terms were defined.

28. **The Chair** said she took it that there was a consensus to delete the definitions in paragraph 2, which would therefore end with a full stop after the words "for subsequent reference". She also took it that the Commission had agreed to replace the words "regardless of the expression used and irrespective of the basis upon which the process is carried out" in paragraph 3 with the words "irrespective of the expression used or the basis upon which the process is carried out".

29. *It was so decided.*

30. **The Chair** drew attention to the new paragraph 4, which was aimed at clarifying the notions of "granting relief" and "seeking relief" and would be retained only if there was a consensus in favour in the Commission since, unlike all the other issues to be considered by the Commission in the draft text, it had been inserted since the most recent meeting of the Working Group and could not therefore reflect any consensus of the Working Group.

31. **Mr. Rosner** (Observer for the European Union) said that, considering in particular the number of official languages into which the text was to be translated, it might be appropriate to have a definition of the term "relief", but that the proposed wording was too complex. He proposed that the paragraph should be replaced with the following: "*Relief* means any of the actions set out in article 3".

32. **Mr. Schnabel** (United States of America) said that, while he understood the reasons behind the proposed clarification, having regard to the different language versions, it was clear in the context that references to relief elsewhere in the draft convention were in fact references to article 3. The inclusion of a definition, whether the long definition proposed in the note by the Secretariat or the shorter one proposed by the Observer for the European Union, might well sow further confusion. Moreover, in the shorter definition, the term "actions" might be as ambiguous or vague as that of "relief". His delegation would therefore prefer not to include the proposed new paragraph 4.

33. **Ms. Dostie** (Canada) said that her delegation appreciated the attempts at clarification and understood the usefulness of a definition but preferred the text proposed by the Secretariat, as the term "action" remained unclear. The inclusion of a cross-reference to article 3 might be helpful.

34. **Mr. Apter** (Israel) agreed that the term "action" was inadequate and would not translate easily into other languages, including his own. His delegation supported the wording proposed by the Secretariat, possibly with the addition of a cross-reference.

35. **Mr. Teehankee** (Philippines) and **Mr. Maradiaga** (Honduras) said that it would be preferable to leave out paragraph 4.

36. **The Chair** said that, as there did not appear to be any general support for new paragraph 4 proposed by the Secretariat or for an alternative wording, she took it that it was agreed that paragraph 4 should not be included.

37. *It was so decided.*

Article 3

38. **Mr. Boulet** (Observer for Belgium), drawing attention to the use of the word "enforceable", twice in article 1, paragraph 3, of the draft convention and once in article 15 of the draft model law, said that the notion of "enforcement" expressed in article 3, paragraph 1, encompassed the notion of "enforceability" and that every party to the convention should ensure that the settlement agreement could take the form of an enforceable instrument. The whole point was that while "enforcement" referred to the actual enforcement of an enforceable instrument, it also encompassed the "enforceability" of that instrument.

39. **Mr. Bellenger** (France) said that he agreed and wondered whether any change would be required in the wording of article 3, paragraph 1, or whether it would suffice to provide an explanation elsewhere.

40. **The Chair** said it was her understanding that no amendment was required to the text and that the necessary clarification would be provided in the Commission's report, which would feed into the *travaux préparatoires*. She took it that the Commission did not wish to make any changes to the text.

41. *It was so decided.*

Article 4

42. **The Chair** said that the issue to be addressed was whether the words "such as" in paragraph 1 (b) should be replaced with the words "in the form of".

43. **Mr. Apter** (Israel) said that "in the form of" would be more suitable and suggested an order of priority in the list of materials to be supplied when

relief was being sought, which remained open by virtue of subparagraph (iv), as might be clarified elsewhere. He recalled that his delegation had moved on from its original view that it should be a closed list.

44. **Ms. Dostie** (Canada) said that her delegation's preference was for "such as" and wondered whether a cross-reference to article 3 might be appropriate.

45. **Mr. Kurashov** (Russian Federation) expressed the same preference and said that he did not fully understand the implications of the proposed change. He recalled that it had been agreed, after much debate in the Working Group, that the list should be open.

46. **Ms. Matias** (Jerusalem Arbitration Centre) said that, to avoid confusion, it would be preferable not to change the wording and that "in the form of" would suggest a more restrictive interpretation of the text and of the acceptable possibilities for mediation. Not everyone would wish to look to the *travaux préparatoires* for clarification.

47. **Mr. Rosner** (Observer for the European Union) said that his delegation agreed with the proposed change in the wording.

48. **The Chair** said she took it that the Commission noted that the article reflected a balance between, on the one hand, the formalities required to ascertain that a settlement agreement resulted from mediation and, on the other, the need for the draft convention to preserve the flexible nature of the mediation process. In the absence of a consensus in the Commission and in accordance with the principle she had established earlier, the text that had emerged from the deliberations of the Working Group would remain unchanged. She took it that there was no further interest in the possible insertion of a cross-reference to article 3. She also took it that the Commission noted that the words "the party requesting the relief to supply" had been deleted after the words "may request" in paragraph 3, for the sake of simplification and consistency between that paragraph and paragraph 4.

49. *It was so decided.*

Article 5

50. **The Chair** said she took it that the Commission noted the extensive consultations of the Working Group at its sixty-eighth session aimed at clarifying the various grounds provided for in paragraph 1, in particular the relationship between subparagraph (b) (i), which mirrored a similar provision of the New York Convention and was considered to be of a generic nature, and subparagraphs (b) (ii), (c) and (d), which were deemed to be illustrative in nature; that, at that session, the various attempts for regrouping the grounds had been unsuccessful; and that the Working Group shared an understanding that there might be overlap among the grounds provided for in paragraph 1 and that competent authorities should take that aspect into account when interpreting the various grounds.

51. *It was so decided.*

Article 6

52. **Mr. McCormick** (Australia) questioned the wording of the article, according to which the competent authority could adjourn its decision, and wondered whether a more appropriate wording might not be "adjourn the application".

53. **The Chair** said that the wording had been drawn from the New York Convention and that it might be argued that it would not be the application that would be adjourned but what came after it.

54. **Mr. McCormick** (Australia) said that a decision that had been made could not be adjourned.

55. **The Chair** said she took it that, in the absence of any support for a change to the wording, the article was acceptable in the form proposed by the Working Group.

56. *It was so decided.*

Article 7

57. **The Chair** said she took it that article 7, which mirrored article VII of the New York Convention and would permit application of more favourable national legislation or treaties to matters covered by the draft convention, was acceptable without change.

58. *It was so decided.*

Article 8

59. **Mr. Marani** (Argentina), noting the current wording of paragraph 1 (a) of the article and referring to the two options proposed in working paper A/CN.9/WG.II/WP202/Add.1, said that his delegation would have preferred option 1, whereby a contracting State might declare that it would apply the Convention to settlement agreements to which it was a party, as opposed to option 2, whereby it might declare that it would not apply it to such agreements, to guard against the possibility of disputes related to investments. Moreover, it should be made clear in the report that States could declare that the instrument would apply only to matters of a commercial nature, as defined by the national law of the State concerned, in accordance with the New York Convention. Paragraph 1 (b) was understood to cover situations in which States remained silent on the question of the applicability of the instrument to a settlement agreement.

The meeting was suspended at 11.55 a.m. and resumed at 12.15 p.m.

60. **Mr. Marani** (Argentina) proposed that the report should reproduce the following sentence from paragraph 78 of the report of the Working Group on the work of its sixty-eighth session (A/CN.9/934): "With regard to how article 8 (1) (b) of the draft convention would operate in practice, the Working Group confirmed its understanding that even without an explicit provision in the draft convention, parties to a settlement agreement would be able to exclude the application of the draft convention".

61. **Mr. Rosner** (Observer for the European Union) said that paragraph 1 (b) was an opt-in provision and that States would need to agree to the applicability of the convention in cases where they made reservations. The suggested interpretation was an additional point, leaving open the possibility of opting out.

62. **Mr. Schnabel** (United States of America) said that he agreed but had no objection to the reiteration of the Working Group's understanding of the subparagraph. He drew attention to article 5 (1) (d), which explicitly provided for the possibility of opting out.

63. **Mr. Apter** (Israel) also agreed and said that it would be useful to include an explicit link to article 5 (1) (d) in the accompanying material.

64. **Mr. Bellenger** (France) said that he hoped he was right in assuming that paragraph 1 (b) would remain.

65. **The Chair** said that such was her understanding. In addition, the points that had been made would be included in the Commission's report. She took it that the Commission noted article 8.

66. *It was so decided.*

Article 9

67. **The Chair** said that article 9 addressed the impact on settlement agreements of the entry into force of the draft convention and of any reservations or withdrawal thereof. She took it that the Commission noted the article.

68. *It was so decided.*

Articles 10 to 16

69. **The Chair**, drawing attention to the gaps to be filled in article 11 (1), said that the delegation of Singapore had expressed an interest in hosting a ceremony for the signing of the convention, once adopted.

70. **Ms. Ong** (Singapore) requested that the Commission should consider her delegation's proposal that Singapore to host the signing ceremony on 1 August 2019.

71. **The Chair,** having heard from a number of delegations, said it was her understanding that delegations generally welcomed the proposal. There was also general agreement that article 11 should be completed accordingly and that the convention should be known as the Singapore Convention on Mediation.

72. **Ms. Ong** (Singapore) thanked the members of the Commission for their support. She looked forward to the General Assembly's acceptance of the Commission's recommendation and to the signing ceremony on 1 August 2019.

73. **Ms. Joubin-Bret** (Secretary of the Commission) said that the Secretariat would spare no effort to ensure the success of the signing ceremony, in particular by encouraging the largest possible number of States to sign on at the outset.

74. **The Chair** said she took it that it could be stated in paragraph 1 that the convention would be open for signature by all States in Singapore on 1 August 2019 and thereafter at United Nations Headquarters in New York. A decision would be circulated to reflect the Commission's understanding that the Convention would be signed in Singapore and that it would be known as the Singapore Convention on Mediation.

75. *It was so decided.*

76. **Ms. Dostie** (Canada) said that, in view of the reference to future amendments in article 15, it should be clarified in the report that States could avail themselves of article 13 to decide whether or not such amendments would apply to their territorial units.

77. **The Chair** said she took it that the inclusion of such a clarification in the report, without any change to the text of the draft convention, was acceptable to the Commission and that, apart from the insertions in article 11, paragraph 1, articles 10 to 16 were acceptable in their current form. She also took it that the Commission approved the articles of the draft convention on international settlement agreements, as amended, as a whole.

78. *It was so decided.*

Other matters

79. **The Chair** drew attention to paragraph 25 of the note by the Secretariat, containing the agreed wording of the recommendation to the General Assembly for inclusion in the relevant resolution, subject to any changes required to reflect the Commission's decision regarding the date and venue of the signing ceremony and the short name to be given to the Convention.

80. She took it that the Commission noted the recommendation by the Working Group that, resources permitting, the *travaux préparatoires* of the draft convention should be compiled by the

Secretariat, so that they could be easily accessible and user-friendly.

81. *It was so decided.*

Draft model law on international commercial mediation and international settlement agreements resulting from mediation

82. **The Chair** invited the Commission to consider the note by the Secretariat on a draft model law on international commercial mediation and international settlement agreements resulting from mediation (A/CN.9/943).

Title, sections and terminology

83. **The Chair** drew attention to the suggestion by the Republic of Korea, set out in the compilation of comments on the draft instruments (A/CN.9/945), that the title of section 2 should be changed from "Mediation" to "International commercial mediation", to mirror the phrase used in the title of the Model Law.

84. **Mr. Takashima** (Japan) said that, while his delegation had no issue with the proposed change of title, it was concerned about the implicit suggestion in the text of the proposal to narrow down the Model Law to exclude investor-State mediation.

85. **The Chair** said she took it that the Commission wished to change the title of section 2 of the draft Model Law to "International commercial mediation", it being understood that the change would have no substantive impact on the import or provisions of the draft instrument.

86. *It was so decided.*

87. **The Chair** said that the Republic of Korea had also proposed that the words "settlement agreement" in the title of article 15 should be replaced with "agreement", such that the title would read: "Binding and enforceable nature of agreement settling disputes", as well as in the text of that article, which would then read: "If the parties conclude an agreement settling a dispute, that agreement is binding and enforceable". In the absence of any support for those proposals, she took it that the wording of the title and text of that article would remain unchanged.

88. *It was so decided.*

89. **The Chair** drew attention to the decision of the Working Group to use the term "mediation" in place of "conciliation" throughout the text of the draft Model Law, as explained in footnote 2 of the note by the Secretariat, on the understanding that that change in terminology had no substantive or conceptual implications. She took it that the change was acceptable to the Commission. She also took it that the Commission agreed to the deletion from article 6 (1) of the definition of "electronic communication" and "data message", in line with its decision regarding the draft convention.

90. *It was so decided.*

91. **Mr. Bellenger** (France), referring to the title of section 3, said that footnote 5 of the note by the Secretariat should more appropriately be divided into two. The third sentence of the footnote related to the first paragraph of article 16 concerning explicit agreement between the parties and reflected the Commission's understanding of the provision on reservations to the application of the draft convention, discussed earlier. That sentence should form a separate footnote and should refer to article 16, paragraph 1.

The meeting rose at 1 p.m.

Summary record of the 1070th meeting
held at Headquarters, New York, on Monday, 25 June 2018, at 3 p.m.

[A/CN.9/SR.1070]

Chair: Ms. Czerwenka (Germany)
later: Ms. Morris-Sharma (Chair of Working Group II) (Singapore)
later: Ms. Czerwenka (Germany)

The meeting was called to order at 3.10 p.m.

Agenda item 4: Finalization and adoption of instruments on international commercial settlement agreements resulting from mediation (*continued*) (A/CN.9/929, A/CN.9/934, A/CN.9/942, A/CN.9/943, A/CN.9/945 and A/CN.9/LI/CRP.2)

1. **The Chair** said that, in accordance with established practice, the Chair of Working Group II would be chairing the meeting under the current agenda item.

2. *Ms. Morris-Sharma (Singapore), Chair of Working Group II, took the Chair.*

The meeting was suspended at 3.10 p.m. and resumed at 3.25 p.m.

Draft model law on international commercial mediation and international settlement agreements resulting from mediation

3. **The Chair** invited the Commission to resume its consideration of the articles of the draft text contained in document A/CN.9/943.

Article 16 (*continued*)

4. **The Chair** recalled that France, referring to the title of section 3, had proposed that the third sentence of footnote 5 of the note by the Secretariat, which related to the first paragraph of article 16, should become a separate footnote and should refer to article 16, paragraph 1.

5. **Mr. Rosner** (Observer for the European Union) said that his delegation supported the proposal made by France. Since the footnote dealt with two separate issues, it would be logical to split it into two footnotes.

6. **Mr. Boulet** (Observer for Belgium) said that his delegation supported the proposal to split the footnote but considered that the two new footnotes should be moved to article 16, paragraph 1.

7. **The Chair** said she took it that the Commission wished to transform the third sentence of footnote 5 into a separate footnote referring to article 16, paragraph 1, and that the footnote comprising the first two sentences of footnote 5 would continue to refer to the title of section 3.

8. *It was so decided.*

9. **Mr. Boulet** (Observer for Belgium) said that his delegation proposed inserting the word "also" (*également*) before the word "international" in the subparagraph added to paragraph 4 set out in footnote 6, since "international" was used in a different context in the body of article 16 (4), to which the footnote referred. Paragraph 4 referred to internationality ascertained at the time the settlement agreement was concluded, while the footnote referred to internationality ascertained at the time of mediation.

10. **Mr. Schnabel** (United States of America) said that his delegation supported the proposal made by Belgium.

11. **The Chair** said she took it that the Commission wished to amend footnote 6 by inserting the word "also" before the word "international" in the additional subparagraph, and by adding the missing inverted commas at the end of the footnote.

12. *It was so decided.*

13. **The Chair** said she took it that the Commission agreed to the deletion from paragraph 6 of the definitions of the terms "electronic communication" and "data message", and the deletion of paragraph 7 in its entirety, in line with the changes that had been made to the counterpart article, article 2, of the draft convention on international settlement agreements resulting from mediation.

14. *It was so decided.*

15. **The Chair**, drawing attention to the remarks in paragraph 19 of document A/CN.9/943, reminded the Commission that, along with footnotes 5 and 6, footnote 2 had also been inserted in the draft model law. Footnote 2 had been added to explain the reasons for the replacement of the word "conciliation", which had been used in the Commission's previously adopted texts and relevant documents, with the word "mediation". The footnote was based on the explanatory text approved by the Working Group, although the first sentence of the explanatory text had been omitted in order to avoid any possible confusion with the definition of mediation as provided in the text of the draft model law.

Article 17

16. **The Chair** said that article 17 set out the general principles for section 3 of the draft model law. Its counterpart was article 3 of the draft convention. She recalled that the Republic of Korea had suggested, as set forth in the compilation of comments by the Secretariat (A/CN.9/945) that the title of the article should be changed from "General principles" to "General principles regarding enforcement", to make it clear that the provision applied only to section 3, not the entire draft model law.

17. **Mr. Boulet** (Observer for Belgium) said that reducing the scope of the draft model law to enforcement would mean ignoring the possibility of invoking a settlement agreement as a defence against a claim, which was equally important. His delegation therefore considered that the text should remain as it stood.

18. **The Chair** said she took it that the Commission did not wish to amend the title of article 17.

19. *It was so decided*.

Article 18

20. **The Chair**, drawing attention to paragraphs 15 and 16 of document A/CN.9/943, said she took it that the Commission wished to take the same approach to draft article 18 of the Model Law as it had to article 4 of the draft convention. She therefore took it that the Commission noted that the article reflected a balance between, on the one hand, the formalities required to ascertain that a settlement agreement resulted from mediation and, on the other, the need for the draft convention to preserve the flexible nature of the mediation process. Similarly, she took it that the Commission wished to retain the phrase "such as" instead of replacing it with "in the form of" in paragraph 1 (b), and that it wished to note that the words "the party requesting relief to supply" had been deleted from paragraph 3.

21. *It was so decided*.

Article 19

22. **The Chair**, drawing attention to paragraph 17 of document A/CN.9/943, said she took it that the Commission wished to take the same approach to article 19 as it had to article 5 of the draft convention. That would entail retaining the wording agreed by the Working Group, as reflected in the version of the draft article contained in document A/CN.9/943, and noting the Working Group's shared understanding that there might be an overlap among the grounds provided for in paragraph 1 and that the competent authorities should take that aspect into account when interpreting the various grounds.

23. *It was so decided*.

Article 20

24. **The Chair**, drawing attention to paragraph 18 of document A/CN.9/943, said that the article, which drew inspiration from the New York Convention, provided the competent authority with the discretion to adjourn its decision under certain circumstances. The article would apply both when enforcement of a settlement agreement was sought and when a settlement agreement was invoked as a defence. She took it that the Commission, having discussed and rejected the suggestion to replace the word "decision" with the word "application" in the parallel wording in article 6 of the draft convention, wished to do the same regarding the draft model law.

25. *It was so decided*.

Other matters

26. **The Chair** drew attention to paragraph 22 of document *A/CN.9/943*, which contained a recommendation of the Working Group that, resources permitting, the *travaux préparatoires* for the draft model law should be compiled by the Secretariat in an easily accessible and user-friendly format, and a further recommendation of the Working Group that the Secretariat should be tasked with the preparation of a text to supplement the Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation. In connection with the second recommendation, it was also suggested in paragraph 22 that the Commission might wish to consider whether the Guide to Enactment should provide guidance on how sections 2 and 3 of the draft model law on International Commercial Mediation and International Settlement Agreement Resulting from Mediation could be enacted as stand-alone legislative texts.

27. **Ms. Montineri** (Secretariat) said that the essential question was whether or not the Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation should be updated to reflect the new section and revisions contained in the draft model law. If an updated guide to enactment were produced, it would address each section of the draft model law and comment on how they could be enacted together or separately. The Secretariat would most likely be able to present a draft updated Guide to Enactment to the Commission at its session in 2019.

28. **The Chair** said she took it that the Commission wished to task the Secretariat with producing a draft updated Guide to Enactment for submission at its next session.

29. *It was so decided*.

Draft decision on the adoption of the convention on international settlement agreements resulting from mediation (A/CN.9/LI/CRP.2)

30. *Ms. Czerwenka (Germany) took the Chair.*

31. *The draft decision was adopted*.

Draft decision on the adoption of the draft model law on international commercial mediation and international settlement agreements resulting from mediation (*A/CN.9/LI/CRP.2*)

32. *The draft decision was adopted*.

33. **Ms. Montineri** (Secretariat) said that the Commission could adopt the draft model law during its current session but could not adopt the draft convention, which it could only recommend to the General Assembly, which might adopt it at its seventy-third session.

34. **Mr. Apter** (Israel) said that three years of hard work had resulted in two texts that had the potential to be very useful for States. He wished to thank the members of the Secretariat in particular for their technical work and to highlight the valuable contribution that had been made by the delegation of the United States.

The meeting rose at 3.55 p.m.

Summary record of the 1071st meeting
held at Headquarters, New York, on Tuesday, 26 June 2018, at 10 a.m.

[A/CN.9/SR.1071]

Chair: Ms. Czerwenka (Germany)
later: Ms. Malaguti (Chair of the Committee of the Whole) (Italy)

The meeting was called to order at 10.15 a.m.

Agenda item 5: Consideration of issues in the area of micro, small and medium-sized enterprises (MSMEs)

(a) Finalization and adoption of a legislative guide on key principles of a business registry (A/CN.9/928, A/CN.9/933 and A/CN.9/940; A/CN.9/LI/CRP.8)

1. **The Chair** said that, in accordance with established practice, it was suggested that the Chair of Working Group I chair the meetings under the current agenda item. Since the Chair of the Working Group, Ms. Malaguti (Italy), was not a Vice-Chair of the Commission, the Commission would meet as a Committee of the Whole. She took it that the Commission wished to invite Ms. Malaguti, Chair of Working Group I, to chair the Committee of the Whole.

2. *It was so decided*.

3. *Ms. Malaguti (Italy) took the Chair*.

4. **The Chair** invited the Committee to consider the draft legislative guide on key principles of a business registry contained in document A/CN.9/940. The Working Group had reached agreement on the text as a whole and had highlighted only two substantive issues that had proved particularly contentious and would need further consideration by the Commission: the definitions of the terms "business registry" and "business registration system" in paragraph 12 and the use of those terms throughout the draft guide; and recommendation 57 and the commentary thereto. She urged delegations not to reopen discussions of other matters on which the Working Group had already agreed. On all issues besides the two that she had mentioned, it was her intention to consider any proposed amendment rejected if any member of the Committee objected to it.

5. **Mr. Apter** (Israel) said it was unfortunate that many of those who had attended the Working Group discussions, including the expert from Israel, were unable to attend the current session; moreover, some of the relevant documents, including those containing comments from Member States, had been made available only at a late stage. He therefore concurred that the Committee should not reopen discussions of matters that had already been agreed upon.

6. **Ms. Simard** (Canada) said that the Committee's main aim should be to make the text readable and useful for States. She hoped that it could be adopted at the current session; however, if that proved impossible, adoption could be postponed until the next session. In that case, in order to avoid the Working Group spending another full session on the text, perhaps an expert editorial group could provide comments to the Secretariat for brief consideration by the Working Group at its session in March 2019, with a view to facilitating the adoption of the text at the Commission's next session.

7. **Mr. Dennis** (United States of America) said that his delegation would prefer to adopt the draft legislative guide at the current session because the guidance that it contained was urgently needed in order to help MSMEs in developing countries, most of which currently operated in the informal sector, to transition into the formal sector.

8. **Mr. Bellenger** (France) agreed that, since only a few issues remained to be resolved, the text should be adopted at the current session.

9. **The Chair** invited the Committee to consider the text of the draft legislative guide paragraph by paragraph.

Paragraphs 1 to 4

10. **Ms. Simard** (Canada) proposed replacing the words "in certain States" in the first sentence of paragraph 2 with the phrase "in many States, depending on their legal form".

11. **Mr. Dennis** (United States of America) said that he agreed with the proposed change. The formulation "many States" had been used elsewhere in the draft guide.

12. **The Chair** said she took it that the Committee wished to accept the proposal.

13. *It was so decided*.

Paragraphs 5 to 11

14. **Ms. Simard** (Canada) said that the word "lifespan" in the first sentence of paragraph 5 should be replaced with the term "life cycle", since that term had been used in other UNCITRAL texts. Indeed, for the sake of consistency, "life cycle" should be used in place of all instances in the text of the terms

"lifespan", "lifecycle" and "lifetime", which had been used interchangeably, either as two words or one. In the last sentence, the words "which greatly reduces the risks of transacting and contracting" should be replaced with the words "which contributes to reducing the risks of transacting and contracting". In paragraph 6, the words "without differentiating between large-scale business activities and much smaller business entities" in the second sentence should be replaced with the words "for all businesses".

15. **Mr. Petrović** (Observer for Croatia), noting that the paragraphs under discussion were part of the introduction to the draft legislative guide rather than the actual recommendations, said that he did not disagree with the proposed changes, but that they made little difference to the substance of the text. He wondered whether it was appropriate to have a detailed discussion of such editorial changes at the current stage of deliberations.

16. **Mr. Dennis** (United States of America) said that he supported the proposal to replace the terms "lifespan", "lifecycle" and "lifetime" with the term "life cycle". The word "greatly" in the last sentence of paragraph 5 should be deleted so as not to overstate the extent to which the risks of transacting and contracting could be reduced. As to the second sentence of paragraph 6, his delegation's preference would be to delete it entirely, as it was misleading and detracted from the text's intended focus on MSMEs.

17. Regarding paragraph 10, as mentioned in the comments of Colombia and the United States set out in document A/CN.9/LI/CRP.8, he wondered whether it would be possible to distinguish the work of the World Bank Group and the United Nations Conference on Trade and Development from that of the other entities mentioned, most of which were not international organizations. It was important to reflect the fact that the Commission worked closely with those two organizations to ensure that its output was consistent with theirs. He proposed holding consultations on that paragraph so as to draft more appropriate wording for the Committee to consider.

18. **Ms. Sande** (Observer for Uruguay) said that, in paragraphs 5 and 7, and in all other parts of the text that referred to the facilitation of access to registries, mention should be made of the difference between the common-law and continental-law systems. In Uruguay and other continental-law countries, institutions such as notaries performed a verification function that was considered vital because it contributed to legal certainty, even though it might slow down the registration process. There should be no implication in the text that notaries or other institutions performing similar functions in continental-law countries should be eliminated.

19. **Mr. De Giorgi** (Italy) said that the word "greatly" in paragraph 5 should be retained as its deletion would diminish the role played by business registries.

20. **Mr. Soh** (Singapore) said that the word "greatly" should be retained, as it had been included in the text for some time, and the Working Group had not seen fit to delete it. Likewise, other matters agreed upon by the Working Group should preferably not be changed.

21. **Mr. Machado** (Brazil) said he concurred that the Committee should refrain from making too many changes to the text agreed upon by the Working Group. Moreover, all proposed changes should be submitted in writing so that they could be forwarded to the experts who had been present at the Working Group's discussions.

22. **Mr. Maradiaga** (Honduras) said that he agreed with the comments made by the representatives of Singapore and Brazil. The text in its current form was the result of lengthy deliberations by the Working Group.

23. **The Chair** said that, since the text was due to be finalized the following day, there was not sufficient time to send written proposals to the Working Group members for comment. As there did not appear to be general support for the changes that had been proposed to paragraphs 5 to 11, she took it that the Committee did not wish to accept them.

24. *It was so decided*.

Paragraph 12

25. **The Chair** said that, in paragraph 12, the main issue left pending by the Working Group was the definitions of the terms "business registration" and "business registry or business registration system".

26. **Mr. Dennis** (United States of America) said that, as mentioned in document A/CN.9/LI/CRP.8, his delegation proposed adding the following sentence to the definition of "business registration": "A business registration system may allow for simultaneous registration with all relevant public authorities." That would be consistent with the view, set out in paragraph 57 of the draft legislative guide, that establishing one-stop shops for registration with at least the business registry, taxation and social security authorities was the best approach for States wishing to optimize their business registration system. Alternatively, the term "business registration system" could be deleted from the definition of "business registry", which would make it unnecessary to add the proposed new sentence to the definition of "business registration".

27. In the definition of "business registry or business registration system", the phrase "as distinct from mandatory registration by the business with

other relevant authorities (e.g. taxation and social security authorities)" suggested that there was no connection between registration with the business registry and registration with the taxation and social security authorities, whereas, elsewhere in the draft legislative guide, it was explained that, in several States that had reformed their registration systems, business registries functioned as one-stop shops to support registration with other authorities. The phrase in question should therefore either be deleted or be replaced with the following new sentence: "The business registry may also function as a one-stop shop to support registration with other relevant authorities (e.g. taxation and social security authorities)."

28. **Ms. Sande** (Observer for Uruguay) suggested that the definitions of the terms "business registration" and "business registry or business registration system" be merged and that the reference in the latter definition to registration with other authorities be deleted, since the system for such registration with other authorities varied from one country to another.

29. **Ms. Simard** (Canada) said that the deletion of the term "business registration system" from the definition of "business registry" would make the definition clearer. However, that change would make necessary a thorough review of the entire text to ensure that the terms "business registry" and "business registration system", of which there were some 200 occurrences altogether, were used appropriately and consistently. The two terms were not necessarily synonymous; for example, the term "business registration system" was used in some cases to refer only to the business registry and in other cases to refer to the one-stop shop. The Secretariat could be entrusted with the task of carrying out the necessary review. If necessary, a separate definition of the term "business registration system" could be introduced.

30. **Mr. Teehankee** (Philippines) agreed that the term "business registration system" and the phrase "as distinct from mandatory registration by the business with other relevant authorities (e.g. taxation and social security authorities)" should be deleted from the definition of "business registry".

31. **Mr. Noack** (Germany) said that his delegation strongly opposed the rewording of the definitions as proposed by the United States. A business registry did not necessarily function as a one-stop shop.

32. **Mr. Petrović** (Observer for Croatia) said that, provided that the term "business registry" was clearly defined, the expression "business registration system" did not need to be defined separately, nor did its use elsewhere in the text present any linguistic or substantive difficulties. Clearly, if a business registry existed, there had to be a business registration system.

33. In order to accommodate the various views expressed, elements of the existing definition of "business registry or business registration system", together with part of the wording proposed by the United States, could be incorporated into the definition of "business registration", so that the latter would read: "'Business registration' means the entry of certain information about a business, as required by the domestic law, into the State's system for receiving, storing and making accessible to the public this information (business registry). The business registry may also function as a one-stop shop to support mandatory registration with other relevant authorities, for example taxation and social security authorities."

34. **Mr. De Giorgi** (Italy) said that the definition of "business registration" should remain unchanged, as it was clear and represented a compromise that had been reached after lengthy discussions. The definition of "business registry or business registration system" should either remain unchanged or the term "business registration system" should be deleted from it. If the term "business registration system" was deleted from the definition, it would have to be replaced throughout the draft legislative guide with the term "business registry" or another term in those cases where "business registry" would not be appropriate.

35. **Mr. Gómez-Riesco Tabernero de Paz** (Spain), having expressed support for the remarks made by the representative of Italy, said that any reference to one-stop shops in the definition of the term "business registry" was inappropriate, since not all business registries functioned as one-stop shops.

36. **Mr. Dennis** (United States of America) said that the proposal made by the representative of Croatia, which maintained consistency with the existing wording, merited consideration. He agreed that, if the Committee decided to delete the term "business registration system" from the definition of the term "business registry", the use of both terms throughout the draft legislative guide would have to be reviewed. In the vast majority of cases, it would be possible to replace "business registration system" with "business registry", but in some instances, such as the last sentence of paragraph 57, the term "business registration system" would have to be retained.

37. **Mr. Machado** (Brazil) said that the wording used must be broad enough in scope to reflect the practice of all countries. Given that the United States had unique experience with one-stop shops, it was right to include a reference to them. By contrast, although Brazil had established a process for facilitating the registration of businesses, including with the taxation, social security and other

administrative authorities, it did not have a one-stop shop. He was therefore unsure whether eliminating the word "system" throughout the text was the right approach. It would be preferable to add to the definition of "business registration" the new second sentence proposed by the representative of the United States: "A business registration system may allow for simultaneous registration with all relevant public authorities."

38. **Ms. Simard** (Canada) expressed support for the remarks made by the representatives of the United States, Spain and Croatia.

39. **Ms. Sande** (Observer for Uruguay) said that her delegation supported the wording proposed by Croatia, since it made the meaning of the term "business registry" clear and also reflected the fact that States could choose whether or not their business registry would support registration with other authorities.

40. **The Chair** suggested that consultations be held with a view to agreeing on proposed new wording for the Committee's consideration.

The meeting was suspended at 11.20 a.m. and resumed at 11.55 a.m.

41. **Ms. Clift** (Secretariat) said it had been proposed that the definition of "business registration" be deleted and that the definition of "business registry and business registration system" be amended to read: "'Business registry' means a State's mechanism for receiving, storing and making accessible to the public certain information about businesses, as required by domestic law." The expression "a State's mechanism" had been suggested as a replacement for the expression "a State's system" because some delegations had expressed reservations about the word "system". It had also been suggested that a footnote be added to the definition, which would read: "The business registry may also function as a one-stop shop to support mandatory registration with other relevant authorities (for example, taxation and social security authorities) – this is further discussed in paragraph 57." Thus there would be no reference to one-stop shops in the definition itself but rather a cross reference to the relevant part of the draft legislative guide.

42. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that he was in favour of the proposal presented by the Secretariat. However, he wondered whether the footnote was needed, since the definition of "one-stop shop" already mentioned the registration of a business with at least the business registry, taxation and social security authorities. In addition, different ways of organizing the registration of businesses were discussed at length in the draft legislative guide, for example in paragraph 57.

43. **Mr. Teehankee** (Philippines) agreed that the footnote was not needed.

44. **Mr. Petrović** (Observer for Croatia) said that, in principle, it would be preferable not to include the footnote; however, since it did not represent a substantive change, it did no harm.

45. **Ms. Sande** (Observer for Uruguay) said that the proposed new definition of "business registry" was acceptable but her delegation would prefer not to include the footnote, since it did not form part of the definition of the term but rather referred to the registration process.

46. **Mr. De Giorgi** (Italy) said he agreed that it would be odd to have the footnote as part of the definition.

47. **Mr. Soh** (Singapore) said that he was in favour of deleting the definition of "business registration" and supported the proposed new definition of "business registry". It would be unusual to include a footnote to the definition but, in the spirit of compromise, he would be willing to accept it. Regarding the definition of the term "one-stop shop", the second sentence appeared to be purely advisory. He had no objection to its content, but wondered whether it would be better placed elsewhere.

48. **Mr. Maradiaga** (Honduras) said that the differences of opinion between delegations were not substantive. Given that the draft legislative guide would be used by many different countries, its wording should be as simple and clear as possible.

49. **Mr. Teehankee** (Philippines) said that, if a footnote referring to the one-stop shop was going to be inserted, perhaps the whole second sentence of the definition of "one-stop shop" could be added to it.

50. **Mr. De Giorgi** (Italy) agreed that the sentence in question was more of a comment describing the purpose of a one-stop shop than a definition.

51. **Mr. Dennis** (United States of America) said that the sentence described the crucial elements and the operation of a one-stop shop; he therefore hoped that it could be retained as part of the definition.

52. **Ms. Simard** (Canada), referring to the definition of the term "unique identifier", said that, although the Working Group had decided to retain the expression "or a non-business entity" in the definition, her delegation would prefer to delete it. Although it was true that, in some States, unique identifiers were assigned to non-business entities as well as businesses, there was no need to account for that possibility in the draft legislative guide, since it was focused solely on businesses.

53. **Mr. Dennis** (United States of America) said he agreed that the Commission's work was essentially directed at business entities.

54. **Ms. Yamanaka** (Japan), referring to the definition of the term "formal economy", said that the phrase "nor does it include illicit trade in goods or services" in the second sentence should be deleted, since it could imply that such illicit trade was part of the informal economy. That would be inconsistent with paragraph 20 of the document on adopting an enabling legal environment for the operation of micro, small and medium-sized enterprises contained in the annex to document A/CN.9/941, in which it was stated that the informal economy was not related to illegal or criminal activity and that the discussion in the document was limited to extralegal commercial activities and did not address illicit trade in goods or services.

55. **Mr. Teehankee** (Philippines) expressed support for that proposal.

56. **Mr. Dennis** (United States of America) said that, in International Labour Organization (ILO) recommendation No. 204 concerning the transition from the informal to the formal economy, it was specified that the term "informal economy" did not cover illicit activities. It would therefore be preferable to retain the phrase referred to by the representative of Japan. However, as an alternative, his delegation could support eliminating the definition of "formal economy" altogether, on the basis that the document on adopting an enabling legal environment for the operation of MSMEs contained a full discussion of what constituted the formal and informal economy. The Commission could discuss the issue at greater length when it came to consider that document, and could consider including a reference to ILO recommendation No. 204, which contained crucial guidance for States on eliminating or reducing the size of the informal economy.

57. **Ms. Yamanaka** (Japan) said that her delegation did not have a preference, but if the issue was controversial and would be more appropriately addressed in the aforementioned document, it would be better to delete the definition from the draft legislative guide.

58. **Mr. Soh** (Singapore) said it was his understanding that the definition had been included in order to make it clear that businesses operating in the informal economy were not necessarily operating illegally. Provided that that point was captured elsewhere, he could go along with the deletion of the definition.

59. **Mr. Teehankee** (Philippines) said that, on that basis, he could also support its deletion.

60. **The Chair** said she took it that the Committee wished to delete the definition of "business registration" and to amend the definition of "business registry" along the lines described by the Secretariat, including the addition of the proposed footnote, which, though an inelegant solution, represented a fair compromise. The term "business registration system" would not be defined and would be replaced with "business registry" throughout the text, unless the context dictated otherwise. She also took it that the Committee wished to retain the definition of "one-stop shop" unchanged; to delete the expression "or a non-business entity" from the definition of the term "unique identifier"; and to delete the definition of "formal economy".

61. *It was so decided.*

Paragraphs 13 to 24

62. *Paragraphs 13 to 24 were approved.*

63. **The Chair**, noting that the remainder of the draft legislative guide consisted of recommendations with accompanying paragraphs of commentary, suggested that the Committee consider each recommendation in turn, together with the relevant paragraphs.

Recommendation 1

64. **Ms. Simard** (Canada) said that the sentence in paragraph 25 that began with the words "[a] desirable approach" should be deleted, since it duplicated the content of the last sentence of the paragraph. The phrase "subject to the legal and institutional organization of the enacting State" in the penultimate sentence should also be deleted, as it was unnecessary. Recommendation 1 could be reformulated to read: "The law should ensure the establishment of a business registry that facilitates the operation of businesses in the formal economy and that can participate in a one-stop shop for business registration and registration with other authorities."

65. **Mr. De Giorgi** (Italy) said that his delegation supported those proposed changes.

66. **Mr. Dennis** (United States of America) said that his delegation supported the proposed changes to paragraph 25.

67. **Mr. Bellenger** (France), supported by **Mr. Teehankee** (Philippines), said that his delegation would prefer not to make any changes to recommendation 1.

68. **The Chair** said she took it that the Committee wished to keep the current text of recommendation 1 and to accept the proposed changes to paragraph 25.

69. *It was so decided.*

Recommendation 2

70. **Mr. Marani** (Argentina) said that the commentary to the recommendation should reflect the fact that, in many States, the information in the business registry was opposable to third parties. He was aware that the issue had been a source of

controversy in the Working Group; he therefore hesitated to reopen the discussion. However, since the opposability of registered information could serve as an incentive to MSMEs to register, it was important to include a reference to it.

71. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that recommendation 10 (g) might be a more appropriate place for a reference to opposability. The phrase "the legal effects of the information" could be changed to "the legal effects and opposability of the information".

72. **Ms. Simard** (Canada) said that, in her delegation's view, the concept of legal effects included opposability. However, if others felt that the proposed change would make the text clearer, her delegation could support its inclusion.

73. **Mr. Teehankee** (Philippines) said that his delegation was not prepared to amend recommendation 10.

74. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that, as there was no consensus on his proposal to amend recommendation 10, he could go along with the Argentine proposal.

75. **Mr. Maradiaga** (Honduras) said that his delegation supported the Argentine proposal because the text should accommodate the various points of view of the different countries that would be using it.

76. **Mr. Dennis** (United States of America) said that his delegation wished to propose some changes to paragraph 26, as set out in document A/CN.9/LI/CRP.8. Firstly, in the fifth sentence, the phrase "[h]owever, since business registration may be viewed as a conduit through which businesses of all sizes and legal forms interact with the State and operate in the formal economy" should be deleted because, in many States, some businesses, such as sole proprietors and partnerships, were not required to register in order to operate in the formal economy. Secondly, for the sake of consistency with paragraph 52 (h) and recommendation 10 (h), the sixth sentence should be changed to read: "Through registration, a business receives assistance in searching and reserving a business name that enables the business to establish its commercial identity and interact with its business partners, the public and the State." Thirdly, a cross reference to paragraphs 123 to 126 and recommendation 20 of the draft legislative guide should be added to the last sentence of the paragraph. Lastly, if those changes were accepted, the word "identity" in recommendation 2 should be replaced with the term "business name", again for the sake of consistency with paragraph 52 (h) and recommendation 10 (h).

77. **Ms. Simard** (Canada) said that her delegation supported the proposals of the United States.

78. **The Chair** said she took it that the Committee wished to include a reference to the opposability of information in the commentary to the recommendation and suggested that the delegation of Argentina draft some specific wording to present to the Committee for consideration. She also suggested that the Committee discuss the proposals just made by the United States at its next meeting.

79. *It was so decided*.

The meeting rose at 1.05 p.m.

Summary record of the 1072nd meeting
held at Headquarters, New York, on Tuesday, 26 June 2018, at 3 p.m.

[A/CN.9/SR.1072]

Chair: Ms. Malaguti (Chair of the Committee of the Whole) (Italy)

The meeting was called to order at 3 p.m.

Agenda item 5: Consideration of issues in the area of micro, small and medium-sized enterprises (MSMEs) (*continued*)

(a) Finalization and adoption of a legislative guide on key principles of a business registry (*continued*) (A/CN.9/928, A/CN.9/933 and A/CN.9/940; A/CN.9/LI/CRP.8)

1. **The Chair** invited the Committee to resume its consideration of the draft legislative guide on key principles of a business registry contained in document A/CN.9/940, taking up each recommendation in turn, together with the accompanying paragraphs of commentary.

Recommendation 2 (continued)

2. **The Chair** recalled that, at its previous meeting, the delegation of the United States of America had proposed a number of changes to recommendation 2, as reflected in document A/CN.9/LI/CRP.8.

3. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that he agreed with the proposal of the United States to delete the phrase "[h]owever, since business registration may be viewed as a conduit through which businesses of all sizes and legal forms interact with the State and operate in the formal economy" from the fifth sentence of paragraph 26. However, the new wording proposed for the sixth sentence of that paragraph was technically inaccurate, as businesses did not receive assistance in searching and reserving a business name as part of the registration process, but rather as a consequence of registration.

4. **Mr. Huang** Jie (China) agreed that the proposed amendments to the sixth sentence of paragraph 26 and to recommendation 2 (a) seemed to constitute substantive changes that were at variance with the Commission's understanding of the business registration process.

5. **Mr. Dennis** (United States of America) said that his delegation merely sought to ensure consistency between the description of the purposes of the business registry, as reflected in the sixth sentence of paragraph 26 and in recommendation 2 (a), and the description of the business registry's core functions, as set out in paragraph 52 (h). If others believed that the wording of paragraph 26 and recommendation 2 (a) more accurately reflected the nature of the business registration process, paragraph 52 (h) could be amended instead.

6. **The Chair** said she took it that the Committee wished to approve the amendment to the fifth sentence of paragraph 26 proposed by the representative of the United States but not the other proposed amendments.

7. *It was so decided.*

Recommendation 3

8. **Ms. Simard** (Canada) said that, to enhance clarity and concision, subparagraph (a) of the recommendation should be amended to read "[b]e simple and avoid unnecessary exceptions or granting of discretionary power". In subparagraph (b), the words "necessary pursuant to the law" should be deleted. Lastly, in the first sentence of paragraph 30, the words "the records" should be replaced with "the registered information" because the latter expression was used throughout the draft guide.

9. **Mr. Dennis** (United States of America) agreed with the proposed amendment to subparagraph (a).

10. **Mr. Soh** (Singapore) said that, should the proposed amendment to subparagraph (a) be approved, it would no longer be clear that the expression "the law" in the chapeau referred specifically to laws governing the business registry, as indicated in the existing wording.

11. **Mr. Noack** (Germany) said that the amendments proposed by the representative of Canada appeared to constitute editorial changes and should not distract the Committee from more substantive issues.

12. **Ms. Simard** (Canada) said that, as the term "the law" was defined in paragraph 12 of the draft legislative guide and was used throughout the text, further clarification in the recommendation seemed unnecessary.

13. **Mr. Soh** (Singapore) said that the clarification was still necessary, as the recommendations in the draft legislative guide might be read without reference to the definitions in paragraph 12.

14. **Ms. Joubin-Bret** (Secretary of the Commission) said that the Committee might wish to amend the chapeau and subparagraph (a) to read:

"The laws governing the business registry should: (a) Adopt a simple structure and avoid the unnecessary use of exceptions or granting of discretionary power."

15. **Mr. Dennis** (United States of America) said that he supported that formulation but proposed that the word "adopt" be replaced with the word "provide".

16. **The Chair** said she took it that the Committee wished to amend the recommendation along the lines suggested by the Secretary of the Commission but did not wish to approve the proposed amendments to subparagraph (b) of the recommendation and paragraph 30.

17. *It was so decided.*

Recommendation 4

18. **Mr. Dennis** (United States of America) said that the last three sentences of paragraph 32 should be deleted, as they amounted to an expanded definition of the term "good quality and reliable", which was already defined in paragraph 12. If other delegations objected to that proposal, at the very least the reference in the third sentence to whether or not the information in the business registry was legally binding on the registry, the registrant, the registered business or third parties should be removed, as it duplicated part of the definition in paragraph 12, which the Working Group had decided should not be repeated elsewhere in the text (see A/CN.9/333, para. 35). The sentence would thus read: "'Good quality and reliable' in this guide does not refer to whether the enacting State uses a declaratory approach or an approval approach in respect of its business registration system." If others considered that the remaining part of the three sentences in question contained important elements of the definition of "good quality and reliable", the relevant text could be moved to the definition in paragraph 12.

19. **Mr. Noack** (Germany) said that paragraph 32 should be retained as currently drafted because it went beyond the scope of the definition in paragraph 12. For example, the second sentence contained an important reference to the neutrality of the draft legislative guide with regard to the methods that enacting States used to ensure the good quality and reliability of their business registration systems.

20. **Mr. Dennis** (United States of America) said that he did not object to the inclusion of a reference to the neutrality of the draft legislative guide on that point. Rather, he was suggesting that, if such a reference was included, it would be more appropriate to place it in the definition of "good quality and reliable" in paragraph 12. In addition, the term "method" in the second sentence of paragraph 32 was inconsistent with the term "system" in the first sentence of paragraph 33. While either term would be acceptable, one of the two terms should be used consistently throughout the draft legislative guide.

21. **Ms. Simard** (Canada) agreed that definitions of terms should not be repeated or modified in subsequent sections of the text once they had been set out in paragraph 12.

22. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that the last three sentences of paragraph 32 contained important explanatory information, in particular the specification that good quality and reliability did not refer to whether enacting States used a declaratory approach or an approval approach to business registration. The repetition of the definition of "good quality and reliable" in the third sentence was essentially an editorial matter; the relevant phrase could simply be deleted if delegations so wished.

23. **Mr. Noack** (Germany) said that his delegation could go along with the proposed amendment to the third sentence.

24. **The Chair** said she took it that the Committee wished to amend the third sentence of paragraph 32 along the lines proposed by the representative of the United States. She also took it that the Committee wished to request the Secretariat to ensure that the use of terms such as "method" and "system" was consistent throughout the text.

25. *It was so decided.*

Recommendation 5

26. **Ms. Nsanze** (Uganda) said that, in the second sentence of paragraph 40 and in subparagraph (b) of the recommendation, the word "competence" should be replaced with the word "authority" in order to emphasize the fact that, while the day-to-day operation of the registry might be delegated to another entity, the State was ultimately responsible for ensuring that the registry was operated in accordance with the applicable law.

27. **Mr. Dennis** (United States of America) said that, while his delegation tentatively supported the amendment proposed by the representative of Uganda, the use of the word "competence" was the result of extensive deliberations by the Working Group, the history of which should be reviewed before a decision was taken.

28. **Mr. Bellenger** (France) said that, in the French version, "autorité" was not the appropriate term in the context. His delegation would therefore prefer to retain the word "compétence".

29. **The Chair** said that, prior to the Working Group's decision to use the word "competence", the word "ownership" had been used. She wondered whether it would be possible to replace "competence" with "authority" in the English version and retain "compétence" in the French version.

30. **Ms. Sande** (Observer for Uruguay) said that, in Spanish, the term "competencia" referred to an authority's power to carry out a particular task and its responsibility to do so. The term "autoridad" was more vague and would not be appropriate in the current context.

31. **Mr. Dennis** (United States of America) said that, in earlier versions of paragraph 38, the second sentence had contained a footnote referring to the International Business Registers Report 2017, which indicated, inter alia, that 76 per cent of business registries were governed by State executive agencies and only 5 per cent by the judiciary. As proposed in document A/CN.9/LI/CRP.8, the footnote should be reinstated, since the paragraph was unclear without it. Moreover, the phrase "oversight by the government" in the second sentence should be changed to "oversight by government executive agencies", since the term "government" could be viewed as including the judiciary. In the third sentence, the expression "in such States" should be changed to "in most States". The fourth sentence should be amended to read: "Another type of organization of a business registry used in some States is one that is subject to administrative oversight by the judiciary." Lastly, in paragraph 40, the word "liability" in the first sentence should be changed to "responsibility".

32. **Ms. Simard** (Canada) said that the footnote in paragraph 38 had been deleted by the Working Group in line with the usual editorial practice for Commission texts. However, she agreed that, without the footnote, the paragraph was unclear. Her delegation therefore supported the changes proposed by the representative of the United States.

33. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that the current wording of the paragraph was clear. He did not see the value in specifying what percentage of States used a particular system for organizing their business registries.

34. **The Chair** said she took it that the Committee wished to approve the recommendation as currently drafted and to replace the word "liability" in paragraph 40 with the word "responsibility", but that it did not wish to approve the other proposed amendments.

35. *It was so decided.*

Recommendation 6

36. **Mr. Dennis** (United States of America) said that, in line with the approach taken in the UNCITRAL Model Law on Secured Transactions, only the liability of the registry, not that of the registry staff, was addressed in the draft legislative guide. The reference to the liability of the registry staff in the second sentence of paragraph 43 was therefore inconsistent with the rest of the draft guide. Accordingly, the sentence should be amended to read: "In this regard, the applicable law of the enacting State should establish the liability (if any) of the registry (see paras. 211 to 216 and rec. 47 below)."

37. **Ms. Simard** (Canada) and Mr. Maradiaga (Honduras) expressed support for that proposal.

38. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that his delegation supported the inclusion of the words "if any". However, if the expression "the registrar and the registry staff" was replaced with "the registry", it would no longer be clear whether the sentence was referring to the liability of the State, of the registry as an entity or of the registrar as the individual responsible for the registry.

39. **Mr. Noack** (Germany) said that he supported the inclusion of the words "if any" but wondered whether the word "liability" should be changed to "responsibility", in line with paragraph 40.

40. **Mr. Dennis** (United States of America) said that the word "liability" should be retained in paragraph 43, as it was a cross reference to paragraphs 211–216, in which the potential liability of the registry was addressed.

41. **Mr. Teehankee** (Philippines) said that his delegation supported the inclusion of the words "if any", which would reflect the fact that different States could take different approaches to the issue of liability. He also agreed that the expression "the registrar and the registry staff" should be replaced with "the registry". However, the phrase "to ensure their appropriate conduct in administering the business registry" in the existing text should be retained.

42. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that one way to accommodate the proposal made by the representative of the United States would be to delete the words "and the registry staff" and refer simply to "the liability (if any) of the registrar". That change would also make the sentence consistent with the title of section II.B and of recommendation 6. Another option would be to place the words "if any" after the words "registry staff" instead of after the word "liability". A third option would be to replace the words "registry staff" with "persons liable for the registry" [*las personas responsables del registro*], which would accommodate the different approaches to liability taken by different countries. In Spain, for example, liability was borne by the registrar, not the registry staff.

43. **Mr. Dennis** (United States of America) said that, in his delegation's view, the cross reference to paragraphs 211 to 216 and recommendation 47 made the phrase "to ensure their appropriate conduct in administering the business registry" unnecessary. However, it could be retained if the Committee so wished. The most important proposed changes were

the addition of the words "if any" and the deletion of the reference to the registry staff.

44. **Mr. Bellenger** (France) said that, since recommendation 6 related to the appointment and accountability of the registrar, he did not understand why the word "registrar" in the second sentence of paragraph 43 should be changed to "registry". The liability of the registry was addressed in recommendation 47.

45. **Mr. Dennis** (United States of America) said that the sections of the draft guide relating to liability covered the liability of the State rather than personal liability; therefore, any reference to the liability of the registrar or the registry staff was inappropriate. If other delegations considered that paragraph 43 should contain no reference at all to liability, the sentence in question could be deleted in its entirety.

46. **Mr. Soh** (Singapore) said that he supported the addition of the words "if any" but that it would not be appropriate to change the word "registrar" to "registry". The commentary to recommendation 47 included several references to the conduct of registry staff; it might have been better to move them to the commentary to recommendation 6 and delete the cross reference in paragraph 43.

47. **The Chair** said that the Secretariat suggested the following wording for the second sentence of paragraph 43: "In this regard, the applicable law of the enacting State should establish principles for the accountability of the registrar to ensure appropriate conduct in administering the business registry (the potential liability of the registry is addressed in paras. 211 to 216 and rec. 47 below)."

48. **Mr. Teehankee** (Philippines), **Mr. Dennis** (United States of America) and **Mr. De Giorgi** (Italy) expressed support for that wording.

49. **The Chair** said she took it that the Committee wished to amend paragraph 43 accordingly.

50. *It was so decided.*

Recommendation 7

51. *Recommendation 7 was approved.*

Recommendation 8

52. **Ms. Sande** (Observer for Uruguay), reiterating the need for a neutral approach to States' diverse legal traditions, said that paragraph 46 was not consistent with such an approach because it indicated that not using an intermediary reduced registration costs and contributed to the promotion of business registration among MSMEs. In the continental-law system, there was no option not to use an intermediary: a business could not be legally registered without one.

53. **Mr. Dennis** (United States of America) said that the draft guide contained numerous references to notaries. His delegation opposed any change to the paragraph.

54. **Ms. Simard** (Canada) said that the recommendation and the commentary thereto were not intended to undermine approval systems. Rather, the intention was to make business registration simpler in those States where the use of an intermediary was not mandatory, through the use of standard registration forms.

55. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that, in an earlier draft of the guide, the last sentence of the paragraph had contained a reference to the principle of party autonomy. He suggested that the phrase "according to the principle of party autonomy" or similar wording be added at the end of the sentence.

56. **Mr. Dennis** (United States of America) said that, in other UNCITRAL texts, the concept of party autonomy had a specific meaning that was related to freedom of contract. It would not, therefore, be appropriate to refer to it in the current context.

57. **The Chair** said she took it that the Committee wished to approve the recommendation and the commentary thereto as currently drafted.

58. *It was so decided.*

Recommendation 9

59. *Recommendation 9 was approved.*

Recommendation 10

60. **Mr. Dennis** (United States of America), noting that the Committee had earlier decided not to approve his delegation's proposed amendment to the sixth sentence of paragraph 26, said that recommendation 10 (h) and paragraph 52 (h) would now need to be amended in order to make them consistent with that sentence.

61. **Mr. Bellenger** (France) said that the text in question had been negotiated line by line. He was therefore opposed to any changes.

62. **Mr. Soh** (Singapore) said that he agreed with the representative of France. The list set out in paragraph 52 and the recommendation had been discussed extensively and was a list of core functions, not a list of powers or desirable functions or services. The phrase "when required by the law" in paragraph 52 (h) and recommendation 10 (h), which would be lost if the United States proposal was accepted, was particularly important because it indicated that assisting businesses in searching and reserving a business name constituted a core function of the registry only when required by the law. In some systems, the registry did not provide assistance to businesses in searching and reserving a business name but rather had the power to determine, by

conducting a search, whether the name proposed by a business was acceptable.

63. **Ms. Simard** (Canada) said that her delegation appreciated that the list of core functions in paragraph 52 had been extensively discussed by the Working Group. However, paragraph 52 (e) was redundant: the requirement that the information on a registered business be as current and accurate as possible was already covered by the reference in paragraph 52 (b) to good quality and reliable information, since the definition of "good quality and reliable" in paragraph 12 included the requirement of currency and accuracy. Paragraph 52 (e) could therefore be deleted.

64. The third sentence of paragraph 53 was confusing in that it contained a reference to both unique business identifiers and unique business names, and might be taken to imply that the two served the same purpose. That was not the case: a unique identifier was typically used by a business in its interaction with the State rather than with the public. Moreover, the use of unique identifiers was covered adequately elsewhere in the draft guide. The phrase "and in any event, the assignment of a unique identifier will assist in ensuring the unique identity of the business within and across jurisdictions (see also paras. 98 to 105 below)" should therefore be deleted.

65. **The Chair** drew attention to paragraph 44 of the report of Working Group I on the work of its thirtieth session (A/CN.4/933), which indicated that the Working Group had specifically decided that more emphasis could be placed on keeping information as current as possible in the commentary to recommendation 10 (e).

66. **Mr. Dennis** (United States of America) said that his delegation agreed with the comment made by the representative of Canada on paragraph 53. In the second sentence of paragraph 56, the reference to email should be expanded, in line with other Commission texts, to include electronic addresses or other electronic means of communication, such as online chat. Similarly, the references to email in paragraphs 74, 120 and 196 of the draft legislative guide would have to be changed.

67. **Mr. Petrović** (Observer for Croatia) said that he did not find the reference to business names and unique identifiers in the same sentence in paragraph 53 confusing. However, if others supported the proposed amendment, he could go along with it.

68. **Mr. Maradiaga** (Honduras) said that his delegation supported the proposed amendment to paragraph 53.

69. **The Chair** said she took it that the Committee wished to approve the amendment to paragraph 53 proposed by the representative of Canada and to expand the references to email in paragraphs 56, 74, 120 and 196 to include electronic addresses or other electronic means of communication.

70. *It was so decided.*

Recommendation 11

71. *Recommendation 11 was approved.*

The meeting was suspended at 4.45 p.m. and resumed at 4.55 p.m.

Recommendation 12

72. **Ms. Simard** (Canada) said that the last sentence of paragraph 77 should be amended to read: "Furthermore, when developing laws with respect to these processes, States should also consider whether all aspects of registration can be accomplished electronically without the intervention of registry staff, or if some aspects require their intervention." That wording would better reflect the fact that, in some cases, all stages of the registration process could be completed electronically.

73. **Mr. Dennis** (United States of America) said that the change suggested by Canada was consistent with the recommendation, which indicated that the optimal medium for a business registry was electronic. He suggested that the title of the recommendation be changed to "Electronic registry" for the sake of consistency with the body of the recommendation, in which there was no mention of paper-based or mixed registries. Otherwise, if the recommendation was read in isolation from the accompanying commentary, it might not be clear that an electronic registry was the preferred option.

74. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that the new wording proposed for the last sentence of paragraph 77 was not consistent with paragraph 212, which reflected the fact that, even in some States that had electronic registration systems, information had to be entered into the registry record by the registrar or registry staff. That was the case, for example, in Spain. His delegation would therefore prefer to retain the existing wording.

75. **Mr. Bellenger** (France) said he agreed that the sentence should not be changed. In the draft guide, the Commission recommended a degree of caution with regard to the implementation of an electronic registry, as reflected in the words "phased approach" in the title of section III.C.

76. **Mr. Noack** (Germany) said that, if the title of recommendation 12 was changed to "Electronic registry", it would no longer be consistent with the principle of technological neutrality. It should therefore remain as it stood.

77. **Ms. Simard** (Canada) said that her delegation supported the proposed new title, which would not preclude the use of paper-based or mixed registries;

rather, it would reflect the essence of the recommendation, which was that the optimal medium for a registry was electronic.

78. **Mr. Teehankee** (Philippines) said that, while the recommendation reflected the preference for an electronic registry, its title should perhaps remain unchanged so as to be consistent with the headings of the relevant sections of the draft guide, in particular section III.A (Electronic, paper-based or mixed registry).

79. **Ms. Yamanaka** (Japan) agreed that the title of the recommendation should remain unchanged.

80. **Mr. De Giorgi** (Italy) proposed an alternative title, "Medium to operate a business registry", which was based on the wording of the first sentence of the recommendation.

81. **Mr. Dennis** (United States of America) and Mr. Noack (Germany) expressed support for that proposal.

82. **The Chair** said she took it that the Committee wished to change the title of the recommendation to "Medium to operate a business registry".

83. *It was so decided.*

Recommendation 13

84. **Mr. Dennis** (United States of America) said that the expression "electronic signatures" in the third sentence of paragraph 85 should be changed to wording along the lines of "electronic signatures or other means of identification and authentication", which was based on paragraph 33 (f) of the UNCITRAL Technical Notes on Online Dispute Resolution. The Secretariat could be requested to check that that wording was also consistent with other Commission texts.

85. **Mr. Soh** (Singapore) said that his delegation supported that proposal, not for the sake of consistency with other Commission texts but because, in certain cases, there was actually no electronic signature. Rather, a person's login credentials established his or her identity.

86. **The Chair** said she took it that the Committee wished to approve the proposed amendment, subject to the relevant checks by the Secretariat.

87. *It was so decided.*

Recommendation 14

88. **Mr. Dennis** (United States of America) said that the words "justice and employment" in the fourth sentence of paragraph 86 should be deleted, so that the sentence referred only to the taxation and social security authorities, in line with similar references elsewhere in the draft guide. In paragraph 88, the second sentence indicated that some one-stop shops provided only business registration services, which was inconsistent with the definition and usage of the term "one-stop shop" elsewhere in the draft guide. The sentence could be deleted in its entirety, as there was no need for an explanatory reference to one-stop shops at that point in the text. If it was retained, the references to one-stop shops throughout the remainder of the draft guide would have to be amended.

89. **Ms. Simard** (Canada) expressed support for the deletion of the second sentence of paragraph 88.

90. **Mr. De Giorgi** (Italy) said that, if that sentence was deleted, the third sentence of the paragraph might not make sense.

91. **The Chair** said that the removal of the word "additional" from the third sentence should resolve the problem. The Secretariat could adjust the text as appropriate. She took it that the Committee wished to approve the proposed amendments to paragraphs 86 and 88.

92. *It was so decided.*

Recommendations 15 to 17

93. **Mr. Dennis** (United States of America) said that the last sentence of paragraph 98 was inaccurate because the latest information and communications technology (ICT) solutions were capable of ensuring that different entities did not have the same identifier. Therefore, the sentence should be deleted or redrafted.

94. **Mr. Soh** (Singapore) agreed that the sentence should be deleted.

95. **Ms. Simard** (Canada) said that the reference to "registered entities" in the first sentence of paragraph 101, and also elsewhere in the draft guide, should be changed to "registered businesses" because "entity" could be taken to mean a business with legal personality. In paragraphs 101 and 104, the references to non-business entities should be deleted, in line with the Committee's earlier decision to delete the words "or a non-business entity" from the definition of "unique identifier" in paragraph 12. In paragraph 102, the last two sentences should be deleted, since they referred to the use of unique identifiers in interactions by businesses with the private sector. Such interactions might not be desirable because of the risk of fraud and identity theft.

96. **Mr. Petrović** (Observer for Croatia) said that it was not clear to him why the use of unique identifiers in interactions with the private sector could raise privacy concerns or create a risk of fraud or malpractice. It was his understanding that a unique identifier could be used by a business in interactions with the private sector as well as with the State.

97. **Mr. Dennis** (United States of America) said he agreed with the representative of Canada that the use of unique identifiers in interactions with entities other than the State could raise privacy concerns. He therefore supported the proposal to delete the last two sentences of paragraph 102.

98. **The Chair** said she took it that the Committee wished to approve the proposed changes and to request the Secretariat to ensure that the term "registered entities" was replaced with "registered businesses" throughout the text.

99. *It was so decided.*

Recommendation 18

100. *Recommendation 18 was approved.*

Recommendation 19

101. **Mr. Dennis** (United States of America) said that the phrase "and take a shorter period of time for business registration" should be added at the end of the fourth sentence of paragraph 117, so that the sentence would read: "On the other hand, declaratory systems are said to reduce the inappropriate exercise of discretion; furthermore, they may reduce costs for registrants by negating the need to hire an intermediary and appear to have lower operational costs and take a shorter period of time for business registration." In document A/CN.9/LI/CRP.8, his delegation had provided a reference to a study by the World Bank to support its proposal.

102. **The Chair** noted that the issue in question had already been discussed many times.

103. **Mr. Bellenger** (France) said that the debate on the issue should not be reopened. His delegation was against the proposed amendment.

104. **The Chair** said she took it that the Committee did not wish to approve the proposed amendment.

105. *It was so decided.*

Recommendation 20

106. **Ms. Simard** (Canada) proposed that the reference to government bodies in the fourth sentence of paragraph 124 be removed because the draft guide did not pertain to the registration of government bodies.

107. **The Chair** said that the reference had been included because the delegation of one country had previously stated that government bodies in that country were required to register. The phrase in question was merely a statement that, in some legal traditions, the registration of such bodies was common; it was not a recommendation that they should be registered. However, the reference could be deleted if the Committee so wished.

108. **Mr. Dennis** (United States of America) said he agreed that the registration of government bodies was not the focus of the text. His delegation therefore supported the amendment proposed by the representative of Canada. In addition, in the first sentence of the paragraph, "must" should be replaced with "may", so that the sentence would read: "States may also define which businesses are required to register under the applicable law." Some States simply required all businesses to register and would not, therefore, need to define which businesses were required to register.

109. **Ms. Simard** (Canada) said that her delegation supported that proposal.

110. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that the reason for the proposed change from "must" to "may" was not clear to him. The law had to determine in which cases it was mandatory for a company to register, for example in order to obtain legal personality.

111. **The Chair**, supported by **Mr. Petrović** (Observer for Croatia), said that the positions of the delegations of Spain and the United States both seemed to be accommodated by the current wording.

112. **Mr. Dennis** (United States of America), noting that paragraph 125 concerned voluntary registration, said that the first sentence should end at the word "markets" because the remainder of the sentence referred to circumstances in which registration was mandatory: the separation of personal assets from assets devoted to the business and the limitation of the liability of the owner of the business.

113. **Ms. Simard** (Canada) said that her delegation supported that proposal.

114. **Mr. Petrović** (Observer for Croatia) said that the separation of personal assets from the assets of a business and the limitation of liability were incentives for registration. It was therefore important to indicate that, in order to achieve those benefits, registration was required.

115. **Mr. Dennis** (United States of America) said he agreed that it was important to indicate that registration was required in those circumstances; however, that point should not be included in the sentence in question. Perhaps it could be placed in a separate sentence or moved to a more appropriate place in the draft guide. Another option would be to amend recommendation 20 (a) to expressly state that businesses that had separate legal personality and limited liability should be required to register.

116. **Mr. Bellenger** (France) said he agreed that the sentence was not logical as it stood. However, the last part of it should be reworded rather than deleted.

117. **Mr. Petrović** (Observer for Croatia) said that the phrase "that would not otherwise be required to

register with the business registry (but may be subject to mandatory registration with other public authorities, such as taxation and social security)" could be deleted, as the question of which businesses were or were not required to register was already covered in paragraph 124. The sentence would thus simply indicate the benefits of registration.

118. **Mr. De Giorgi** (Italy) proposed that the sentence should end at the word "markets" and be followed by a new sentence along the following lines: "Where businesses are required to register, registration with the business registry allows businesses also to benefit from the separation of personal assets from assets devoted to business or limiting the liability of the owner of the business."

119. **Mr. Dennis** (United States of America) said that, since paragraph 124 related to businesses that were required to register, perhaps that would be the appropriate place to refer to the fact that, if a business had separate legal personality or limited liability, it should be required to register, as was the practice in most jurisdictions.

120. **Mr. Soh** (Singapore) said that some systems allowed for the separation of assets without the incorporation of a separate legal entity; perhaps the sentence as currently worded was intended to cover that possibility.

121. **The Chair** suggested that the representative of the United States present a specific proposal for the Committee to consider at its next meeting. She said she took it that the Committee wished to delete the reference to government bodies in the fourth sentence of paragraph 124 but did not wish to change the word "must" in the first sentence of that paragraph to "may".

122. *It was so decided.*

The meeting rose at 6.05 p.m.

Summary record of the 1073rd meeting
held at Headquarters, New York, on Wednesday, 27 June 2018, at 10 a.m.

[A/CN.9/SR.1073]

Chair: Ms. Malaguti (Chair of the Committee of the Whole) (Italy)

The meeting was called to order at 10.05 a.m.

Agenda item 5: Consideration of issues in the area of micro, small and medium-sized enterprises (MSMEs) (*continued*)

(a) Finalization and adoption of a legislative guide on key principles of a business registry (*continued*) (A/CN.9/928, A/CN.9/933 and A/CN.9/940; A/CN.9/LI/CRP.8)

1. **The Chair** invited the Committee to resume its consideration of the draft legislative guide on key principles of a business registry contained in document A/CN.9/940, taking up each recommendation in turn, together with the accompanying paragraphs of commentary.

Recommendation 21

2. **Ms. Simard** (Canada) said that, in the first sentence of paragraph 127, it was suggested that States would decide, based on their own laws and economic framework, the information requirements for business registration. The phrase "and economic framework" should be deleted, since it was not clear how a State could base legal information requirements on an economic framework.

3. **Mr. Dennis** (United States of America) said that his delegation supported that proposal. In addition, paragraphs 132 and 190, which both dealt with beneficial ownership, should be reviewed for consistency with the Working Group's decision concerning an UNCITRAL limited liability organization: for such an organization, the only information required was the names of its managers, not of its members. The two paragraphs in question seemed to go beyond that decision.

4. **Mr. Maradiaga** (Honduras) said that his delegation supported the proposal to delete the words "and economic framework" because it was the reference to national laws that was most important.

5. **Mr. De Giorgi** (Italy) said that it was not clear what exactly the United States was proposing. For him, there was no contradiction between paragraph 132, which simply described the current situation regarding registration of the identity of business owners, and the decision of the Working Group on an UNCITRAL limited liability organization, which in any case was a separate matter unrelated to the current discussion.

6. **Mr. Dennis** (United States of America) said that his delegation agreed that the first sentence of the paragraph was merely descriptive. However, the second sentence could be seen as a recommendation about providing information on beneficial owners or on shareholders, even though the draft legislative guide contained no actual recommendations on that subject. It might therefore be appropriate to delete the second sentence of the paragraph but to retain footnote 15, transposing it to follow the first sentence.

7. **Mr. Teehankee** (Philippines) endorsed that proposal.

8. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that his delegation opposed the deletion of the second sentence, which covered matters of the utmost importance to the countries of the European Union, namely prevention of money-laundering and financing of terrorism. Moreover, it was inappropriate, and illogical in terms of legislative technique, to use the draft legislative guide on an UNCITRAL limited liability organization, which had not yet been adopted, as a basis for reasoning on paragraphs 132 and 190.

9. **The Chair** said that, as there was no strong support for the proposal by the United States, she took it that the Committee did not wish to approve it. She also took it that the Committee wished to approve the Canadian amendment to paragraph 127.

10. *It was so decided.*

Recommendations 22 to 26

11. *Recommendations 22 to 26 were approved.*

Recommendation 27

12. **Ms. Yamanaka** (Japan), supported by **Ms. Simard** (Canada), said that the first sentence of paragraph 149 was inconsistent with recommendation 27 (a) and should be amended to read: "States should provide that registries must reject the registration of a business only if its application does not meet the requirements prescribed by the applicable law of the State."

13. **Ms. Simard** (Canada), supported by **Mr. Dennis** (United States of America), said that the

final sentence of paragraph 149 merely repeated the first and should be deleted.

14. **The Chair** said that she took it that the Committee wished to approve those amendments.

15. *It was so decided*.

Recommendations 28 to 32

16. *Recommendations 28 to 32 were approved*.

Recommendation 33

17. **Ms. Simard** (Canada) said that, in the first sentence of paragraph 167, the word "registration" should be deleted and the word "registrants" replaced with "users" because, according to the sentence as currently drafted, solely potential registrants, and not all potential users of the business registry, were to be permitted access to registration services without discrimination. For similar reasons, the first part of the recommendation should be amended to read "[t]he law should permit access to the business registry without discrimination". Lastly, the word "registration" should be deleted in the titles of both section VI.B and the recommendation, so that they would read: "Access to services of the business registry".

18. **Mr. Petrović** (Observer for Croatia) said that his delegation supported those proposals. If the proposal to replace "registrants" with "users" in the first sentence of paragraph 167 was approved, then the words "including potential registrants" should be inserted, for the sake of clarity and coherence with the next sentence.

19. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that his delegation fully supported the proposed changes. In paragraph 170, the phrase "(which is carried out automatically in an electronic registry)" should be deleted because it conflicted with paragraph 212, in which it was made clear that, in some electronic registries, the type of process referred to in paragraph 170 was not carried out automatically.

20. **The Chair** said she took it that the Committee wished to approve the amendments proposed by Canada and Croatia. As there seemed to be no support for the amendment proposed by Spain, she would take it that the Committee did not wish to approve it.

21. *It was so decided*.

Recommendation 34

22. **The Chair** said that, as the word "registration" had been deleted in the titles of section VI.B and recommendation 33, it might also need to be deleted in the titles of section VI.C and recommendation 34.

23. **Mr. Dennis** (United States of America) said that his delegation would prefer the word "registration" not to be deleted from the titles of section VI.C and recommendation 34 because the focus in both was on equal rights of women to access registration services specifically. The World Bank had reported that, in 22 countries, the number of steps that had to be carried out in order to register a business was higher for women than for men.

24. His delegation wished to make a number of proposals, which were based on those set out in document A/CN.9/LI/CRP.8. In the final sentence of paragraph 173, the words "some women" should be replaced with "many women". The first part of the third sentence of paragraph 174 should be amended to read: "Such steps are also consistent with the non-discrimination commitments of States under international human rights instruments, such as the Universal Declaration of Human Rights, as well as with the obligations undertaken by States parties to…". A new paragraph 174 bis should also be added, which would read:

> "To establish gender-neutral business registration frameworks, States also need to institute policies to collect on a voluntary basis anonymized gender-disaggregated data for business registration through the business registry. Such efforts would facilitate a Government's ability to determine the extent of informal barriers. Evidence for policy development continues to suffer because of the lack of sex-disaggregated data for statistical purposes."

Lastly, a new recommendation 34 (c) should be added, to read: "States should institute policies to collect anonymized gender-disaggregated data for business registration through the business registry."

25. **The Chair** said that the proposals by the United States constituted more substantive changes than those that the Committee had discussed so far. The addition of a new recommendation 34 (c) would be a policy decision, because it went beyond what the Working Group had proposed.

26. **Ms. Simard** (Canada) agreed that the word "registration" should not be removed from the titles of section VI.C and recommendation 34 and said that her delegation supported the changes proposed by the representative of the United States.

27. **Mr. Petrović** (Observer for Croatia) said that his delegation could support the proposals by the United States, in particular the addition of a new recommendation 34 (c), as they were in line with the general policy outlined in recommendation 34.

28. **Mr. De Giorgi** (Italy) said that, in principle, he could support the proposals of the United States, but since the chapeau of recommendation 34 began with the words "The law should", the new recommendation 34 (c) could not begin with the

words "States should"; another formulation would have to be found.

29. **Mr. Apter** (Israel) said that the requirement to collect gender-disaggregated data might be problematic from a purely technical perspective: it would place a burden both on businesses, which would be required to provide additional information in order to register, and on registries and States, which would be responsible for collecting the information. That would be the case for Israel, where such information was not currently required. However, if the Committee supported the proposal, Israel would not object to it.

30. **Mr. Maradiaga** (Honduras) said that his delegation supported the proposals of the United States.

31. **Mr. Dennis** (United States of America), referring to the comment by the representative of Italy, said that the wording of the new recommendation 34 (c) should be revised to read: "Provide for the collection of anonymized gender-disaggregated data for business registration through the business registry."

32. **Mr. Teehankee** (Philippines) said that his delegation supported the United States proposals but pointed out that developing countries had concerns about technical capacity in connection with the collection of data. In order to facilitate their compliance on a best-efforts basis, he proposed that the new recommendation 34 (c) begin with the word "encourage" instead of "provide for".

33. **Mr. Noack** (Germany) said that his delegation agreed that the new recommendation 34 (c) could raise some technical problems, especially in developing countries. He wondered whether it was really necessary to collect data for the purpose of non-discrimination, especially when, in accordance with recommendation 34 (b), a non-discrimination policy should be in place.

34. **Mr. Dennis** (United States of America) requested time for consultations on the wording of the proposed new recommendation 34 (c).

The meeting was suspended at 10.50 a.m. and resumed at 11 a.m.

35. **Mr. Dennis** (United States of America) said that the new recommendation 34 (c), as amended, would read: "Provide for institution of policies to collect anonymized gender-disaggregated data for business registration through the business registry."

36. **Ms. Simard** (Canada) asked whether the phrase "on a voluntary basis" had inadvertently been omitted.

37. **Mr. Dennis** (United States of America) said that the phrase was included in the proposed paragraph 174 bis, which described how to achieve gender-neutral business registration; it had not been repeated in the recommendation, which merely stated the relevant policy.

38. **Mr. Teehankee** (Philippines) agreed that the phrase "on a voluntary basis" was unnecessary in the recommendation.

39. **Mr. Noack** (Germany) said that, since the proposed new recommendation referred to data collection, there needed to be some kind of safeguards in place for protection of the data collected. Moreover, the actual functioning of the data collection had not been explained.

40. **Mr. Dennis** (United States of America) said that the data to be collected was gender-disaggregated data relating to business registration in general; it would therefore not be specific to any one business. All the information in a registry had to be protected, and the provision of safeguards for all the types of data that might be collected was an overarching concern in the draft guide. It did not seem necessary to cover the subject under recommendation 34.

41. **The Chair** said she took it that the Committee wished to approve recommendation 34 and the accompanying paragraphs of commentary, as amended.

42. *It was so decided*.

Recommendations 35 and 36

43. *Recommendations 35 and 36 were approved*.

Recommendations 37 and 38

44. **Ms. Simard** (Canada) said that the titles of section VI.F and recommendation 37 should be changed to "Direct electronic access to registry services". In the first sentence of paragraph 185, after "any electronic device", the words "including mobile devices" should be inserted; the final two sentences of paragraph 185 would then be unnecessary and could be deleted. In the penultimate sentence of paragraph 188, the final words, "for both electronic and paper submissions and information requests", should be deleted. In the final sentence, the words "[h]owever, even where States continue to use paper-based registries, the overall objective is the same" should be replaced with "[t]he overall objective of access to business registry services is the same for both paper-based and electronic or mixed registries".

45. **Mr. Teehankee** (Philippines) expressed support for the proposed amendment to the titles of section VI.F and recommendation 37.

46. **Mr. Maradiaga** (Honduras) said that his delegation endorsed the proposed changes to paragraph 185 because they made it easier to understand.

47. **Mr. Dennis** (United States of America) said that he supported the proposed amendments to paragraph 188.

48. **The Chair** said she took it that the Committee wished to approve the proposed amendments.

49. *It was so decided*.

Recommendations 39 and 40

50. *Recommendations 39 and 40 were approved*.

Recommendation 41

51. **Mr. Dennis** (United States of America) said that the recommendation should be divided into two sentences, to make it clear that there were two separate questions: whether fees were to be established for business registry services and, if they were established, at what level they should be set. The recommendation would thus read:

> "The law should establish fees, if any, for business registration and post-registration services. If fees are required, they should be at a level that is low enough to encourage business registration, in particular of MSMEs, and that, in any event, does not exceed a level that enables the business registry to cover the cost of providing those services."

In addition, even though it was standard practice in many States to require the payment of fees for registration services, it was important to emphasize in the commentary that providing business registration free of charge was the best practice. Accordingly, the penultimate sentence of paragraph 198 should be transposed to precede the first sentence of paragraph 197. The existing first sentence, which would become the second sentence, should be amended to read: "It is also a practice in many States to require the payment of a fee for registration services."

52. **Mr. Petrović** (Observer for Croatia) said that, while his delegation supported in principle the proposed change to the recommendation, it wished to simplify the text even more. The recommendation dealt with business registry services, whereas the commentary referred not only to business registration but also to other services that the business registry might provide. The recommendation should therefore be amended to read: "The law should establish that fees, if any, do not exceed a level that enables the business registry to cover the cost of providing those services."

53. **Mr. Teehankee** (Philippines) said that the subject of fees had already been extensively discussed in the Working Group. His delegation was unable to go along with any amendments.

54. **Mr. Bellenger** (France) said that a balance had been found during the Working Group's discussions. The issue should not be reopened.

55. **Ms. Simard** (Canada) said that her delegation supported the proposals of the United States. In addition, in paragraph 197, there was a reference to fines, in which they seemed to be assimilated to fees. However, the two were separate, and the subject of fines was addressed elsewhere in the text. Accordingly, the phrase "while to a lesser extent, fines may also generate funds" should be deleted.

56. **Mr. Soh** (Singapore) said that, in some systems, fines were computed as part of revenue, which helped in determining the cost of registration services. The fines collected could help reduce the fees that might be charged. However, he did not oppose the amendment put forward by Canada.

57. **Mr. Teehankee** (Philippines) said that his delegation supported the amendment proposed by Canada.

58. **The Chair** said she took it that the Committee wished to approve the amendment to paragraph 197 proposed by Canada and to reject the other amendments proposed.

59. *It was so decided*.

Recommendation 42

60. **Ms. Simard** (Canada), supported by **Mr. Gómez-Riesco Tabernero de Paz** (Spain) and **Mr. Dennis** (United States of America), said that subparagraph (a) of recommendation 42 contained the basic principle that information in a business registry should be available free of charge, but subparagraph (b) provided that there might be a charge for some information services. To make the recommendation less self-contradictory, she proposed that the word "information" at the start of subparagraph (a) be replaced with the words "basic information".

61. **The Chair** said she took it that the amendment was approved.

62. *It was so decided*.

Recommendations 43 and 44

63. *Recommendations 43 and 44 were approved*.

Recommendations 45 and 46

64. **Ms. Yamanaka** (Japan), supported by **Mr. Dennis** (United States of America), said that, since paragraph 210 related to liability, it should be moved from section VIII.B (Sanctions) to follow paragraph 207 in section VIII.A (Liability for misleading, false or deceptive information).

65. The Chair said she took it that the amendment was approved.

66. *It was so decided*.

Recommendation 47

67. **Mr. Dennis** (United States of America) said that, on several occasions, the Working Group had instructed the Secretariat to try to ensure concordance between section VIII.C of the draft legislative guide (Liability of the business registry) and the provisions concerning the liability of the security rights registry in the UNCITRAL Model Law on Secured Transactions. In many States, the business registry and the security rights registry were housed in the same location and were under the authority of the same registrar. His delegation therefore wished to propose three changes to section VIII.C in order to ensure consistency between the draft guide and the Model Law. The title of the recommendation should be changed to "Limitation of liability of the business registry", consistent with the title of article 32 of the Model Registry Provisions set out in the Model Law. In paragraph 211, the phrase "[t]he law of the State should provide for the allocation of liability" should be replaced with "[t]he law of the State should establish whether and to what extent the State is liable". Lastly, the following new sentence, based on wording in the Guide to Enactment of the Model Law on Secured Transactions, should be added to the paragraph: "The objective is to limit the liability of the registry and to thus avoid an increase in the cost of the registry services in the rare event where loss or damage can be attributed to acts or omissions of the registry."

68. **Mr. Soh** (Singapore) said that the Working Group had decided not to make a recommendation that liability should be limited; each State would make its own decision on the matter. The proposals of the United States therefore represented a substantial change in policy.

69. **The Chair** said she took it that the proposed amendments were rejected.

70. *It was so decided*.

Recommendations 48 to 55

71. Recommendations 48 to 55 were approved.

Recommendation 56

72. **Mr. Dennis** (United States of America) said that his delegation proposed deleting the words "in a single clear legislative text" at the end of the recommendation. Legal provisions pertaining to business registration would not necessarily be set out in a single legislative text; States would need to decide whether to include them in primary or secondary legislation, a question that was not covered in the draft guide. Moreover, in most States, some aspects of business registration, such as liability of the business registry, were covered in laws other than those relating to business registration.

73. **Ms. Simard** (Canada) said that her delegation supported the suggested change. In addition, in the first sentence of paragraph 239, the words "where possible" should be inserted after the word "unification" because, in some States, there were separate laws that affected business registration, such as those on State liability, electronic documents and privacy; depending on how they were organized, it might not be possible or desirable to unify them into a single piece of legislation. Her delegation also proposed the deletion of paragraph 238 because it dealt not with the clarity of the law – the subject of the recommendation under discussion – but with the fact that States might want to shift the focus of the law towards privately held businesses. That was an important point, but it would be better placed in the document on adopting an enabling legal environment for the operation of micro, small and medium-sized enterprises (MSMEs) contained in the annex to document A/CN.9/941.

74. **Mr. De Giorgi** (Italy) said that he supported the proposal by the United States and the proposal to add the words "where possible" to the first sentence of paragraph 239.

75. **Mr. Noack** (Germany), noting that the title of the recommendation was "Clarity of the law", said that, if the proposal of the United States was approved, there would be no reference to clarity in the body of the recommendation.

76. **Mr. Soh** (Singapore) said that, without the words "in a single clear legislative text", the reference to consolidating legal provisions became meaningless.

77. **Mr. Dennis** (United States of America) said that the recommendation could be amended to read: "The law should, in a clear manner and to the extent possible, consolidate legal provisions pertaining to business registration." He also supported the deletion of paragraph 238.

78. **The Chair** said she took it that the wording just proposed by the United States and the changes proposed by Canada were approved.

79. *It was so decided*.

Recommendation 57

80. **The Chair** suggested that recommendation 57 be left in abeyance, partly because it was controversial and partly to give delegations time to familiarize themselves with the proposal by Germany and Spain set out in document A/CN.9/LI/CRP.7.

81. *It was so decided*.

Recommendation 58

82. **Mr. Dennis** (United States of America), noting that the Committee had decided to amend the reference to electronic signatures in the commentary to recommendation 13, said that a similar change might be needed in paragraph 244 and in recommendation 13 itself. He suggested that the Secretariat be requested to ensure that the wording was consistent with other UNCITRAL texts.

83. **The Chair** said she took it that the Committee wished to approve that proposal.

84. *It was so decided*.

Recommendation 2 (continued)

85. **The Chair** recalled that the Committee had already approved a proposal by Argentina to include a reference to the opposability of registered information in the commentary to the recommendation and that the representative of Argentina had been asked to propose some specific wording.

86. **Mr. Marani** (Argentina) said that the proposal was to add a new sentence, before the final sentence of paragraph 26, to read: "Besides, in many countries one of the legal effects of the business registry is to provide opposition of the registered information to third parties."

87. **Mr. Dennis** (United States of America) said that his delegation could support the proposal if the word "many" was replaced with "some".

88. **Mr. Marani** (Argentina) said that he could accept that change in the spirit of compromise.

89. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that he supported the proposal by Argentina.

90. **Mr. De Giorgi** (Italy) said that he, too, supported the proposal by Argentina but wondered whether the words "business registry" should be replaced with "business registration".

91. **Mr. Noack** (Germany) agreed that "business registry" should be replaced with "business registration".

92. **The Chair** said that the Secretariat had pointed out that the phrase "provide opposition" was also infelicitous. She suggested that the Secretariat be entrusted with finding a better way of referring to the concept of opposability. Subject to the appropriate editorial changes, she took it that the Committee wished to approve the new sentence proposed by Argentina, with the amendments proposed by the United States and Italy.

It was so decided.

Recommendation 20 (continued)

93. **The Chair** recalled that paragraphs 124 and 125 had been left in abeyance pending a proposal of new wording by the United States.

94. **Mr. Dennis** (United States of America) said that, as he had mentioned at the previous meeting, the first sentence of paragraph 125 began with a list of benefits to be derived from voluntary registration of businesses but ended with a reference to the separation of personal assets from assets devoted to the business and limitation of the liability of the owner of the business, for which registration was usually mandatory. His delegation and others had suggested that paragraph 124, which dealt with mandatory registration, would be a more appropriate place to include a statement that registration was generally required in order to receive those benefits. Accordingly, the first sentence of paragraph 125 should end at the word "markets" and the following new sentence should be inserted after the third sentence of paragraph 124: "Generally, States require the registration of corporations and other similar entities as a condition of receiving the benefit of limited liability and separation of personal assets from assets devoted to the business." Consideration might be given to including a similar reference in the recommendation.

95. **Mr. Bellenger** (France) said that the situation was somewhat different in France. Some businesses did not have legal personality and were therefore not required to register. However, if they did register, certain legal provisions enabled them to separate personal assets from the assets of the business, and thus gave the owner of the business limited liability. That kind of situation should be mentioned clearly in the draft guide. The last part of the first sentence of paragraph 125 could be deleted and replaced with a new sentence along the following lines: "Some businesses that do not have legal personality and therefore are not normally obliged to register may do so with a view to benefiting from the separation of personal assets from assets devoted to the business and limitation of the liability of the owner of the business." [*Certaines entreprises qui sont dépourvues de la personnalité morale et qui ne sont donc pas normalement obligées de s'enregistrer peuvent le faire dans le but de bénéficier d'une séparation entre les biens personnels et les biens destinés à l'entreprise et d'une limitation de la responsabilité du propriétaire de l'entreprise*.]

96. **Mr. Dennis** (United States of America) said that the proposal of France was not compatible with the Working Group's decision that, to receive limited liability, a business must register. For businesses in that situation, the primary form of registration was as a corporation or similar entity with separate legal personality. Even in those jurisdictions where an entity could have limited liability without having

separate legal personality, it was still required to register. That point should be included in paragraph 124.

97. **Mr. Petrović** (Observer for Croatia) said that the point would be better placed in paragraph 125. He proposed that the first sentence end at the word "markets" and that the remainder of the sentence be deleted and replaced with a new sentence, which would read along the following lines: "In any event, registration is always required for the separation of personal assets from assets devoted to the business or for limiting the liability of the owner of the business." That would accommodate the positions both of France and of the United States.

98. **Mr. Dennis** (United States of America) welcomed the wording proposed by Croatia but reiterated that it should be included in paragraph 124, not paragraph 125.

99. **The Chair**, having heard from a number of delegations, said she took it that the Committee wished to amend paragraph 125 along the lines proposed by Croatia.

100. *It was so decided*.

The meeting rose at 1 p.m.

Summary record of the 1074th meeting
held at Headquarters, New York, on Wednesday, 27 June 2018, at 3 p.m.

[A/CN.9/SR.1074]

Chair: Ms. Malaguti (Chair of the Committee of the Whole) (Italy)
later: Ms. Czerwenka (Germany)

The meeting was called to order at 3.10 p.m.

Agenda item 5: Consideration of issues in the area of micro, small and medium-sized enterprises (MSMEs) (*continued*)

(a) Finalization and adoption of a legislative guide on key principles of a business registry (*continued*) (A/CN.9/928, A/CN.9/933 and A/CN.9/940; A/CN.9/LI/CRP.4 and A/CN.9/LI/CRP.7)

1. **The Chair** invited the Committee to resume its consideration of the draft legislative guide on key principles of a business registry contained in document A/CN.9/940. The last point that remained to be discussed was recommendation 57, together with the accompanying paragraphs of commentary.

Recommendation 57

2. **Mr. Noack** (Germany), drawing attention to the proposal of Germany and Spain set out in document A/CN.9/LI/CRP.7, said that recommendation 57 (b) and paragraph 240 should be deleted because they were inconsistent with the principle of legal neutrality. Several jurisdictions required MSMEs to use intermediaries in the business registration process; it was therefore inappropriate to recommend that States consider providing for the optional use thereof. If there was no agreement on the proposed deletions, the recommendation and the paragraph should be reworded along the lines set out in document A/CN.9/LI/CRP.7. Consensus was not possible on the wording as it stood; furthermore, lack of agreement on that point could jeopardize the consensus on the draft guide as a whole and thus the common goal of a low-cost, reliable and efficient registration procedure for MSMEs. That goal could be achieved irrespective of whether a State used the approval system or the declaratory system.

3. **Mr. Ivanco** (Czechia) said that the current wording represented a compromise reached in the Working Group and reflected the aim of the draft guide, which was to provide practical recommendations.

4. **Mr. Gómez-Riesco Tabernero de Paz** (Spain), expressing support for the comments made by the representative of Germany, said that the current wording of recommendation 57 (b) ran counter to the principle of legal neutrality and implicitly cast approval systems in a negative light. Neither his delegation nor that of Germany would have dreamt of proposing a recommendation that States provide for the mandatory use of intermediaries. There was no chance of reaching consensus on the current recommendation, which clearly conflicted with some legal systems; indeed, the Working Group had reached agreement on it only under the threat of a simple-majority vote and after it had been introduced in a wholly improper manner. The need was for wording that would allow each State to choose its own system and develop it in the way it considered most appropriate for the purpose of pursuing the goal set out in the draft legislative guide, namely the establishment of efficient, fast electronic systems of business registration and the promotion thereby of economic growth. As noted in paragraph 6 of the introduction to document A/CN.9/940, some aspects of chapter XI of the draft text might be regarded as being outside the purview of a legislative guide and might be more appropriately placed elsewhere. In that light, his delegation's preference would be to eliminate recommendation 57 (b) and paragraph 240 altogether. Failing that, they should be reformulated along the lines proposed in document A/CN.9/LI/CRP.7.

5. **Ms. Gehmacher** (Austria) said that her delegation supported the proposal made by Germany and Spain. If paragraph (b) of the recommendation was amended rather than deleted, her delegation would be flexible as to the wording, provided that legal neutrality was maintained.

6. **Ms. Matias** (Jerusalem Arbitration Centre) said that the current wording of recommendation 57 (b) should be retained. Many developing countries had a shortage of intermediaries and did not require them to be used for business registration; for those countries, it was important to keep the use of intermediaries optional, as that made it easier for MSMEs to register and do business. If the paragraph was reworded, there should at least be some acknowledgement of the particular difficulties faced by developing countries with regard to business registration.

7. **Mr. Kurashov** (Russian Federation) said that his delegation supported the proposal either to delete recommendation 57 (b) or to reword it.

8. **Mr. Dennis** (United States of America) said that it was not accurate to say that the current wording had

been adopted under the threat of a simple-majority vote rather than by consensus. A previous, stronger, version of the recommendation, aimed at making the use of intermediaries optional, had been supported in the Working Group by 12 States and opposed by 6 States, and had therefore reflected the prevailing view; since, however, the Chair of the Working Group had been unwilling to decide on such an important issue on the basis of the prevailing view rather than a consensus, negotiations had continued and the current wording had been drafted. It represented a compromise and had been accepted both by States with an approval system and by States with a declaratory system. A consensus had thus been achieved, which his delegation had joined, even though it had favoured the previous wording. During the Commission's current session, other proposed amendments to the draft guide, including many put forward by his own delegation, had been rejected if just one delegation had expressed opposition. The joint proposal of the German and Spanish delegations should be treated in the same way. The current text should stand.

9. **Mr. Nemessányi** (Hungary) said that his delegation fully supported the German-Spanish proposal. Intermediaries played an important role in the business registration procedure in many jurisdictions; their verification activities contributed to legal certainty and strengthened efforts to combat money-laundering and abusive practices in the establishment of companies.

10. **Ms. Sande** (Observer for Uruguay) said that Uruguay and other countries that had an approval system, in which the involvement of intermediaries was mandatory, would find it difficult to apply recommendation 57 (b) as it stood. Since the Commission's goal was to draft a consensus-based guide that could be applied by all States, it would be advisable either to eliminate the paragraph or to come up with more neutral wording.

11. **Ms. Simard** (Canada) said that, in the Working Group, there had indeed been a majority in favour of a stronger recommendation that States make the use of intermediaries optional; however, after lengthy discussions, consensus had been reached on the current compromise wording. It had then been agreed that the matter was closed. Her understanding of the procedure currently being followed in the Committee was that, if there were any objections to a proposal to amend wording that had emerged from the Working Group's deliberations, that wording should remain unchanged. She therefore wondered why the Committee was continuing to discuss the proposal made by Germany and Spain.

12. **The Chair** said that it had been made clear at the beginning of the Committee's discussion on the draft legislative guide that two issues remained open since, despite the agreement on them in the Working Group, they remained contentious and had been expressly referred to the Commission for further consideration. The first, the definition of "business registry", had been settled; the second was the recommendation currently under discussion.

13. **Mr. De Giorgi** (Italy) said that, while his delegation was grateful for the reminder of the process that had led to the adoption of paragraph (b) of the recommendation, it fully supported the German-Spanish proposal because the clear implication of the paragraph was that the declaratory system was preferable, which was not in keeping with the principle of neutrality. It also made for an internal inconsistency in the draft guide, given that paragraphs 115 to 117, which had likewise resulted from a long and difficult debate, clearly reflected the principle of neutrality and indeed contained an explicit recognition of the advantages of each system. Furthermore, since paragraph (b) concerned the choice between an approval system and a declaratory system, it was unrelated to the rest of the recommendation and to paragraphs 241 to 243 of the draft guide, which concerned flexible legal forms for business.

14. **Mr. Laghzaoui** (Observer for Morocco) said that his delegation supported the German-Spanish proposal since the draft guide was supposed to be a flexible instrument catering to all legal systems.

15. **Mr. Ahmed** (Observer for Iraq) said that his delegation supported the proposal to delete paragraph (b) or, if that could not be agreed, to reformulate it.

16. **Mr. Kumar** (India) said that his delegation supported the current text.

17. **Mr. Apter** (Israel) said that, while the Committee should in general avoid reopening discussion on matters that had been extensively debated by the Working Group, it should nonetheless try to resolve the most contentious outstanding issues, so as to produce a legislative guide that would be widely supported and used. His delegation favoured the current text, since it reflected the fact that intermediaries were not used in most States but did not contain any requirement to make their use optional. However, in the interests of consensus, his delegation proposed the following wording, which was aimed at merging the existing wording with the approach proposed by the delegations of Germany and Spain: "In most States, the use of intermediaries by MSMEs is optional, while in others it is mandatory. States should consider which practice is more appropriate in the light of their domestic legal system and the need to ensure that registration procedures for MSMEs are fast, efficient, reliable and low cost." While such wording would be unusual in a recommendation, it might help in reaching a compromise, by reflecting the existence of the two

types of registration system; the commentary could also be adjusted accordingly. Furthermore, if members wished, the report on the work of the session could indicate that there had been a divergence of views.

18. **Ms. Yamanaka** (Japan) said that it might be better not to refer to specific systems. She proposed the following new wording for paragraph (b): "States should make sure that the registration system is of good quality and reliable and that the registration procedures for MSMEs are fast, efficient and low cost."

19. **The Chair** said that, of the two alternative wordings proposed, the first was closer to the current thrust of the paragraph; the second changed its focus.

20. **Mr. Petrović** (Observer for Croatia) said that, while his delegation had been happy with the compromise wording adopted in the Working Group, it had understood that the issue would need to be discussed further in the Commission. A new compromise now needed to be reached so that the issue would not jeopardize the consensus on the draft guide as a whole. As in all areas of its work, the Commission should adopt a neutral approach and produce a text that would serve primarily to help developing countries. It was clear throughout the text that there were two different systems, each with its own pros and cons; the draft guide would not cause any State to change from one system to the other. His delegation therefore favoured the simplified wording proposed by the representative of Japan, which had the added benefit of incorporating a reference to business registration. Since recommendation 57 (b) currently contained no such reference, it might be taken to imply that MSMEs should consider using intermediaries in all their activities.

21. **Mr. Teehankee** (Philippines) said that many delegations, including his own, considered it important to mention the optional use of intermediaries. The current wording of paragraph (b) was in fact a watered-down version of a previous wording and had been agreed upon by the Working Group in the interests of neutrality. In his delegation's view, it did not carry negative implications about the use of intermediaries. However, in order to accommodate some of the concerns expressed by other delegations and bolster the neutrality of the recommendation, the current wording could be replaced with the following: "States should consider providing guidance on the optional use of intermediaries in cases that could contribute to increased efficiency of MSME registration procedures." In addition, the last sentence of paragraph 240 could be adjusted slightly to read: "There are States in which the involvement of a lawyer, notary or other intermediary, while encouraged, is not obligatory for the preparation of documents or conducting a business name search." A reference in parentheses to paragraphs 115 to 117 of the draft guide could also be added at the end of that sentence.

22. **Mr. Bellenger** (France) said that the recommendation reflected a consensus that had been achieved following lengthy discussion; its current wording should therefore be retained. The existence of two systems – the declaratory system and the approval system – was rightly recognized in the draft guide, yet paragraphs 116 and 117 conveyed a negative attitude towards the approval system by suggesting that it always required the involvement of intermediaries; that was not the case in France or in many other countries with approval systems. For that reason, the recommendation should indicate that, in all systems, including the approval system, the use of intermediaries was optional. That said, his delegation would be open to the inclusion of an additional comment or footnote to qualify the recommendation.

23. **Mr. Petrović** (Observer for Croatia) said that a combination of the existing text and the German-Spanish proposal might offer the best compromise, namely: "States which are developing or revising their business registry systems should consider providing for the optional use of intermediaries by MSMEs. In any event, States should ensure that their registration procedures for MSMEs are simple, fast, reliable, low cost and efficient." Such wording would emphasize that the Commission's primary concern was to help developing countries.

24. **The Chair** suggested that consultations be held on the various proposals that had been put forward.

The meeting was suspended at 4.30 p.m. and resumed at 5 p.m.

25. **Ms. Clift** (Secretariat) said that the following new wording was proposed for paragraph (b) of the recommendation, based on the proposal of the delegation of Israel: "In many States, MSMEs do not use intermediaries, in others the use is optional, while in yet others that use is mandatory. States should consider which practice is more appropriate in the light of the need to ensure that registration procedures for MSMEs are fast, efficient, reliable and low cost." It was further proposed that paragraph 240 remain unchanged, except for the addition at the end of the last sentence of a cross reference to paragraphs 115 to 117.

26. **Mr. Dennis** (United States of America) said that the proposed text was acceptable, barring the word "reliable", which should be deleted.

27. **Mr. Petrović** (Observer for Croatia) said that, rather than just "reliable", it would be appropriate to use the term "of good quality and reliable".

28. **Mr. Dennis** (United States of America) said that, on the contrary, that term was not appropriate in

the current context; its inclusion would make the recommendation unacceptable.

29. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that "good quality and reliable" was a term that was defined in paragraph 12 and used throughout the draft guide. One of the essential purposes of the draft guide was to ensure that services were not only fast and efficient but also of good quality and reliable.

30. **The Chair** said that what was really at issue in the recommendation was speed, efficiency and cost; good quality and reliability were addressed elsewhere in the draft guide.

31. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that elimination of the word "reliable" would change the substance of the recommendation. If the only considerations were cost and speed, MSMEs in States where the use of intermediaries was optional would not voluntarily use them when they could cite reasons of cost for not doing so. It was not acceptable thus to lower the requirements for registration procedures.

32. **Mr. Gorostegui** (Chile) agreed that it was important to keep the criterion of good quality in the recommendation.

33. **Ms. Gehmacher** (Austria) said that the word "reliable" should indeed be retained. States should have a choice among the different systems available, having regard to their respective advantages and disadvantages; speed, efficiency and cost were important considerations, but so also was reliability.

34. **Mr. Noack** (Germany) said that his delegation supported the comments made by the representatives of Spain and Austria; however, since the criterion of reliability could be considered to be covered by that of efficiency, it could be omitted from the recommendation, on the understanding that a cross reference to paragraphs 115 to 117 would be included in paragraph 240.

35. **Mr. Nemessányi** (Hungary) said that the word "reliable" should be retained.

36. **Ms. Sande** (Observer for Uruguay) said that it was important to retain a reference to the reliability of the registration system, whether the term "reliable" or a synonym was used.

37. **Mr. Petrović** (Observer for Croatia) said that, in earlier discussions of registration procedures, it had been unanimously held that they should be not only fast, low cost and efficient but also of good quality and reliable. If the criteria of good quality and reliability were not specified in the recommendation, the consensus on the draft guide as a whole might be jeopardized.

38. **Mr. Dennis** (United States of America) said that the inclusion of the term "good quality and reliable" in the recommendation would create confusion; where it was used elsewhere in the text, it referred not to the use or non-use of intermediaries but to broader issues, such as the prevention of corporate identity theft, the way in which information was collected and maintained in the registry, the frequency with which that information was updated, and the software that was used. If it could not be agreed to omit the term from paragraph (b), then the paragraph should simply be deleted.

39. **Mr. Soh** (Singapore) said that a possible compromise might be to leave States freedom of choice as to the characteristics of their registration procedures by replacing the second sentence of the text read out by the Chair with the following sentence: "States should consider which practice is more appropriate in the light of their policy objectives."

40. **Mr. Dennis** (United States of America) said that it would not be acceptable to refer to policy objectives unless it was clearly stated what those objectives were.

41. **Mr. Gómez-Riesco Tabernero de Paz** (Spain) said that the wording proposed by the representative of Singapore was an acceptable compromise, given that the policy objectives were mentioned throughout the draft legislative guide.

42. **The Chair** said that a possible alternative to the phrase "in the light of their policy objectives" would be the phrase "in the light of the policy objectives of the legislative guide".

43. **Ms. Simard** (Canada) said that another option would be to use words reflecting the title of document A/CN.9/941, so that the sentence would read: "States should consider which practice is more appropriate in the light of the need to ensure that the registration procedures create an enabling legal environment for the operation of MSMEs."

44. **Mr. Dennis** (United States of America) said that, while he welcomed the various proposals made, he wanted to see a standard consistent with those of the World Bank and the United Nations Conference on Trade and Development (UNCTAD), both of which recommended that the use of intermediaries be made optional. Should the Committee decide not to follow that approach, the only acceptable alternatives were to keep the paragraph as it stood, omit it entirely, or use the wording read out by the Secretariat, provided that no reference was made to good quality or reliability. A general reference to the policy objectives of the draft legislative guide would also not be acceptable, as it was not clear what those policy objectives were. If no acceptable solution was found, the United States would not be able to promote or use the draft guide in its international work and would instead recommend that States use the standards of the World Bank and UNCTAD.

45. **Mr. Petrović** (Observer for Croatia) said that the policy objectives of the draft guide were that procedures should be reliable and of good quality, as well as fast, efficient and low cost. There could be no cherry-picking among those objectives; furthermore, they did not conflict with the standards of the World Bank and UNCTAD.

46. **The Chair** said that, as there was no agreement on the wording of paragraph (b) of the recommendation, she took it that the Committee wished to delete it. She also took it that the Committee wished to add a cross-reference to paragraphs 115 to 117 at the end of paragraph 240.

47. *It was so decided.*

48. *The draft legislative guide on key principles of a business registry, as amended, was approved.*

49. **The Chair** said that the Committee of the Whole had concluded its work.

50. *Ms. Czerwenka (Germany) took the Chair.*

Draft decision on the adoption of the legislative guide on key principles of a business registry (A/CN.9/LI/CRP.4)

51. *The draft decision was adopted.*

(b) Finalization and adoption of a document entitled "Adopting an enabling legal environment for the operation of micro, small and medium-sized enterprises (MSMEs)" (A/CN.9/941)

52. **The Chair** suggested that the document entitled "Adopting an enabling legal environment for the operation of micro, small and medium-sized enterprises (MSMEs)", set out in the annex to document A/CN.9/941, be held in abeyance.

53. *It was so decided.*

(c) Progress report of Working Group I

54. **Ms. Montineri** (Secretariat) said that the Working Group had agreed that it would resume its deliberations on the draft legislative guide on an UNCITRAL limited liability organization at its thirty-first session, with a view to completing the first reading of the text.

Agenda item 2: Election of officers (*continued*)

55. **Mr. Ngendankengera** (Burundi), speaking on behalf of the African States, said that those States wished to nominate Mr. Mbabazize (Uganda) for the office of Vice-Chair of the Commission.

56. *Mr. Mbabazize (Uganda) was elected Vice-Chair by acclamation.*

The meeting rose at 6 p.m.

Summary record (partial) of the 1076th meeting*
held at Headquarters, New York, on Thursday, 28 June 2018, at 3 p.m.

[A/CN.9/SR.1076]

Chair: Ms. Czerwenka (Germany)

The meeting was called to order at 3.05 p.m.

The discussion covered in the summary record began at 3.10 p.m.

Agenda item 7: Investor-State dispute settlement reform: progress report of Working Group III (A/CN.9/930, A/CN.9/930/Rev.1, A/CN.9/930/Add.1/Rev.1 and A/CN.9/935)

1. **Mr. Spelliscy** (Canada), Chair of Working Group III, introducing the reports of the Working Group on the work of its thirty-fourth session (A/CN.9/930, A/CN.9/930/Rev.1 and A/CN.9/930/Add.1/Rev.1) and the work of its thirty-fifth session (A/CN.9/935), said that the Working Group had made good progress in discharging the three-part mandate entrusted to it by the Commission: first, to identify and consider concerns regarding investor-State dispute settlement; second, to consider whether reforms were desirable in the light of any identified concerns; and third, if it were concluded that reforms were desirable, to develop any relevant solutions to be recommended to the Commission. The Commission had also made it clear that the Working Group should carry out its mandate with a view to allowing each State the choice of whether and to what extent it wished to adopt any relevant solutions, if such solutions were developed.

2. At its thirty-fourth session, held in Vienna from 27 November to 1 December 2017, the Working Group had commenced work on the first part of its mandate on the basis of a note by the Secretariat (A/CN.9/WG.III/ WP.142). The Working Group had agreed to focus on treaty-based investor-State dispute settlement and to consider the possibility of extending the results of its work to contract- and investment law-based investor-State dispute settlement. It had generally agreed to first concentrate on identifying concerns regarding arbitration and to subsequently consider other types of investor-State dispute settlement mechanisms as part of a holistic approach to addressing those concerns. The Working Group had thus focused its discussions on concerns with respect to treaty-based investor-State arbitration proceedings, including duration and cost, allocation of costs, security of costs, third-party funding, early dismissal mechanisms and counterclaims. The Working Group had also begun to identify concerns with respect to the coherence and consistency of investor-State arbitration decisions.

3. At its thirty-fifth session, held in New York from 23 to 27 April 2018, the Working Group had continued to identify concerns with respect to the coherence and consistency of arbitral outcomes. It had also identified concerns regarding arbitrators or decision makers, including guarantees of independence and impartiality, the limited diversity of the pool of arbitrators, the absence of transparency in the appointment process, the practice of double-hatting, and third-party funding. International non-governmental organizations had highlighted concerns about the impacts of investor-State dispute settlement, including a possible regulatory chill on a range of issues, such as environmental protection, labour rights, transparency, democracy and the role of domestic courts.

4. Following those two sessions, a number of concerns had been identified for further consideration by the Working Group. In light of the phased nature of the mandate given to the Working Group, no conclusion had been made as to whether any reforms were desirable to address those concerns. The Working Group had recognized that the desirability of reform was to be addressed during the second phase of its work. It had agreed to continue its work at forthcoming sessions in line with the phased nature of its mandate and at a measured pace, allowing sufficient time for all States to express their views, but avoiding unnecessary delay. The Working Group had also recognized that States would continue to have the opportunity to identify additional concerns at future sessions.

5. In preparation for the forthcoming sessions, the Working Group had requested that the Secretariat prepare a list of the concerns raised at the previous two sessions of the Working Group; that a framework for future deliberations be developed and that the Secretariat consider what further information could be provided to States with respect to the scope of some of the concerns; and that States submit papers for the consideration of the Working Group in advance of the forthcoming sessions.

6. The Working Group had welcomed the proposal by the Government of the Republic of Korea to organize an intersessional regional meeting on

* No Summary record was prepared for the 1075th meeting.

investor-State dispute settlement reform with the objectives of raising awareness in the Asia-Pacific region of the work of the Working Group and providing input to the current discussions. It was the Working Group's understanding that the meeting would be open to all States members of the Commission, but that it was not a substitute for the Working Group; that no decisions would be taken at the meeting and everything discussed would be brought to the Working Group solely for its consideration; and that the meeting had been scheduled to take place in Incheon, Republic of Korea, on 10 and 11 September 2018.

7. **Ms. Joubin-Bret** (Secretary of the Commission) said that the Secretariat had been making efforts to help the Working Group in discharging the mandate entrusted to it by the Commission. In that connection, after the thirty-fourth session of the Working Group, with a view to raising awareness among countries and encouraging their participation, the Secretariat had carried out briefings in New York, including a briefing to the Group of 77 and China on the work of the Working Group, to encourage countries that normally did not take part in the Commission's deliberations to do so. It had also briefed francophone ambassadors in Vienna and Geneva in an effort to reach out to African countries that did not normally participate in the Commission's work.

8. The Secretariat had also begun to seek additional funding to support the participation of countries that did not have the means to send delegations to New York or Vienna. In that connection, it acknowledged with gratitude the contributions by the European Union and the Swiss Agency for Development and Cooperation to the trust fund for granting travel assistance to developing States members of the Commission.

9. With regard to the participation of non-governmental organizations in the work of the Commission, the Secretariat had made a number of efforts to help the Commission discharge the transparency element of its mandate by deciding to invite such organizations that did not usually participate in the Commission's work primarily because they did not focus on legal issues. In that connection, the sessions of Working Group III had been opened to a number of new non-governmental organizations in the fields of investment, free trade and public participation and transparency. The Secretariat would bring that decision to the Commission for its approval and would continue, if the Commission so wished, to open the policy discussions on possible investor-State dispute settlement reform to relevant non-governmental organizations.

10. She acknowledged with appreciation the offer of contributions from a global academic forum and the group of practitioners established after the thirty-fourth session of the Working Group to contribute research, studies and practical experience to help the Secretariat in its preparation of documents to be submitted to the Working Group.

11. Lastly, she acknowledged the participation of the United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific, which would be working closely with the Ministry of Justice of the Republic of Korea and the various government agencies involved in the organization of the intersessional regional meeting in September 2018. Participants from that meeting would also be able to attend the Commission's trade law forum for Asia and the Pacific, with would be held the day following the intersessional meeting.

12. **Mr. Marani** (Argentina) welcomed the progress made by the Working Group and the Secretariat and hoped that the Working Group would continue to produce work with practical relevance while upholding the spirit of consensus-building. He also welcomed the convening of the intersessional regional meeting to be hosted by the Republic of Korea, which would ensure broader participation in the Working Group's meetings. In that regard, he joined the Secretariat's call for the identification of funding to increase the participation of developing States in the Commission's work.

13. **Mr. Patrachai** (Thailand) said that his country fully supported the work of the Working Group and welcomed the progress made. During the second phase of the Working Group's work, the active participation of all stakeholders would be key to any meaningful reform. His delegation had submitted a paper to the Working Group (A/CN.9/WG.III/WP.147) highlighting its main concerns, including the need to address the particular challenges faced by developing countries in the context of investor-State dispute settlement. The work in the second phase must be holistic and balanced, and any solutions that might be recommended to the Commission as part of the third phase must flow from the discussion.

14. A number of reform options had already been proposed, including the development of soft-law instruments and appeal mechanisms and the establishment of a multilateral investment court. Any reform option should be formulated with the aim of striking a balance between the different concerns and priorities of all stakeholders. To justify the need for reform, the procedural aspects of investor-State dispute settlement could not be considered in isolation from other elements of the international investment regime, such as the promotion of responsible investment and dispute prevention policy.

15. **Mr. Apter** (Israel) said that his delegation had participated in the drafting of the mandate given to

Working Group III and was therefore pleased that the Working Group had carried out its work in the past year in accordance with that mandate, and that it had emphasized that States could choose whether or not to be part of any of its proposed solutions. It appeared that discussions had included the perspectives of States that had been involved in investor-State dispute settlement and those that had not, such as Israel. His delegation was pleased with the progress made and considered that the Working Group could probably soon move on to the next stages of its discussions: to discuss whether reform was needed and if so to determine what that reform would be.

16. His delegation welcomed the offer by the Republic of Korea to host the regional meeting and agreed with the Chair of the Working Group that any decisions should be made in the Working Group, not at regional meetings. He called upon States that wished to organize regional meetings to do so in a timely manner, at least a year in advance if possible, to allow States to plan their budgets accordingly. While trusting that regional meetings would feed into the discussions of the Working Group, not replace them, his delegation supported such meetings, as they would likely contribute to progress.

17. **Mr. Huang** Jie (China) said that the discussions of Working Group III on the relevant concerns had demonstrated the importance of reform, which would require the constructive participation and cooperation of all parties. The discussions should be based on facts with a view to solving problems. The views of all parties, including non-members and developing countries, should be sought to make the discussions more inclusive. His delegation took note of the offer of the Republic of Korea to host the regional meeting. The Working Group should carry out its work in a progressive manner and avoid rushing into any decisions or closing the door on further discussion prematurely.

18. **Mr. Moolan** (Mauritius), in response to the suggestion by the representative of Israel that the Working Group should soon move on to the next phase of its discussions, said that it was important for the Working Group to proceed at a measured pace, in order to give every State the opportunity to participate fully, and to ensure that no time was wasted. It was for the Working Group to keep the momentum between the three phases, and since it had agreed on how to proceed to that end, there was no need to reopen that discussion. The suggestion that the Working Group had to come back to the Commission to see what phase it had reached and to decide how to proceed was incorrect. The Working Group had the power to determine how to move through the various phases of its work, while reporting to the Commission.

19. In response to the comments made by the representative of Thailand, he recalled that the Working Group had limited its mandate to procedural rather than substantive issues. Many States within the Working Group had expressed concerns about substance, but that was beyond the scope of the mandate.

20. **Mr. Laghzaoui** (Morocco) said that his delegation was concerned about the lack of transparent and objective criteria for payments to investors, the lack of effective means of relief in the event of international arbitration, and the absence of clear criteria concerning the sovereignty of States. It was also concerned about mechanisms for not arbitrarily resorting to arbitration. It thanked the Republic of Korea for its proposal to organize the regional meeting.

Agenda item 8: Electronic commerce: progress report of Working Group IV (A/CN.9/936)

21. **Mr. Castellani** (Secretariat), accompanying his remarks with a digital slide presentation and introducing the report of Working Group IV on the work of its fifty-sixth session, held in New York from 16 to 29 April 2018 (A/CN.9/936), said that the Commission had asked the Working Group to update and conduct preliminary work on the legal aspects of identity management and trust services and on the contractual aspects of cloud computing. Because the two topics were different not only in content but also in nature, the Working Group had decided to replace its November 2017 session with expert group meetings on the two projects, which had allowed for significant progress to be made on both fronts.

22. At its fifty-sixth session, the Working Group had had before it two notes by the Secretariat, one on contractual aspects of cloud computing (A/CN.9/WG.IV/WP.148) and the other on legal issues related to identity management and trust services (A/CN.9/WG.IV/WP.149 and A/CN.9/WG.IV/WP.150).The Working Group had reviewed the document on cloud computing and had recommended that, although it was non-legislative, it should still be presented as a document of the Secretariat to the Commission at its fifty-second session, in 2019, after substantive and editorial revision. There was nothing unusual about that suggestion, since a 2007 document on cross-border recognition of electronic signatures prepared by the Secretariat had also been considered by the Commission and published as a document of the Secretariat.

23. With regard to publication, he recalled that the note on contractual aspects of cloud computing was aimed at users engaged in online activities. While all documents were already published on paper and in electronic form, it had been suggested that its content could be presented online in a more engaging manner, for example, as an interactive tool that would enable users to provide feedback. Questions had been raised in the Working Group about the resources needed and

the ability to maintain updated versions in all languages. Several delegations had acknowledged that preparing an online reference tool would constitute a significant departure from the existing policy on posting the Commission's texts on its website as reproductions of printed documents. Some delegations had expressed the need to consider the details of the tool as well as its budgetary and other implications. The Working Group had recommended that the Commission should consider whether that was a worthwhile endeavour and, if so, whether it would be appropriate to request the Secretariat to prepare a note setting out considerations relating to the preparation of the suggested online reference tool. In 2019, the Commission, if it so wished, would have before it paper and electronic versions of the note on contractual aspects of cloud computing and, if possible, a complementary online tool would be subsequently developed.

24. **Ms. Sabo** (Canada) said that publishing the note on cloud computing contracts as an interactive electronic document would enable the Commission to keep pace with the digital age, although publication in PDF or electronic version of the paper text should remain the norm for Commission documents in the short term. It would be helpful if the Secretariat prepared, for the Commission's review at its fifty-second session, a note setting out considerations relating to the preparation of the interactive document, including potential cost implications. If the proposed approach was successful, the Commission could use the interactive format for its other texts, including the Practice Guide to the UNCITRAL Model Law on Secured Transactions.

25. **Mr. Coffee** (United States of America) said that since the exact meaning of the term "online tool" was not clear, his delegation would support the recommendation that the Commission request the Secretariat to prepare a note clarifying the envisaged components and resource implications of the suggested online reference tool, and to determine whether the tool would allow for the provision of input from outside experts. Given its potential implications for other instruments, the document should be submitted to the Commission for consideration in 2019.

26. **Mr. Apter** (Israel) welcomed the constructive nature of the Working Group's deliberations on contractual aspects of cloud computing. In the current electronic age, his delegation felt that the document should obviously be published as an online reference tool as soon as possible, within existing resources, after which the Commission would decide whether to extend that approach to other texts.

27. **Mr. Maradiaga** (Honduras) said that, in the light of the growing trend of paper-free communications, the Secretariat should prepare the online reference tool for the Commission's consideration in 2019.

28. **Mr. Bellenger** (France) said that since the document to be prepared was a checklist, it was merely descriptive and had no normative implications. In that connection, he saw no reason why the Commission would have to wait another year before publishing it. The Commission should have faith in the Secretariat preparing the note in light of the discussions in the Working Group and should not have to take up the issue again in 2019.

29. **Ms. Joubin-Bret** (Secretary of the Commission) said that the Secretariat had been updating the Commission's website to ensure the availability, searchability and user-friendliness of its documents. If the Commission considered the proposed document to be ready for publication, the Secretariat could proceed directly with the development of a pilot version of the online reference tool for the Commission's consideration at its fifty-second session, without preparing an initial concept note.

30. **Ms. Cap** (Austria) said that the online tool would facilitate the practical use and enhance the relevance of the document. She therefore supported the Secretariat's suggestion to launch a pilot version of the tool without preparing an initial concept note.

31. **Mr. Soh** (Singapore) said that his delegation was in favour of increasing the means of dissemination of the Commission's work and revamping its website in order to meet the demands of the digital age. While a full concept note was not necessary, it would be helpful for the Secretariat to address concerns relating to, inter alia, the availability of the online tool in all official languages; the resource implications of the tool; the use of the online format for other documents produced by the Commission; and the criteria that would be used to distinguish between documents published as online tools and those published in traditional formats.

32. **The Chair** said it was her understanding that there was unanimous consent that the document should be published online. The question that remained was whether it should be published directly online as a pilot project for consideration by the Commission without a concept note or whether such a note should first be prepared before the document could be published online.

33. **Mr. Coffee** (United States of America) said that while everyone agreed with the benefits of modern technology, the discussion about an online tool had so far been purely theoretical, with little agreement on the composition of such a tool. His delegation had only expressed support for the preparation of a concept note in response to the Working Group's recommendation and because the Secretariat's initial description of the scope of the online tool had been

rather vague. He agreed with the Secretariat's suggestion to proceed directly with the development of a pilot document for the Commission's consideration at its fifty-second session.

34. **Ms. Sabo** (Canada) said that, in order to strike a balance between the need for efficiency and the need for clear parameters for the online tool, the Secretariat could develop a basic interactive demonstration tool, together with an explanatory note, for the Commission's consideration. However, her delegation had concerns about presenting the online tool in a manner that would enable users to comment on its content.

35. **The Chair** said she took it that the Commission wished to recommend that the Secretariat publish, for the Commission's consideration at its fifty-second session, a basic interactive document, together with an explanatory note.

36. *It was so decided.*

37. **Mr. Castellani** (Secretariat), introducing the note of the Secretariat on the legal issues related to identity management and trust services (A/CN.9/WG.IV/WP.149 and A/CN.9/WG.IV/WP.150), said that identity management was a matter of fundamental importance for the conduct of commercial and non-commercial electronic transactions. The aim of the Working Group had been to identify the priorities and basis for future work in that area, drawing inspiration from such sources as national and regional legislation and other relevant projects that were being implemented in complex legal and regulatory environments, although they might not necessarily include specific legislation on identity management. The topic of trust services, in particular electronic signatures, had already been addressed in a number of texts produced by the Commission, while the topic of identity management remained relatively unexplored.

38. At its fifty-sixth session, the Working Group had focused its discussions on the search for a mechanism to facilitate cross-border recognition of identity management schemes, which required establishing a common understanding of the difference between identity management schemes and trust services. Although those discussions were still at a preliminary stage, reference had been made to the possibility of mapping identity management schemes and trust services against technologically neutral and outcome-oriented descriptions of levels of assurance as a means of establishing functional equivalencies between various identity schemes and trust services. Various issues, including the relevance of certification mechanisms, had been emphasized in that regard.

39. The Working Group had recommended that the Commission request it to conduct work on legal issues relating to identity management and trust services, on the basis of the principles and issues that it had identified at its fifty-sixth session, with a view to preparing a text to facilitate cross-border recognition of identity management and trust services. Such work would focus primarily on, but could not be restricted to, cross-border issues, as many of those issues necessarily had implications for processes at the domestic level. Without prejudice to the Commission's decision regarding the form of the outcome of its work on the topic, some delegations were already building on the groundwork done by the Working Group to present a more detailed draft text, including draft provisions, for the Working Group's consideration at its fifty-seventh session.

40. **Mr. Field** (American Bar Association) said that his delegation was in favour of requesting the Working Group to conduct the work in question, having long recognized the ways in which legal obstacles to the use of identity management schemes and trust services hindered global commerce.

41. The main topics for further discussion identified by the Working Group in chapter V, section C of its report (A/CN.9/936) were the same as those that had been presented in the form of a one-page road map which the Working Group had used as the basis of its work at its fifty-sixth session. Should the Working Group be authorized to work on the basis of that road map at its next session, he trusted that the topics listed were simply recommendations and that the Working Group would be accorded the usual flexibility to adjust them as necessary. It was his delegation's understanding that the topics were listed for discussion and that no decision had been made with regard to levels of assurance or any other topic. He wondered about the decision to place question marks next to some of the bullet points in the road map document, even though all the matters listed should be open for discussion. He hoped that the issue would be clarified with the removal of the question marks next to those points or with the inclusion of a note at the top of the document stating clearly that all the points were open for discussion.

42. Lastly, considering that the Working Group usually considered issues in the order in which they appeared on lists like the one contained in both the road map document and the report of the Working Group (A/CN.9/936), he recommended that, should the Commission approve the work going forward, the topic of legal recognition should be taken up only after the other more fundamental and building-block topics on the list had been addressed.

43. **The Chair** said that it was her understanding that the Working Group would be granted the flexibility to adjust the topics identified for discussion as it saw fit.

44. **Mr. Castellani** (Secretariat) said that the road map was an informal document that had been distributed in the early stages of the Working Group's deliberations. The document before the Commission was the report of the Working Group and the numbering of the items had no impact on the order in which they were considered. Unless the Commission expressed a strong opinion otherwise, the Working Group normally had some flexibility to determine the order in which the items were discussed. The open-ended list was provided simply as a way of highlighting a number of legal issues that fell clearly within the Commission's mandate and were intended to serve as guidelines for the Working Group's future discussions. While delegations would need to take those topics into consideration in formulating proposals for the Working Group's consideration, the Group would have the freedom to expand the list or combine the discussion of certain topics, as well as to determine the order of consideration of the topics. The form of the outcome of the work on legal issues relating to identity management and trust services would be decided by the Commission on the basis of the progress made and taking into account the Working Group's recommendations.

45. **Mr. Bellenger** (France) agreed that the topics enumerated in the report of the Working Group should serve as the basis for future work on legal issues relating to identity management and trust services and that the Working Group should move forward expeditiously, having already spent a considerable amount of time on identifying the topics for discussion. Delegations should work swiftly in consultation with the Secretariat to ensure the timely submission of draft provisions for the Working Group's consideration at its fifty-seventh session.

46. **Mr. Coffee** (United States of America) said that his delegation was prepared to support the Working Group's recommendation to the Commission regarding further work on identity management and trust services, with a view to preparing a text to facilitate cross-border recognition of identity management and trust services, on the basis of the principles identified by the Working Group. He understood those principles to be technological neutrality, party autonomy, non-discrimination against the use of electronic means and functional equivalence. The main topics for further discussion identified in the road map document were excellent issues. However, like the representative of the American Bar Association, he believed that the discussions of the Working Group should not be limited to those topics. While the road map was a useful document, it had been put together quickly and it should serve as the basis for discussions only.

47. **Ms. Dickson** (United Kingdom) said that the international interoperability of identity management systems was a key driver of the expansion of digital economies and sustainable growth. Her delegation supported, therefore, the Working Group's recommendation. International interoperability, mutual recognition and an outcome-based approach were key. Any text should be aligned with existing internationally recognized standards.

48. **Mr. Apter** (Israel) said that his delegation agreed that the Working Group had spent a considerable amount of time identifying topics for further discussion, and therefore supported the Working Group's recommendation. The Secretariat should prepare a draft text to serve as the basis for discussions, although that should not preclude the addition of topics. It was not up to the Commission to decide in which order the Working Group should address the various topics suggested for discussion. The Working Group should finalize its work on identity management and trust services as quickly as possible so that it could take up other issues.

49. **Ms. Cap** (Austria) said that while identity management was a highly complex issue, it was worth addressing in order to facilitate the establishment of a global system and remove barriers to global commerce. Her delegation supported the Working Group's recommendation. The Working Group should be given a broad mandate and discretion to decide the order in which the topics should be discussed.

50. **Mr. Coffee** (United States of America) said that he understood that some delegations would like the Commission to urge the Working Group to complete its work swiftly. However, such a request might imply that it was acceptable to be anything other than swift.

51. **The Chair** said she took it that the Commission supported the Working Group's recommendation as set out in the report of the Working Group.

52. *It was so decided.*

The meeting was suspended at 4.40 p.m. and resumed at 5 p.m.

Agenda item 9: Security interests: progress report of Working Group VI (A/CN.9/932 and A/CN.9/938)

53. **Ms. Clift** (Secretariat), accompanying her remarks with a digital slide presentation and introducing the reports of Working Group VI on the work of its thirty-second session (A/CN.9/932) and the work of its thirty-third session (A/CN.9/938), said that following the finalization of the Guide to Enactment of the UNCITRAL Model Law on Secured Transactions in 2017, the Commission had mandated the Working Group to prepare a draft practice guide to the Model Law and given it the flexibility to determine the scope, structure and content of the practice guide. The Secretariat had prepared an initial draft which the Working Group had considered at its

thirty-third session. The Working Group had completed the first reading of the draft practice guide and had requested the Secretariat to prepare a revised version for consideration at its next session.

54. The practice guide was expected to provide practical guidance to users of secured transactions in States that had enacted the Model Law, by explaining the key features and benefits of the Model Law, describing the types of secured transactions that were possible under the Model Law, and providing step-by-step explanations of how to engage in the most common and commercially important transactions. While the practice guide built on the Model Law, it neither changed nor supplemented the provisions of the Model Law.

55. The last chapter of the draft practice guide examined the interaction between the Model Law and prudential regulatory frameworks, and as such was addressed specifically to financial institutions that were subject to prudential regulation and supervision. The Secretariat had been requested to work closely with the Basel Committee on Banking Supervision; accordingly, the Secretariat had invited the Basel Committee to attend the forthcoming session of the Working Group.

56. The Working Group would likely be in a position to submit the draft practice guide for adoption by the Commission at its fifty-second session in 2019. It was envisaged that an online tool could also be developed in the future for the practice guide.

57. **Ms. Sabo** (Canada) said that her delegation had participated actively in the deliberations and was satisfied with the progress made to date on the draft practice guide. The Working Group had indeed discussed the possibility of developing an interactive online interface. At a basic level, that could consist of hyperlinks to the relevant provisions of the Model Law and other key texts. In light of the task assigned to the Secretariat concerning cloud computing, she wondered whether the Commission could consider requesting the Working Group to examine in more detail the composition of such an interface. If the Commission developed general parameters for interactive documents as a whole, it could share that information with the Working Group.

58. **Mr. Meier** (Switzerland) said that the practice guide should be as user-friendly as possible and not overly theoretical or legalistic. It should contain model clauses and sample forms and templates, as those were what users found most useful. He recalled that, at its thirty-third session, the Working Group had requested the Secretariat to prepare additional samples, resources permitting, for consideration by the Working Group at its forthcoming session.

59. **Mr. Coffee** (United States of America) asked the Secretariat and the representative of Canada to clarify how they envisaged the interactive online interface. He wondered whether the representative of Canada was suggesting that the Working Group should consider what sorts of texts could be hyperlinked for the sake of interactivity, or whether it was proposing something broader. More clarity was needed, particularly as the Commission had yet to see what the cloud computing online reference tool would look like.

60. **The Chair** said that the cloud computing online reference tool was a pilot project being managed by the Secretariat, whereas the proposal to develop an interactive online interface on the practice guide would be discussed by the Working Group. It would be up to the Working Group, therefore, to decide what the interactive online interface should look like.

61. **Ms. Sabo** (Canada) said that the proposed examination of the interactive online interface by the Working Group was intended to be a brief, conceptual discussion of what aspects of the draft practice guide might benefit from technological support, such as the inclusion of hyperlinks to key texts. The aim was merely to provide more information that would help the Commission to make its texts more user-friendly.

62. **Mr. Coffee** (United States of America) said that it could be useful for the Commission in 2019 to have the benefit of the pilot of the cloud computing online reference tool, along with the Working Group's recommendations on the interactive online interface, which would help the Commission to review how it presented its texts online.

63. **Mr. Castellani** (Secretariat) said that the Commission was eager to explore the possibilities for improving the dissemination of relevant information to users. The cloud computing online reference tool, which dealt with a topic that the Commission had not addressed before, was structurally different from the proposed interactive online interface for the practice guide. The practice guide contained numerous references to other Commission texts, but the draft text on the contractual aspects of cloud computing did not. The guidance document on international commercial contracts referenced both Commission texts and external documents. The Commission might therefore wish to consider inviting the various working groups and member States and other participants to share suggestions, feedback, expertise and lessons learned, with a view to developing innovative solutions for presenting Commission texts in a user-friendly manner.

64. **The Chair** said she took it that the Commission wished to take note of the reports and invite the Working Group to discuss the issue of interactivity and what the interactive online interface might look like.

65. *It was so decided.*

The meeting rose at 5.25 p.m.

Summary record of the 1077th meeting
held at Headquarters, New York, on Friday, 29 June 2018, at 10 a.m.

[A/CN.9/SR.1077]

Chair: Ms. Czerwenka (Germany)

The meeting was called to order at 10.20 a.m.

Agenda item 10: Work programme of the Commission (A/CN.9/952, A/CN.9/952/Corr.1)

1. **Ms. Clift** (Secretariat), drawing the Commission's attention to the note by the Secretariat on the work programme of the Commission (A/CN.9/952), said that table 1, on current legislative activity of the Commission, incorrectly indicated that the work of Working Group I on the introductory chapter on the work on micro, small and medium-sized enterprises had been completed. That work was ongoing but would be held in abeyance pending the completion of further work on the topic. Working Group I had completed its draft legislative guide on key principles of a business registry, while its work on the draft model law on a simplified business entity was ongoing. Working Group II had completed its work programme for the current session. The work of Working Group III in the area of investor-State dispute settlement reform was ongoing. With regard to Working Group IV, the work on cloud computing was likely to be completed in 2019, while the topic of identity management would remain on its work programme beyond that date.

2. As concerned the matters covered by Working Group V, the Commission would likely adopt a draft model law on cross-border recognition and enforcement of insolvency-related judgments and its guide to enactment as its current session, while the work on enterprise groups and the obligations of directors of group members in the period approaching insolvency was expected to be completed in 2019. Substantive work on the insolvency of micro, small and medium-sized enterprises had only recently begun. The practice guide to the UNCITRAL Model Law on Secured Transactions, which was being handled by Working Group VI, was likely to be completed in 2019. The updating of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, which was not currently assigned to a working group, would be considered at the current session but would most likely not be completed until 2019.

3. Turning to table 2, on possible future legislative activity, she said that there was a new proposal for Working Group I on contractual networks for micro, small and medium-sized enterprises. A number of new proposals on dispute settlement had been submitted for possible consideration by Working Group II. Work on a code of ethics and concurrent proceedings in the area of international dispute settlement, which had been assigned to Working Group III, had not yet commenced. Working Group IV had not undertaken any preparatory work on mobile commerce, but there was ongoing cooperation with other organizations on the topic of single windows and paperless trade facilitation. A new proposal, concerning smart contracts and artificial intelligence, had been submitted by Czechia at the current session, and was contained in document A/CN.9/960. The four topics for potential work by Working Group VI remained on the work programme for further discussion at a future session, as previously decided. At its thirty-third session, the Working Group had received a proposal to prepare a substantive text on warehouse receipts, contained in the report of the Working Group on its work of that session (A/CN.9/938). Two additional topics had been proposed for consideration by the Commission: judicial sale of ships, and civil law aspects of asset tracing and recovery.

4. **Mr. von Ziegler** (Switzerland), introducing his Government's proposal for the Commission to take up work on cross-border issues related to the judicial sale of ships, as contained in document A/CN.9/944/Rev.1, said that the proposal had been endorsed by Malta. He recalled that, at its fiftieth session, the Commission had agreed that it was well placed to consider that important issue, which many delegations had supported. In response to the Commission's request for additional information on the issue, the Comité Maritime International, with the assistance of the Maltese Government and the Malta Maritime Law Association, had held a high-level technical colloquium on the topic in February 2018.

5. The colloquium had been attended by some 200 representatives of Governments, judiciaries, banks and the shipping industry, who had almost all agreed that the lack of harmonized rules concerning the judicial sale of ships created unnecessary problems that had ramifications for trade beyond the shipping industry. Most ship-financing banks represented at the colloquium had confirmed that the lack of recognition of judicial sales increased their risks and therefore the cost of ship financing. Moreover, the lack of legal certainty resulted in decreased revenues for all parties involved in judicial sales, meaning that assets were being destroyed for no good reason. Ship owners not directly involved in

judicial sales were also affected, as the lower proceeds from judicial sales were included in global sales statistics, thereby lowering the average value of vessels.

6. Furthermore, attempts by creditors of previous owners of vessels purchased in judicial sales to arrest those vessels caused disruptions to international trade. Support for a clear and harmonized legal environment had been expressed by representatives of creditors, flag States, registrars, judiciaries, bunker suppliers and other service providers, harbour authorities and labour unions. Most of the participants had agreed that the problem would be relatively simple to overcome, and many had supported his delegation's view that the Commission was the organization best placed to find a solution to the issue. The work would aim to resolve a cross-border issue concerning the recognition of judicial decisions at the international level in order to safeguard the security interests of financiers and prevent the disruption of international commerce.

7. It therefore fell within the mandate of the Commission and, moreover, concerned areas addressed by most of the Working Groups. His delegation was convinced that it would be possible to free the working group resources necessary to tackle the issue. The fact that the proposal was being made by Switzerland, which though a flag State was a landlocked country known primarily for its commercial trading and banking industries, was an indication of the importance and far-reaching nature of the problem. The Government of Switzerland accordingly requested the Commission to give favourable consideration to the proposal.

8. **Mr. Hetherington** (Comité Maritime International) said that the Comité Maritime International fully endorsed the proposal by Switzerland. The lack of harmonized rules on the judicial sale of ships created a number of problems. Difficulties could arise for companies in any State if they purchased a vessel overseas through a court-ordered sale and the flag State refused to transfer the ship from its registers. Vessels were sometimes sold without notice being given to a mortgagee in another jurisdiction, which could create problems for that mortgagee. Furthermore, the owner of a ship purchased through a judicial sale could face having the ship arrested by the creditors of the original owner, even though the court-ordered sale had been predicated on providing the buyer with a clean title to the ship and the removal of all prior encumbrances. While such situations were not daily events, they had occurred frequently in recent years and invariably played out to the detriment of creditors, crew, international trade and comity among courts and States.

9. There were striking similarities between the activities of the Comité Maritime Internationale in the area of judicial sale of ships and the work of Working Group V on the draft Model Law on Recognition and Enforcement of Insolvency-related Judgments. The draft Model Law, as set out in the annex to the report of Working Group V on the work of its fifty-third session (A/CN.9/937), contained a number of provisions that would be relevant to the topic, including those concerning greater certainty in regard to rights and remedies, timely and cost-effective recognition and enforcement of judgments, promotion of comity and cooperation between jurisdictions, and protection and maximization of the value of assets. The draft Model Law and the work of the Comité Internationale Maritime both sought to preserve the integrity of national judicial systems for the benefit of international trade.

10. **Ms. Fenech** (Comité Maritime International), after reading out a statement from the Baltic and International Maritime Council reiterating the Council's support for the proposal for the Commission to take up work on cross-border issues relating to the judicial sale of ships, which it had already submitted to the Commission in writing, said that in her career as a marine litigation lawyer, she had come across many cases involving the issues described by the previous speakers. As a recent example, in January 2018, a Greek buyer had purchased a ship through a judicial sale in Jamaica. The vessel had been reflagged to Liberia, under a new name. In June 2018, the ship had been arrested when it had stopped to pick up bunkers in Malta while transporting cargo under a time charter from the Russian Federation to the Bolivarian Republic of Venezuela. The ship had been arrested at the request of a former creditor, with whom the new owner had no relationship. The new owner had not been responsible for the debt, but his ship had been placed under arrest and the time charter had been stopped, which had affected his income. Furthermore, the arresting party had not accepted an offer from the insurers of the ship to put up a security, forcing the shipowner to borrow 1 million euros in cash from a bank, at a cost, in order for the ship to be able to leave the Maltese port. The consequences would have been even more severe if the shipowner had not had access to that substantial sum. Given the serious problems that could result from non-recognition of judicial sales in other jurisdictions, she was confident that greater legal certainty would be welcomed by most of those involved in maritime trading operations.

11. **Ms. Malaguti** (Italy), introducing her Government's proposal for possible future work on alternative forms of organization to corporate-like models, as contained in document A/CN.9/954 and endorsed by Croatia, said that in the document her Government had addressed questions and requests for clarification that it had received from delegations in response to the initial proposal that it had presented at the fiftieth session of the Commission.

12. During the discussions within Working Group I on an UNCITRAL limited liability organization, it had become clear that the establishment of a legal entity could be excessively costly for micro and small enterprises. Her Government's proposal drew inspiration from existing models that aimed to facilitate cooperation among micro, small and medium-sized enterprises, in particular the Italian contractual network regime. Contractual networks allowed enterprises to cooperate without necessarily forming a joint legal entity. The Italian model also offered the possibility of segregation of assets, and consequently limited liability. Contractual networks were normally used as a means of sharing resources, including intellectual property and workers. Networks could jointly provide services to other companies, or form part of a supply chain as a group of producers. Furthermore, a bank or financial institution could provide financing to the network, rather than to the individual enterprises participating in it. Contractual networks thus had the potential to reduce costs while enhancing flexibility and efficiency. They could also serve as a means of internationalization or cross-border cooperation for micro, small and medium-sized enterprises. It was worth noting that organizations such as the United Nations Industrial Development Organization were already implementing projects to build links between micro, small and medium-sized enterprises in industry clusters, but without the legal certainty that could be provided by contractual networks.

13. The development of a new instrument might be challenging, as it would involve the consideration of alternative forms of cooperation and the resolution of legal issues concerning matters such as intellectual property and the segregation of business assets. However, it had the potential to be very useful for micro, small and medium-sized enterprises and would complement the ongoing work of Working Group I on the UNCITRAL limited liability organization.

14. **Ms. Cordero Moss** (Observer for Norway), introducing the proposal by Italy, Norway and Spain in support of future work in the area of international commercial arbitration, as contained in document A/CN.9/959, said that the aim of the proposal was to enable Working Group II to return to the topic of commercial arbitration after completing its work on instruments for the enforcement of international commercial settlement agreements resulting from mediation. The overregulation of commercial arbitration, the increasingly time-consuming nature of arbitral proceedings and the growing cost and volume of documents had led to multiple initiatives aimed at making arbitration more efficient. There was a concurrent push to enhance the credibility and quality of arbitration, with courts taking a more aggressive approach to control of commercial awards and recognizing the arbitrability of disputes. The proposal should provide a basis for striking a balance between efficiency and quality, a need that should inform future work on arbitration, including the definition of subtopics.

15. At the Working Group's February 2018 meeting, expedited arbitration had received the most support. She therefore proposed that the Working Group begin with that topic, which exemplified the attempt to balance quality and efficiency. The Working Group could propose modifications to the UNCITRAL Arbitration Rules to make expedited arbitration an option. It could work on model clauses that would provide for the possibility of combining expedited arbitration with other forms of arbitration. It could also produce a guide to arbitral institutions that administered expedited arbitration. To conclude, the balance between quality and efficiency was of great practical importance for international commercial arbitration. As such, the Commission would do well to devote its resources and competence to promoting that balance, which fit into its mission of facilitating international trade.

16. **Mr. Ivanco** (Czechia), introducing his Government's proposal as contained in document A/CN.9/960, said that his Government requested the Secretariat to monitor legal developments in the area of smart contracts and artificial intelligence, given the need for a better understanding of the field and its potential, and called for cooperation with other international organizations. The Commission was the ideal forum in which to address those issues.

17. **Mr. Schnabel** (United States of America), introducing his Government's proposal for the development of model legislative provisions on civil asset tracing and recovery, as contained in document A/CN.9/WG.V/WP.154, said that the Commission's work on that topic could be useful and relevant to insolvency and commercial fraud, among other areas. In the context of insolvency, the ability to trace and recover assets that had been moved across borders could be vital for enabling insolvency representatives to obtain the maximum possible recovery for creditors. The Commission had previously worked on commercial fraud, which the Secretariat had identified as a serious international problem that caused direct losses of billions of dollars per year.

18. Many jurisdictions currently lacked adequate legal tools to enable insolvency representatives, victims of commercial fraud and others to trace and recover assets that had been moved through those jurisdictions. During its discussions on the proposal, the Working Group had heard examples such as one where over $1 billion in assets had had to be traced through fourteen countries over five years before they could be recovered. The Commission could develop a "toolbox" approach to the topic by providing a set of legislative provisions from which jurisdictions

could choose, drawing upon the tools that certain jurisdictions already had in place.

19. Based on discussions in the Working Group, he wished to make a number of clarifications. First, the project would need to be explicitly limited to developing civil tools for asset tracing and recovery, excluding any attempt to address criminal law issues. However, organizations such as the United Nations Office on Drugs and Crime should be requested to participate in order to ensure that the tools developed were neither problematic nor redundant from a criminal law standpoint, but a helpful complement to criminal law tools.

20. Second, any tools developed by Working Group V should not overlap, interfere with, undermine or be inconsistent with any instruments adopted by the Hague Conference on Private International Law. To that end, the active participation of the permanent bureau of the Hague Conference should be requested.

21. Third, although his delegation had proposed the topic in Working Group V because its expertise was pertinent, the tools developed needed not be limited to insolvency-related matters and could also be useful in addressing commercial fraud and other areas within the Commission's mandate. That said, a more thorough discussion of the area would be a necessary first step to determine the scope of their utility.

22. Fourth, his delegation was not proposing the development of a cross-border mechanism by which a court in one State would seek to provide relief in another State, but rather a suite of model options that States could choose to use internally.

23. Fifth, his delegation was proposing the development of a toolbox, not a unified model law. The Commission could develop a suite of options for States with civil law or common law systems to use, as appropriate.

24. In line with the view expressed by the Working Group at a recent session, his delegation requested that the Secretariat provide the Working Group with a paper exploring the issues more fully. The paper would enable the Working Group to discuss those issues in greater detail and make a proposal to the Commission, which could then decide on the substance of the Working Group's mandate.

25. His delegation also supported the recommendation of Working Group VI to authorize work on harmonizing and modernizing the legal framework for warehouse receipts. At the fourth UNCITRAL International Colloquium on Secured Transactions held in 2017, experts had recommended developing a modern general framework for the issuance, transfer and cancellation of warehouse receipts. Subsequently, Working Group VI had recommended to the Commission that it be mandated to undertake work on preparing a substantive text on warehouse receipts. In a proposal endorsed by his Government, Working Group VI had pointed out that a legal instrument on warehouse receipts would allow many businesses to benefit from a predictable and modern legal framework that facilitated sales of warehouse receipts and increased access to credit by promoting the use of those receipts as collateral for loans.

26. A modern warehouse receipt regime was important to the business of agriculture and in promoting global food security. Moreover, with the development of supply and value chains that relied on the adequate storage of commodities, the international trade aspect of a legal regime on warehouse receipts had become increasingly important. The Commission's development of legislative frameworks for negotiable documents in other contexts provided a neutral basis for it to engage in developing a legal framework for warehouse receipts. Any new Commission text on warehouse receipts could build on other texts, such as the UNCITRAL Model Law on Secured Transactions. His delegation endorsed the Working Group's recommendation that work be undertaken in cooperation with international and regional organizations involved in similar efforts.

27. **Ms. Joubin-Bret** (Secretary of the Commission) said that Working Group II had agreed that the Secretariat would complete the mediation framework by preparing notes on the organization of mediation proceedings and updating the UNCITRAL Conciliation Rules to bring them into line with the text of the draft Convention on International Settlement Agreements Resulting from Mediation just approved by the Commission. It had been agreed that such work should be carried out by the Secretariat rather than by the Working Group.

28. Turning to the proposal by Czechia, she said that developments in the digital economy were very relevant to the Commission's work. A broader assessment of those developments and their impact on international trade and, in particular, international trade law would help to ensure that the Commission's activities enabled all economic actors to become actively involved in the digital economy and bridged the widening digital gap for countries lacking the legal frameworks needed to participate efficiently in electronic and digital trade. The Commission might therefore wish to undertake a broader analysis of the areas affected by the explosion in new technology and its impact on trade and trading methods. The commercial aspect of transactions involving data, the quintessential twenty-first century commodity, was crucial. The Commission's approach to the topic might extend beyond the work of Working Group IV and Working Group VI and include work with other institutions, particularly the International Institute for the Unification of Private Law (UNIDROIT), which

had an interest in doing relevant preparatory work. Lastly, the Commission might wish to bear in mind the limited human and financial resources of the Secretariat and its limited capacity to take on new projects.

29. **Mr. Schnabel** (United States of America) said that at the February 2018 session of Working Group II, the United States and Switzerland had presented a joint proposal regarding future work on expedited dispute resolution issues. Its first element was the development of model rules or similar tools to facilitate the use of expedited arbitration procedures. Its second element was the development of model legislative provisions or contractual clauses to facilitate the use of adjudication in the context of long-term projects, in particular, construction projects. The Working Group had expressed a desire to begin work on expedited arbitration procedures, the top priority for its future work, and to seek further information regarding possible work on adjudication, taking into account other proposals to expand future discussions to other topics related to commercial arbitration.

30. His delegation supported the approach recommended by the Working Group in that regard and believed that the Commission should do likewise. The Working Group had acknowledged that expedited arbitration procedures had been the focus of many arbitral institutions in recent years, partly as a response to concerns about rising costs and lengthier timelines, making arbitration more burdensome and too similar to litigation. Given the importance of the UNCITRAL Arbitration Rules, the Working Group should develop useful guidance on the topic, assisting users either by modifying those rules or by incorporating them into contracts via arbitration clauses that provided for expedited procedures. Moreover, exploration of other topics related to commercial arbitration could be useful. The benefit of gathering additional information about the utility of work on adjudication was a crucial element of his Government's joint proposal with Switzerland. However, the Commission could further expand the mandate of Working Group II at a later date instead of granting it an overly broad and vague mandate at the current session. Consistent with the Working Group's discussion, his delegation supported authorizing the Secretariat to work with experts on proposing updates to the conciliation rules as discussed and developing proposed draft notes on mediation proceedings.

31. **Mr. Möller** (Observer for Finland) said that his delegation fully endorsed the proposal by Italy, Norway and Spain and suggested that expedited arbitration could be the first topic, as the widespread support it had received from delegations indicated that it was a top priority. Working Group II could continue to deal with commercial arbitration, as investment disputes were the purview of Working Group III. The Secretariat's limited resources meant that not every subject could be taken up. However, the Secretariat could work on mediation, in consultation with other actors, as the Working Group's resources were also limited.

32. **Mr. Meier** (Switzerland) said that he wished to clarify certain components of his Government's joint proposal with the United States on expedited arbitration. The option of adjudication could be useful, as it made it possible to address the higher risk of legal and factual errors inherent in an expedited arbitration procedure, as the adjudicator handed down a prompt decision that was applicable immediately. The expedited procedure would make prompt dispute resolution possible while also allowing parties subsequently to request a standard arbitration procedure if necessary. Expedited arbitration could thus improve and accelerate arbitration procedures; it should therefore remain on the agenda.

33. **The Chair** requested delegations to use their interventions to endorse particular proposals, given that neither the Secretariat nor the Commission had unlimited working resources to pursue all proposals before the Commission and that priorities must be defined.

34. **Mr. Marani** (Argentina) agreed that there was a need to establish priorities, particularly given the Commission's limited resources. His delegation endorsed the proposal on possible future work on cross-border issues related to the judicial sale of ships, recognizing the need for an instrument that filled the gaps left by existing conventions in that area.

35. **Mr. Warner** (International Insolvency Institute) said that digital architecture was developing so rapidly that it might be beneficial to organize a colloquium to identify the issues that could be addressed effectively by the various working groups. By its very nature, digital architecture was also an area that was not limited geographically, hence required an international solution. Lastly, the Commission, along with other groups like UNIDROIT, could help to shape best practices as legal structures were developed to adapt to digital architecture. The process would be akin to the Commission's work on the Model Law on Cross-Border Insolvency, whose structure had helped drive the development of general law in that area; similarly helpful projects could be undertaken on digital architecture.

36. **Mr. Trojan** (National Law Center for Inter-American Free Trade) said that the Center supported the possible future work on warehouse receipts, owing to its related work in Mexico, Ghana, China and Ukraine. It supported that initiative for four main

reasons. Firstly, warehouse receipts had an impact on agriculture and financing for agriculture, which were key to many developing economies. Agricultural products were exported and constituted part of the supply chain, thus generating receivables. Such products were stored not only in modern, public warehouses, but also in less formal, village warehouses. Secondly, though many warehouse receipts reform projects were under way, they were not coordinated and were hence sub-optimized. There was no model law on warehouse receipts, such that relevant laws were inadequate and frameworks unharmonized. In addition, laws on warehouse receipts were not properly aligned with laws on secured transactions. Thirdly, warehouse receipts were now being issued electronically and traded on electronic platforms. Traditional laws that were used as models for reform might not provide sufficient guidance. In fact, even the Commission's Model Law on Secured Transactions provided specific third-party effectiveness rules only on security rights in paper-based warehouse receipts. Fourthly, holding electronic warehouse receipts in distributed ledger technology applications raised new issues that might need to be addressed strategically.

37. **Ms. Carpus Carcea** (Observer for the European Union) said that on the issue of asset tracing and recovery as it related to insolvency in the context of Working Group V, her delegation was sensitive to the request that had been made by the Secretariat to give due regard to the fact that resources were limited. The European Union believed that the Commission should pursue only broadly supported topics. In that connection, it could consider alternatives to the proposal that had been made by the representative of the United States of America. At previous sessions of Working Group V, there had been an agreement that work should be carried out on certain topics listed in a certain order. A top priority on that list had been the topic of applicable law provisions, which could add value to the Model Law on Cross-Border Insolvency. At the forty-seventh session of the Commission, a convention on cross-border insolvency had been retained as a possible topic for work, and the applicable law could be one of the issues considered for the future convention. The Commission had nearly 20 years of experience in harmonized rules regarding the applicable law in insolvency cases, which could serve as a starting point for the Working Group’s work.

38. Her delegation welcomed the clarification provided by the United States in respect of its proposal. If work on that proposal received the support of a majority of States, it should be limited to an exploratory study to be carried out by the Secretariat. A decision concerning the scope of any future instrument should be taken by the Commission on the basis of the results of said study. The instrument should not be in the form of a model law having extraterritorial effect, but in the form of a "toolbox", for example. The study, even in the exploratory phase, should be limited to insolvency scenarios, and asset tracing and recovery could be treated from the perspective of the powers of insolvency representatives in insolvency cases. The study should not, in any way, cover criminal law, property law, privacy or data protection, and the Commission should ensure that there would be no overlap with the work carried out in other international forums.

39. Her delegation would like to understand why cases of commercial fraud were not currently being pursued efficiently in the context of the Stolen Asset Recovery Initiative of the World Bank and the United Nations Office on Drugs and Crime. Those types of problems appeared to be handled appropriately by other forums and did not need to be referred to Working Group V.

40. With regard to the judicial sale of ships, her delegation understood that the delegation of Malta had withdrawn its sponsorship of the Swiss proposal. More attention should be given to the data that justified such work. If the data, and the time to study it were available, then her delegation could consider supporting a soft-law instrument on the topic.

41. **The Chair** said that delegations were encouraged to discuss which of the existing proposals should be given high priority. The Commission should not go into too much detail during the current meeting, since the proposal papers had already been distributed among the membership. Furthermore, the papers emanating from the high-level technical colloquium held earlier in the year provided ample information about the judicial sale of ships.

42. **Mr. Scott-Kemmis** (Australia) said that his delegation supported the Swiss proposal regarding the judicial sale of ships. It was important to ensure uniformity in procedures for the judicial sale of ships and to ensure that the purchaser of a ship from a judicial sale by a competent court received a clean title to the ship, free of mortgages, liens and other legal encumbrances. Certainty and integrity in judicial sales by domestic courts would thus be ensured. The cross-border nature of the issue required international cooperation and the Commission was the appropriate forum to conduct work related to it; therefore, the issue should be included in the future programme of work of the Commission. With regard to the issue of data and information raised by the representative of the European Union, he said that compelling examples demonstrating the importance of the topic could be found in the outcome document of the high-level technical colloquium on the topic organized by Switzerland and Malta and held in February 2018 and in the presentations by both countries at the current meeting.

43. **Ms. Echeverri** (Colombia) said that one of the most important pillars of international trade was certainty, as was clarity in the judicial sale of ships. Therefore, it was appropriate for the Commission to take up the issue, and her delegation supported the proposal to develop an international instrument on the topic.

44. **Mr. Villamizar** (Colombia) said that his delegation supported the proposal by the delegation of Italy in connection with contractual networks. Colombia had also submitted, for the consideration of Working Group I, a proposal on model provisions on the dissolution and liquidation of micro, small and medium-sized enterprises, contained in the report of the Working Group on the work of its twenty-eighth session (A/CN.9/900). The Commission could consider such provisions as part of its work on limited-liability organizations. As that proposal had not yet been taken up, his delegation hoped that it would be considered in the future work of Working Group I.

45. **Mr. Soh** (Singapore) said that rather than attempt to declare which issues were more important than others, his delegation took the approach that all topics were at various stages of development. In that connection, for topics that were still at an early stage, it would be up to the Secretariat to determine whether it had the necessary resources to proceed. If it was confident that it had the resources, there was no reason why the Commission could not authorize it, for example, to organize proceedings on conciliation and look further into the issues affecting the digital economy. His delegation was of the view that work on proposals that were ready for implementation, such as the proposal regarding the judicial sale of ships, should commence immediately. In light of the information available, there was a very compelling case for reform on the topic at an international level. It was unclear how a soft law could solve the problem; an international instrument was required. It was extremely important to address the issue with certainty, given the role that ships played in facilitating trade around the world.

46. **Mr. Apter** (Israel) said that it was important for States to take clear positions on priority issues and allocate issues to specific working groups, to provide appropriate direction for the work of the Secretariat. It was difficult for his delegation to see which working group could take on the Swiss proposal on the judicial sale of ships. There should therefore be no future work on that issue. From a substantive perspective, having consulted with colleagues responsible for shipping law, his delegation had been made to understand that the International Maritime Organization had some regulations on the judicial sale of ships. Israeli law also contained regulations concerning the judicial sale of ships, and an international regulation or convention would create obstacles for Israeli creditors with respect to ship owners. Nevertheless, if the decision was taken to pursue future work, then his delegation believed, like the European Union, that it should be in the form of soft law. Even in that case, he expected that participation would be relatively limited. Indeed, the Commission should endeavour to address broader issues that spanned across industries rather than industry-specific matters.

47. Israel would not stand in the way of a consensus but believed that the delegations that supported the proposal should say which working group they preferred to take on the issue and whether such work should commence in 2018. It seemed clear that in that case, the workload of other working groups might need to be reallocated, unless a new working group were to be created, an act that his delegation would not support. He would be happy to hear from other delegations about which working group should take on the issue of the judicial sale of ships. The proposal by Czechia, though not allocated to a working group, was important and would require resources from the Secretariat.

48. The most concrete of all the proposals was that made by Italy, Norway and Spain for Working Group II. Israel supported most of the elements of that proposal but felt that the issue of expedited arbitration should be tackled first. It was his delegation's understanding that the International Chamber of Commerce and the World Intellectual Property Organization had developed rules concerning expedited arbitration, and it was time for the Commission to follow suit. That high priority topic could then be followed by rules for arbitral institutions. At the current time, no work should be done on emergency arbitration. His delegation understood that it might be taken up in the future, and was willing to hear more about that prospect, but it would be a very controversial topic. Similarly, his delegation would welcome more information about the issues presented by Switzerland and the United States on adjudication, but did not see the topic as a matter of priority.

49. With regard to Working Group V, there appeared to be an emerging consensus on requesting the Secretariat to prepare a document on the proposal that had been made by the United States on the development of model legislative provisions on civil asset tracing and recovery. It was important that any work on that issue not have implications for its criminal regulation, and that it be in line with current private international law instruments, such as the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. When preparing any document on the issue, the Secretariat should also consider the obstacles that domestic authorities might face when requested to provide private information. Lastly, his delegation supported the proposal

concerning Working Group VI on warehouse receipts.

50. **The Chair** said that speakers should refrain from saying which working group should take on which topics, as such decisions could be handled later. She requested that delegations wishing to make interventions look at the proposals themselves and state what the future work of the Commission should be.

51. **Mr. Huang** Jie (China) said that the work undertaken by the Comité Maritime International and the Government of Malta on the judicial sale of ships had already produced some results and served as a good foundation for further study. Difficulties and challenges relating to the judicial sale of ships had already caused harm to various interested parties in international shipping and hindered the development of the industry, while also having a substantive impact on international trade. Therefore, it was a high-priority topic to be addressed. Soft law would not be a viable solution, but an international convention could address the problem. It could set out the relevant conditions and procedures, guarantee international recognition of the legal validity of the sale of ships by domestic courts and safeguard the interests of stakeholders. The topic should be added to the agenda of the Commission as soon as possible.

52. **Mr. Bellenger** (France) said that the Secretariat should be commended for organizing a general debate which would give Commission members an overview of the work of the working groups and to determine the priorities for the working groups, as opposed to the past practice of allowing the Working Groups to determine their own priorities and how to proceed. As for his delegation’s priorities, Working Group II should once again take up its work on commercial arbitration, particularly on mediation. His delegation also supported the proposal by Italy, Norway and Spain concerning expedited arbitration. On the topic of insolvency, priority should be given to applicable law provisions, and his delegation supported the comments made by the representative of the European Union on that issue, including the suggestion to seek alternative solutions.

53. With regard to work on the topic of micro, small and medium-sized enterprises, the question of contractual networks should be addressed, possibly jointly with the question of individual entrepreneurs, as had been suggested by the representative of Italy.

54. **Mr. Boulet** (Observer for Belgium) said that the efficiency and quality of arbitral proceedings was a high priority, a position that had been expressed in his Government's proposal in support of future work in the area of international commercial arbitration, contained in document A/CN.9/961. As the delegation of the United States had pointed out, it was not good enough merely to discuss general topics. Specific subtopics needed to be addressed in order to inform and define a clear mandate for the working groups. In the future, it would be important to set out not only one topic, but a series of work plans under the general topic. Several delegations, including his own, had supported expedited arbitration in the interest of improving efficiency in arbitration.

55. One of the purposes of his Government's proposal was to highlight the principles considered to be decisive for good administration of arbitral proceedings, such as the independence and impartiality of arbitrators. In that connection, it was important to bear in mind that the proposal of Italy, Norway and Spain contained in document A/CN.9/959 concerned commercial arbitration and not investment arbitration, which dealt with specific issues that were, or would be, addressed by Working Group III.

56. Arbitration should be preserved as an alternative dispute settlement mechanism. His delegation was concerned that legitimate concerns raised in the context of investment arbitration could ultimately have repercussions on the status of commercial arbitration. The Commission had a unique status as the only global forum for discussing the topic of arbitration, and it should offer appropriate responses to such concerns. In that context, it was important for Working Group II to address the topic of the independence and impartiality of arbitrators after dealing with the issue of expedited arbitration. Though the topic had been addressed in the past, the response had been inadequate, and it was possible for Working Group II to achieve more progress on it in the future.

57. **Mr. Umasankar** (India) said that the topic of judicial sale of ships was an important one for his country and something which the Commission should consider as a priority. The Commission needed to engage in a constructive discussion to consider an international instrument that would address the range of obstacles that faced purchasers in the judicial sale of ships.

58. **Ms. Sabo** (Canada) said that the Commission was fortunate to have been presented with so many proposals. Since most of the working groups would remain occupied by the topics already on their agenda for the remainder of the year, the objective of the current discussion was to help the Secretariat prepare for work to be undertaken the following year. The Commission had held similar discussions to establish priorities in the past and would need to do so every year, taking into account the Secretariat’s limited resources.

59. There was no clear need for the Commission to work on the topic of contractual networks, although her delegation would support it if a sufficient number of members were interested in doing so. It would be

preferable for Working Group I to focus on completing its work on the project currently on its agenda. Of the overlapping proposals for future work for Working Group II, priority should be given to the topic of expedited arbitration, in the context of commercial arbitration, which was in line with the Commission's mandate. Should the Secretariat have the resources, it should move forward with the suggested work to complete the package of mediation instruments.

60. Recalling that Working Group IV had engaged in many interesting discussions over the years on topics without identifying any legal problems in need of solution, she said that a colloquium on the legal aspects of smart contracts and artificial intelligence would only be useful if the legal issues were identified in advance. For example, although the topic of mobile payments was interesting, there were no legal issues associated with it that required the Commission's attention. Instead, discussion could focus on secure transactions, digital technologies and registries, and security rights in relation to smart contracts. In that connection, the Commission had an opportunity to cooperate with UNIDROIT in the area of intermediated securities and security interests. The Working Group should stay away from questions pertaining to data flow and privacy, which members had previously agreed were not fruitful topics for the Commission's work.

61. Although her Government would support work on the topic of civil aspects of asset tracing and recovery, it was not certain that such work should be confined to insolvency law. She noted that Working Group V was busy with the many topics already allocated to it by the Commission and would not be able to begin work on the topic in 2018. Provided that Working Group VI completed its work on the practice guide to enactment of the UNCITRAL Model Law on Secured Transactions at its next session, it could begin preliminary work on the topic of warehouse receipts at its subsequent session. An international legal standard on warehouse receipts would benefit many States. With regard to the topic of judicial sale of ships, she requested the Secretariat to only work on it if it had the resources to do so after working on the other priorities identified by the Commission.

62. **Mr. Meier** (Switzerland) said that the proposal by Italy on contractual networks addressed a very important area that would benefit from greater legal certainty and should be taken up by Working Group I. He agreed that Working Group II should take up the topic of expedited arbitration. Meanwhile, the proposal by Italy, Norway and Spain contradicted the usual methodology of Working Group II, which generally looked for a solution to a specific problem and allowed for flexibility on other matters. The stated goal in the proposal to improve the efficiency and quality of arbitral proceedings was overly broad. He requested that Working Group II prepare a more specific proposal on that topic for the Commission's session the following year. With regard to the future work of Working Group IV, he requested that the Secretariat limit its work to the proposal by Czechia to monitor developments relating to the legal aspects of smart contracting and artificial intelligence.

63. His delegation was opposed to including the topic of civil asset tracing and recovery in the future work of Working Group V. Other international bodies, such as The Hague Conference on Private International Law, were better equipped to address that issue, which was already covered by the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and other instruments. Rather than take up the proposal, which raised issues not limited to insolvency law, the Commission could assist the Hague Conference in its consideration of the topic. He agreed that the next priority for the future work of Working Group V should be choice of law or applicable law provisions relating to insolvency. In response to the criticism of the topic of judicial sale of ships as being too narrow, he recalled that 85 per cent of world trade was conducted by ship.

64. **Mr. Coffee** (United States of America) said that his delegation accorded high priority to the topic of expedited arbitral procedures and suggested that Working Group II prepare a proposal for future work on the efficiency of arbitral proceedings for the Commission's session the following year. His delegation also considered its own proposal on civil asset tracing and recovery in the context of insolvency a priority, to be taken up within the limitations proposed by the European Union and Israel, although he recognized that despite its limited resources, the Secretariat would need to prepare a note before the topic could be discussed. If there was no support for including the topic in the future work of Working Group V, his delegation would support the proposal that the Commission could instead assist the Hague Conference in its work on the topic. His delegation was not prepared to take a decision regarding the modification of the mandate of Working Group V, however. Turning to the topic of warehouse receipts, which was another priority topic for his delegation, he requested that the Secretariat update the rules on mediation based on the instruments that had been finalized earlier in the week.

65. His delegation considered the topic of the judicial sale of ships to be of medium priority. Although the proposal had been helpful in identifying the main issues involved, more discussion was needed to determine what type of legal instrument might be appropriate to address them. In the meantime, his delegation was not authorized to support a convention on the topic. Speaking with regard to the proposal by Czechia, he noted that it

placed the bulk of the burden not on a working group but on the Secretariat and progress would depend on the availability of the Secretariat's resources. A colloquium on the topic should be held, provided that discussions of the topic remained focused.

66. His delegation was opposed to the proposal on the topic of contractual networks, as it remained unclear what the authors of the proposal sought to achieve and whether it was relevant in the case of countries where no such arrangements existed. He therefore suggested that Working Group I discuss the topic further and present a proposal to the Commission the following year.

67. **Mr. Teehankee** (Philippines) said that he was curious to know whether the Commission's working groups had ad hoc status or whether they were standing groups.

68. **The Chair** said that the Commission's six working groups were not responsible for any specific topics; they took up new topics once they completed work on topics allocated to them at any given time.

69. **Mr. Teehankee** (Philippines) said he took it from the Chair's answer that it was unclear whether the Commission had ad hoc or standing working groups, despite its more than 50-year history. Although the Commission appeared to be attached to the idea of having six working groups, having fewer working groups was preferable and the success of a working group could be measured by its ability to adjourn permanently. Specifically, Working Group I could adjourn permanently once it concluded its work on micro, small and medium-sized enterprises, the draft registry guide and the introductory chapter on the work on micro, small and medium-sized enterprises. His delegation therefore opposed all proposals for future work of Working Group I.

70. With regard to the various proposals for the future work of Working Group II, he hoped that they could be limited or referred to the Secretariat for further study. He agreed that the Working Group should take up the topic of expedited arbitration. A more specific proposal was needed to clarify what the Working Group wished to accomplish with regard to ensuring the effectiveness of arbitration. Working Group III should remain focused on its very important ongoing work on investor-State dispute settlement reform.

71. With regard to the proposal by Czechia for Working Group IV, he noted that the topic of smart contracts and artificial intelligence was included in the chart displayed on the screen in the meeting room but was absent from the paper version of document A/CN.9/952. He hoped that the proposal on the judicial sale of ships could be taken up by Working Group VI, although some clarification was needed regarding the form that the Commission's output on the topic might take. His delegation did not support the proposals on the topic of warehouse receipts or the topic of asset tracing and recovery, which required further study by the Secretariat before they could be included in the Commission's work programme.

72. **Mr. Apter** (Israel) said that although the proposal by Italy regarding contractual networks had potential, it appeared to concern an issue that was unique to Italy and a handful of other States. It would be helpful if an expert seminar could be organized to examine the proposal's relevance to the broader membership before the topic was included in the future work of Working Group I.

73. **Mr. Tirado Martí** (Observer for the International Institute for the Unification of Private Law (UNIDROIT)) said that the proposal by the Comité Maritime International merited careful consideration. Turning to the proposal by Czechia, he affirmed the readiness of UNIDROIT to assist the Commission in its work on the topic, while noting that the proposal placed much of the burden on the shoulders of the Secretariat at a time when its resources were very limited. A colloquium would indeed be helpful, provided that it focused on topics clearly identified and prepared in advance.

74. **Mr. Gómez-Riesco Tabarnero de Paz** (Spain) said that his Government supported the Commission's work on the topic of expedited arbitration as set out in the proposal by the United States and Switzerland. That proposal was compatible with the proposal by Spain, Italy and Norway, which included expedited arbitration at the top of a list of topics related to arbitration practice that should be taken up by Working Group II. He agreed that Working Group V should work on the model law on the recognition and enforcement of insolvency-related judgments. Noting his Government's interest in the proposal by Italy on contractual networks, he welcomed the suggestion that a colloquium should be held, or a more detailed analysis should be conducted, to study the topic further.

75. **Ms. Cap** (Austria) said that further study of the topic of contractual networks and its various implications was needed before it was included in the future work of Working Group I. The proposal by Italy, Norway and Spain regarding the future work of Working Group II had been favourably received by stakeholders in the arbitral community in Austria. She agreed with the reasons given in the proposal for the advisability of Working Group II returning to the topic of commercial arbitration. She also supported the proposal by Belgium that the Commission work on a code of ethics and conduct for commercial arbitrators, particularly in relation to the issues of arbitrator independence and impartiality. Working Group IV was still busy with the challenging topics of identity management and trust services, which

would take more time to be discussed in detail. Working Group V should complete the other topics on its agenda before taking up work in other areas.

76. Echoing the views expressed by the representatives of the European Union and France, she agreed that Working Group V should examine choice of law issues relating to insolvency and shared their concerns regarding the proposal on civil asset tracing and recovery. Her Government would support the development of a soft-law instrument by the Commission on the topic of judicial sale of ships. Turning to the proposal on smart contracts and artificial intelligence, she noted that it was a cross-cutting issue and suggested that the topic should be analysed to determine which issues were relevant to the work of the Commission and could be addressed by a legal instrument.

77. **Mr. Mbabazize** (Uganda) said that Working Group I should take up the topic of contractual networks; that Working Group II should study the topic of expedited arbitration to address the rising costs and lengthening timelines associated with commercial arbitration; and that Working Group V should consider the topic of civil asset tracing and recovery, which would help to bring about reform in that area. He supported the proposal that Working Group VI should work on the topic of warehouse receipts, since improved electronic warehouse receipt systems would greatly help developing economies.

78. **Mr. Ivanco** (Czechia) said he agreed with other speakers that a colloquium on smart contracts and artificial intelligence would provide an opportunity to identify specific issues related to his country's proposal on the topic, some of which had already been highlighted in the report of Working Group VI and discussed at a colloquium held in Brno, Czechia, particularly issues related to electronic transferrable records. With regard to the future work of Working Group II, he suggested that it continue its work on topics related to commercial arbitration.

79. **Ms. Dickson** (United Kingdom) said that Working Group V should continue its work on the topic of civil asset tracing and recovery and agreed that sensible restrictions on the scope of the work were needed. She supported the proposal that Working Group VI take up the topic of warehouse receipts, as that work would facilitate reform and harmonization and bring economic benefits in that field.

80. **Ms. Matias** (Jerusalem Arbitration Council) said that the digital economy played a vital role in the economies of many countries and that developed and developing countries alike were struggling to develop legislative norms in that area, with few professionals available to assist them in that task. Her organization therefore strongly supported the proposal by Czechia and found the proposal for a study and a colloquium on the topic an excellent idea. She also suggested that a new working group be established to consider issues related to artificial intelligence.

The meeting rose at 1.05 p.m.

Summary record (partial) of the 1078th meeting held at Headquarters, New York, on Friday, 29 June 2018, at 3 p.m.

[A/CN.9/SR.1078]

Chair: Ms. Czerwenka (Germany)

The meeting was called to order at 3.10 p.m.

Agenda item 10: Work programme of the Commission (*continued*) (A/CN.9/952 and A/CN.9/952/Corr.1)

1. **The Chair**, summing up the priorities for the work programme that had emerged from the discussion at the previous meeting, said that there were two topics that had garnered considerable support and should be at the top of the Commission's list of priorities: judicial sale of ships and expedited arbitration. Another topic that had received considerable support and could be placed in a middle category, in that all States did not think it should be a high priority, was that of warehouse receipts. Contractual networks, asset tracing and the digital economy were other topics that had received some support and could be placed in the bottom category. As she understood it, the Secretariat still needed to so some preparatory work on judicial sale of ships and expedited arbitration, and that those topics could easily be referred to working groups. Since Working Group II was already dealing with arbitration and conciliation, it could take on the topic of expedited arbitration, and the topic of judicial sale of ships would be allocated to the working group that had completed the work on its agenda and was ready to take on a new topic. The other topics would be allocated to working groups after the Secretariat had been able to do some fairly extensive preparatory work on them.

2. **Ms. Joubin-Bret** (Secretary of the Commission) said the Commission had had a fruitful, in-depth debate which had provided excellent guidance to the Secretariat on the topics to be considered and how they were to be approached. The Secretariat would accordingly be preparing notes on organizing mediation proceedings and working on updating the UNCITRAL Conciliation Rules. There was a need for exploratory work in the form of a colloquium or expert conference on issues of the digital economy. According to the guidance given by Canada and other delegations, topics that were not for the Commission to consider, such as privacy and consumer protection, should be clearly identified. The Commission had also indicated that the Secretariat was to draw up working papers on expedited arbitration for Working Group II, but those papers would certainly not be ready for the Working Group's sixty-ninth session, to be held in September 2018.

3. The guidance received from the Commission was that the topic of judicial sale of ships, having gone through the preparatory phase of a colloquium, would be assigned to a working group as soon as possible. As far as future work was concerned, some of the relevant proposals needed further exploratory work in the form of working papers, for example, to be prepared by the Secretariat. Lastly, the Secretariat had been reminded that there were resources and partners available for joining forces in exploring issues relating to the digital economy. The objective was to focus on topics that were rapidly emerging in that economic area and on the legal issues that arose or were already covered by existing instruments on electronic commerce, with a view to bridging the digital gap and ensuring that as many countries as possible could set up the necessary legal framework for addressing the challenges of the digital economy. The Secretariat pledged to do its utmost on all those fronts within the resources that were currently available.

4. **Ms. Malaguti** (Italy) said that as she understood it, two colloquiums or expert meetings were envisaged. Her delegation would do everything possible, in close cooperation with the delegation of Czechia, to facilitate the expert meeting or colloquium on the digital economy, including by developing an agenda that was as specific as possible. She wondered whether in return Working Group I could devote some time during the expert meeting or colloquium to the issue of contractual networks, which was closely related to the work being done on the draft legislative guide on an UNCITRAL limited liability organization.

5. **Ms. Clift** (Secretariat) said that a procedure that had worked quite well in Working Group V had been to set aside two days for a colloquium, to which experts had been invited; a report on the outcome of the colloquium had been issued, after which the Working Group had met to take a decision on the outcome of the colloquium.

6. **Ms. Malaguti** (Italy) said that such a procedure would undoubtedly be appropriate for the discussions on contractual networks.

7. **Ms. Sabo** (Canada) said her delegation could agree to the idea of holding a mini-colloquium on

contractual networks within the time allocated for meetings of Working Group I. However, if the work was to advance, the colloquium must address existing mechanisms in both civil law and common law systems that could achieve similar objectives, and the focus must be narrowed to produce a tool that was useful. She asked whether the Secretariat could begin preparatory work on the topic of warehouse receipts so that it could start working on it fully once Working Group VI completed its work on the draft practice guide to the UNCITRAL Model Law on Secured Transactions.

8. **The Chair** said that since the topic of judicial sale of ships was a priority, whichever working group finished first with its current efforts would be assigned to work on that topic. Further study by the Secretariat was necessary before any working group could take up the topic of warehouse receipts.

9. **Ms. Joubin-Bret** (Secretary of the Commission) said the problem was basically one of timing: it would be necessary to see how work advanced, especially in Working Groups V and VI, before any arrangements could be made for discussing the topic of warehouse receipts. All the topics were not at present equally ripe for discussion. For example, after the colloquium held in February 2018 in Malta, advanced material was already available to start work on the judicial sale of ships as soon as working group time became available, whereas preparatory work would still have to be done on warehouse receipts.

10. **Ms. Sabo** (Canada) said that there was a question of efficiency in addition to those of priority and timing. Perhaps the delegation that had made the proposal on warehouse receipts might be able to advance the work sufficiently so that when a working group was ready, the topic could be taken up right away.

11. **The Chair** said that if priorities were not established, no progress could be made. As she had said in her summing up, the Commission had agreed that judicial sale of ships and expedited arbitration were the priority topics that should be dealt with as soon as possible in one of the working groups.

12. **Mr. Apter** (Israel) said that he agreed with the representative of Canada that there was a need for clarification on whether the topic of judicial sale of ships should be taken up automatically by any working group that finished its work, or whether the Commission should further discuss its allocation. At its next session, the Commission must take a decision on whether any working group that had not completed its work on an issue but wished to put it aside to deal with judicial sale of ships could do so. He would also be interested to hear whether any preparatory work or expert meetings were to take place on the topic of expedited arbitration. Lastly, in the working paper to be prepared on asset tracing, the Secretariat must explore options beyond that of insolvency.

13. **Mr. Coffee** (United States of America) said that he, too, sought further clarification on the plans for future work. As he understood it, the Commission was being asked to decide whether work on judicial sale of ships should be allocated to the next available working group, and whether work on expedited arbitration should be allocated to Working Group II for consideration at its seventieth session. It had been suggested that for the remaining topics that had received some support, the Secretariat would prepare working papers. He would like to know whether those documents would be submitted to one of the working groups for consideration, or to the Commission in 2019 for a final decision.

14. **The Chair** said that her understanding of the allocation of topics to the working groups was as the representative of the United States had described it: Working Group II should deal with expedited arbitration, and the next available working group should take up judicial sale of ships. The working papers on the other topics would be submitted to the Commission for a decision in 2019.

15. **Mr. Marani** (Argentina) endorsed the Chair's summing up of the outcome of the discussion at the previous meeting. It was not in the Commission's interest to micromanage the discussion of the topics, but it was important to have a clear understanding of the priorities. The topic of judicial sale of ships had clearly been of great interest to most members of the Commission and awaiting a decision on which working group should commence discussion on it would not be productive. As the Chair had indicated, the Secretariat could begin drafting working papers on the topics not designated as priorities so that work on them could also go forward.

16. **Ms. Joubin-Bret** (Secretary of the Commission) said that the various projects were at different levels of advancement. Working Group VI would most likely complete its work on the draft practice guide to the UNCITRAL Model Law on Secured Transactions by its thirty-fifth session, to be held in May 2019. The objective was to turn the practice guide into an online tool, but that would depend on the Commission's approval of the pilot project on cloud computing, and thus would not be feasible before the Commission's 2019 session. Once that work was completed, Working Group VI could then take up the topic of judicial sale of ships. That would not preclude, however, the convening of an expert meeting on warehouse receipts with the help of the United States, the main proponent of work on that topic, so that as soon as the work on judicial sale of ships was completed, the topic of warehouse receipts could be taken up. That was how the Secretariat envisaged the future work programme,

and she hoped to hear from the Commission whether it agreed with that course of action.

17. **Ms. Sabo** (Canada) said that the interrelations between the Commission's priorities, the availability of working groups and the state of preparation of work on the various topics were important for her delegation to understand for its own planning purposes. She wished to know whether it was the Secretariat's intention to have work on the judicial sale of ships begin in the Working Group's May 2019 or November 2019 session. If the Commission's priority topics were indeed judicial sale of ships, expedited arbitration and warehouse receipts, it would appear logical to have the topic of warehouse receipts allocated to the next working group that became free and to even rename it as a working group on secured transactions, or something to that effect.

18. **Ms. Joubin-Bret** (Secretary of the Commission) said that her understanding was that the Commission was to decide on what the priorities were rather than to have each working group develop its own priorities. In that spirit, at the previous meeting, the Chair had attempted to identify what the priority issues were. The next step was to see which working group could start to address them. It appeared most likely that Working Group VI would be the next working group that became available and it could take on the issue of warehouse receipts under a new name, if necessary. However, it was impossible to say for certain exactly at what point its work on the draft practice guide would end. In addition, it was her view that working groups should not be identified with any specific titles, such that topics could be assigned to any working group that became available at any point in time. The same applied to Secretariat staff, who should be discouraged from operating in silos; they should be versatile enough that they could be assigned to work on any topic, regardless of their level of expertise on that topic.

19. **Mr. Maradiaga** (Honduras) said he fully endorsed those comments by the Secretary. The Secretariat must be given the opportunity to move forward with its analysis, on the basis of the Commission's discussion. If the topic of judicial sale of ships best corresponded to Working Group VI, then the Secretariat should be free to start working along those lines. The main thing was that the topic should be taken up in good time.

20. **Mr. Apter** (Israel) said that he had no objection to the suggestion by the Secretariat but, like the representative of Canada, he considered it extremely important to know as soon as possible, and preferably a year in advance, what exactly would be happening in May 2019, so as to decide whether to participate in the work of the working group dealing with the judicial sale of ships.

21. **Mr. Coffee** (United States of America) said that there was no reason why the Commission should not have six projects being carried out by six different working groups. In her summing up, the Chair had said that the topic of warehouse receipts was in a middle category, having received some support but not considered a priority. His delegation was concerned that it might be treated like the other three topics in the bottom category, and hence there might be no progress on it. Given that it was in the middle category and hence had a heightened status compared to the topics in the bottom category, his delegation would prefer it to be slated for consideration by a working group immediately after expedited arbitration and judicial sale of ships had been taken up. The remaining topics could be addressed in notes or working papers by the Secretariat. However, his delegation's strong preference was for the notes or working papers to be provided first to a working group or expert group for a short discussion before they were presented to the plenary Commission.

22. **Ms. Joubin-Bret** (Secretary of the Commission) said it was clear to the Secretariat that the length of the Commission's sessions should be shortened to two weeks instead of three. The session should be divided as follows: one week for the approval of texts prepared by the working groups and a second week for matters relating to the Commission's functioning, its cooperation with other institutions and other topics that were part of its mandate. However, in order not to lose a week of conference servicing time, the Commission should devote a third week, not to its own meetings but to expert discussions or colloquiums like the one suggested on the digital economy. Such discussions helped the Commission to keep abreast of issues and the latest developments. They could also be a good opportunity to present for discussion the notes or papers that the Secretariat was preparing without using valuable working group time, which needed to be preserved for work on topics that were well advanced.

23. **Mr. Mbabazize** (Uganda) said that the Secretariat should be given sufficient time to carry out the research that was to be presented to the Commission in the priority areas, namely judicial sale of ships and expedited arbitration; the Secretariat was best placed to determine which working groups should handle those topics.

24. **Mr. Tirado Martí** (Observer for the International Institute for the Unification of Private Law (UNIDROIT)) said that as he understood it, Working Group VI had been mandated to prepare a practice guide for consideration at its thirty-fourth session, to be held in November 2018, if possible, and if not, then by its thirty-fifth session, to be held in May 2019. If the Working Group finished its work on the guide in November 2018, then it would be free

from then on. It would seem to make sense, therefore, to keep the Working Group together for a few more months to work on the topic of warehouse receipts, instead of dismantling a group of people who would have developed synergies among themselves, only to reassemble it a year or two later.

25. **The Chair**, speaking from her personal perspective as an official of her country's Ministry of Justice, said that one could assume that the States represented in an international organization like the Commission were able to provide experts in a wide range of areas who could move on to one topic after working on another. Flexibility was possible within the Commission's mandate and she was sure that synergies would be found in all the groups of experts that might be convened. Notwithstanding the fact that the experts enjoyed meeting in the working groups, the main objective should be efficiency in coverage of topics in order to achieve a final outcome as soon as possible. The procedure must therefore be to identify a topic and then to deploy the experts to deal with it, not to simply keep the same working groups going indefinitely.

26. **Mr. Boulet** (Observer for Belgium) said he endorsed what the Chair had just said as well as the approach outlined by the Secretary. It was important to recall that the working groups took up conference servicing time set aside for the Commission, which itself was mandated by the General Assembly to address issues relating to international trade law. The objective must be to find the best way of addressing those issues, which must then inform the efforts of the working groups, not the reverse.

27. **Mr. Marani** (Argentina) said he endorsed the ideas just put forward by the representative of Belgium. A working group was not a group of experts but rather a platform in which a group of experts could meet for a specific period of time to discuss a topic and then produce an outcome that could subsequently be considered by the Commission. The approach to be followed was therefore clear: one of the six working groups had to take up the topic of judicial sale of ships, and the Secretariat must be trusted to find the most appropriate group for that purpose. It would be unfortunate if the Commission met in a year's time only to see that none of the groups had taken up the item. The predictability which some States were requesting flowed from the fact that the Commission had already decided that the topic of judicial sale of ships was its priority. When it would be tackled, and by what group, would be decided by the Secretariat as soon as possible. However, delegations could already report back to their capitals that a decision needed to be taken on whether or not to take part in the debate on the topic and who were the right experts for the job.

28. **Mr. Leinonen** (Observer for Finland) said he supported the approach outlined by the three previous speakers. It was indeed important to set priorities, as the Commission had just done, and clearly, there were two main priorities, starting with the judicial sale of ships; determining a hierarchy among the remaining ones was unimportant. He did not think it was problematic to have experts coming in for a year or two to discuss one topic and then having another topic with new experts to address it. While it was true that the first group of experts would have developed synergies among themselves by the end of their work, the new experts too would certainly develop synergies among themselves as the work went on. As to the actual structuring of work for the coming year, he shared the concern expressed by Canada and others that it was important to know as soon as possible what Working Group VI would be doing at its May 2019 session. However, everything hinged on when it finished its current tasks. When it did, it would, as his delegation understood it, take up judicial sale of ships, followed by warehouse receipts, a topic for which meeting time would not be available before the Commission's fifty-second session, in 2019. What needed to be discussed now was how to allocate work in the third week of that session: his delegation was very much in favour of reducing the meeting time for the plenary Commission to two weeks.

29. **Mr. von Ziegler** (Switzerland) said his delegation considered that the approach of first identifying priorities and then allocating resources to them was a judicious one. Like Argentina, he fully endorsed the comments by Belgium and, like the representatives of Honduras and Uganda, he had full confidence that the Secretariat was best placed to decide which working group should take up which topic.

30. **Ms. Sabo** (Canada) said she wished to clarify some of her earlier comments, for fear they might have been misunderstood. Certainly, it was very important to assign work to working groups on the basis of the priorities set by the Commission, and although her delegation might not be entirely pleased with the order of priorities, it fully accepted them. Thus, the first available working group should take up the topic of judicial sale of ships. Her only question had been whether it was generally understood that, following the same logic, the next free working group would take up warehouse receipts. She was somewhat concerned by the comment by the representative of Finland that the Commission might decide on other priorities when it met in 2019. Her delegation hoped that that would not be the case, because of the need for long-term planning based on the Commission's priorities.

31. **The Chair** said that she also wished to clarify her understanding of the way forward with regard to topics such as warehouse receipts. The Secretariat had indicated that further work would need to be done

on such topics, perhaps in expert group meetings. Whether a specific working group should be mandated to look into such topics should not be decided yet, pending further study. On the other hand, her understanding was that a mandate was to be given to Working Group II to deal with the priority topic of expedited arbitration. Working Group VI would probably be called upon to deal with the other priority topic, judicial sale of ships, with the proviso that if a different working group was ready beforehand, that working group should take it up.

32. **Mr. Coffee** (United States of America), referring to the clarification from the representative of Canada about the points she had raised earlier, said her points had been very clear and he completely agreed with them. Every new project required some preparatory work, either by member States, expert groups or the Secretariat. While some priority might be given to judicial sale of ships and expedited arbitration, he was having difficulty understanding the relative priority of warehouse receipts. At the previous meeting, some delegations had expressed support for that topic, and no delegation had objected. For that reason, a decision should be taken to have the topic lined up for consideration by the next working group that became available after expedited arbitration and judicial sale of ships had been taken up. That would enable his country and others which intended to send experts to that working group to start preparing.

33. **Ms. Carpus Carcea** (Observer for the European Union) said that she agreed with the approach of setting certain priorities, but there seemed to be a tension between that approach and safeguarding the expertise in a certain group. It would be unfortunate if the priority topics already identified, including perhaps warehouse receipts, were dealt with only once a working group had finished all its work. In Working Group V, for example, three topics had in the recent past been handled simultaneously. Now that only one remained, she saw no reason to wait until the Working Group had completed its work on that topic before taking on new work.

34. **Mr. von Ziegler** (Switzerland) drew attention to paragraph 2 of the note by the Secretariat on the work programme of the Commission (A/CN.9/952), which indicated that "the Commission may also wish to recall its decision at the forty-sixth session that it would normally plan for the period to the next Commission session, but that some longer-term indicative planning (for a three-to-five-year period) may also be appropriate …" The point was that if there was no time available immediately for work on a given topic, the Commission could stipulate that it should be taken up in the context of longer-term indicative planning.

35. **The Chair** said that the text quoted made it clear that the Commission could take a decision, for indicative planning purposes, that warehouse receipts would be addressed as soon as a working group was ready to deal with the topic.

36. **Mr. Apter** (Israel) said that his delegation had no problems with the approach outlined by the Chair, although he wished to point out that that approach differed from past practice. While priorities should certainly be designated, it was desirable to avoid the automatic allocation of topics to working groups, and the Secretariat should not take such decisions without prior discussion with the Commission. In addition, for planning purposes, the allocation of topics to working groups had to be decided at the current session. Therefore, his delegation proposed that Working Group VI be definitely – not probably – assigned the work on judicial sale of ships, and that at the Commission's next session, a decision be taken on which working group was to be assigned the topic of warehouse receipts.

37. **Mr. Soh** (Singapore) said that since the moment when the Commission had decided to specialize – to establish working groups on secured transactions, arbitration and conciliation, and so on – a certain sense had developed that the working groups had ownership of certain areas of specialization. There was no need to fear the dismantling of expert groups in specialized areas; the six broad titles of the working groups did not always correspond to the six most important topics that the Commission should be addressing. For judicial sale of ships, for example, a group called "Shipping" might simply be created.

38. **Ms. Joubin-Bret** (Secretary of the Commission) said she hoped it had been understood that she wished to work in close cooperation with members of the Commission, including on the way that working time was allocated – both for working groups and for the Secretariat. She drew from the discussion that the Secretariat and the Commission agreed on how to approach topics for future work. Clearly, the Secretariat would be doing some work on its own; it would team up with certain delegations to set up expert group meetings or colloquiums; and some work would be allocated to working groups, because the Commission had decided that its conference servicing time should be used for that purpose. The Secretariat would do its utmost to ensure that the resources entrusted to it to service the Commission were used in the most transparent and cooperative manner possible.

39. **The Chair** said she took it that the Commission had agreed that Working Group II was to be assigned the topic of expedited arbitration; that the first available working group, probably Working Group VI, would deal with the topic of judicial sale of ships; and that the Secretariat would be asked to work on the other topics, particularly that of warehouse receipts, with a view to their future consideration in a working group. In addition, an expert meeting

would be convened, as part of the work of Working Group I, to deal with the topic of contractual networks.

40. *It was so decided*.

The discussion covered in the summary record was suspended at 4.35 p.m. and resumed at 5.35 p.m.

Agenda item 21: Adoption of the report of the Commission (A/CN.9/CRP.1/Add.1, A/CN.9/LI/CRP.1/Add.2, A/CN.9/LI/CRP.1/Add.3, A/CN.9/LI/CRP.1/Add.4 and A/CN.9/LI/CRP.1/Add.5)

41. **The Chair** drew attention to the sections of the draft report relating to the finalization and adoption of instruments on international commercial settlement agreements resulting from mediation, as contained in documents A/CN.9/LI/CRP.1/Add.1, Consideration of issues in the area of micro, small and medium-sized enterprises, as contained in document A/CN.9/LI/CRP.1/Add.2 and A/CN.9/LI/CRP.1/Add.3, celebration of the sixtieth anniversary of the New York Convention, as contained in document A/CN.9/LI/CRP.1/Add.4, and investor-State dispute settlement reform, as contained in document A/CN.9/LI/CRP.1/Add.5. Rather than renegotiating the contents of the documents, delegations should simply draw attention to specific paragraphs that required modification.

Document A/CN.9/LI/CRP.1/Add.1

42. **Mr. Boulet** (Observer for Belgium) said that the second sentence of paragraph 13 should be amended to better reflect a comment made by his delegation during the first week of the session. The sentence currently read: "It was clarified that the notions of 'enforcement' and 'enforceability' used in the instruments should be understood as having a similar meaning." However, his delegation's point had been, not that the meaning was similar, but that while "enforcement" referred to the actual enforcement of an instrument, it also encompassed the "enforceability" of that instrument. To make that clearer, he proposed that the second sentence should read: "It was clarified that the fact that the notions of 'enforcement' and 'enforceability' are used in the instruments should not be understood as meaning that enforcement refers to something different than enforceability." An additional sentence should be inserted, to read: "'Enforcement' in the meaning of the two instruments, covers both the process of issuing an enforceable title and the enforcement of that title."

43. **Ms. Carpus Carcea** (Observer for the European Union) said she supported the proposal by the Belgian delegation for paragraph 13.

44. **Mr. Coffee** (United States of America) said that the additional sentence seemed to reflect something which the Commission had agreed, but he doubted that such an agreement existed. The sentence should therefore be tempered by the insertion of the words "It was stated that", at the beginning.

45. **Mr. Apter** (Israel) said he had no objection to reflecting in an additional sentence what the representative of Belgium had stated during the earlier discussion.

46. **The Chair** said she took it that the Commission wished to adopt the Belgian proposal, as amended by the United States.

47. *It was so decided*.

48. **Mr. Soh** (Singapore) pointed out that paragraphs 48 and 50 should refer to draft articles 18 and 19, respectively.

49. **The Chair** said she took it that those editorial corrections were approved.

50. *It was so decided*.

51. **Mr. Teehankee** (Philippines), referring to paragraph 55, queried whether the meeting number was correctly written.

52. **The Chair** suggested that the Secretariat should look into the question.

53. *It was so decided*.

54. *Document A/CN.9/LI/CRP.1/Add.1, as orally amended, was approved.*

Document A/CN.9/LI/CRP.1/Add.2

55. **Ms. Montineri** (Secretariat) said that because the Commission had not had a chance to look at document A/CN.9/941, the Secretariat proposed that paragraph 2 of document A/CN.9/LI/CRP.1/Add.2 be amended by deleting subparagraph (c) and the conjunction "and" which preceded it.

56. *It was so decided*.

57. **Mr. Coffee** (United States of America), referring to paragraph 5, said that the Commission had agreed to delete the definition of "business registration system" as well as that of "business registration". Accordingly, the word "definition" should be replaced with "definitions" and the words "and 'business registration system'" inserted after "of 'business registration'".

58. *It was so decided*.

59. *Document A/CN.9/LI/CRP.1/Add.2, as orally amended, was approved.*

Document A/CN.9/LI/CRP.1/Add.3

60. **Ms. Clift** (Secretariat), referring to paragraph 17, said that there had been extensive discussion of the sentence to be added to that paragraph, with particular reference to the notion of opposability. The

Secretariat, having consulted with various experts and delegations, including that of Argentina which had originally proposed the addition, wished to suggest the following amendment. After the phrase "[t]he Commission agreed to add before the penultimate sentence of paragraph 26 the following text", the following text would be added: "recognizing that in some States one of the consequences of business registration is that the registered information has erga omnes legal effect." The Secretariat would work with the various language groups to ensure that the idea expressed therein was properly conveyed in all languages.

61. *It was so decided*.

62. **Mr. Coffee** (United States of America), referring to paragraph 18, proposed that the words "that language was" be replaced with "the reference to 'electronic signatures and other equivalent identification methods' in recommendation 13 (a) be …".

63. *It was so decided*.

64. *Document A/CN.9/LI/CRP.1/Add.3, as orally amended, was approved*.

Document A/CN.9/LI/CRP.1/Add.4

65. *Document A/CN.9/LI/CRP.1/Add.4 was approved*

Document A/CN.9/LI/CRP.1/Add.5

66. *Document A/CN.9/LI/CRP.1/Add.5 was approved.*

The meeting rose at 6 p.m.

Summary record of the 1079th meeting
held at Headquarters, New York, on Monday, 2 July 2018, at 10 a.m.

[A/CN.9/SR.1079]

Chair: Ms. Czerwenka (Germany)

The meeting was called to order at 10.15 a.m.

Agenda item 12: Consideration of issues in the area of insolvency law:

(a) Finalization and adoption of a model law on cross-border recognition and enforcement of insolvency-related judgments and its guide to enactment (A/CN.9/931, A/CN.9/937, A/CN.9/955, A/CN.9/956, A/CN.9/956/Add.1, A/CN.9/956/Add.2, A/CN.9/956/Add.3 and A/CN.9/WG.V/WP.157)

1. **Ms. Clift** (Secretariat) drew attention to the draft model law, contained in the annex to document A/CN.9/937, the draft guide to enactment of the model law, contained in document A/CN.9/WG.V/WP.157, and a note by the Secretariat summarizing the amendments to the text of the draft guide to enactment, contained in document A/CN.9/955. Comments by States and international organizations on the draft model law were contained in documents A/CN.9/956, A/CN.9/956/Add.1, A/CN.9/956/Add.2 and A/CN.9/956/Add.3.

2. **The Chair** invited the Commission to consider the text of the draft model law on recognition and enforcement of insolvency-related judgments, as contained in the annex to document A/CN.9/937, with a view to its adoption. She suggested proceeding article by article, but that comments on the specific provisions of the draft model law should be as brief and precise as possible. Since the text had already been thoroughly negotiated within Working Group V, she took it that it had largely been approved and that any proposals made at the current meeting for which no strong support was expressed would not be renegotiated.

Preamble

3. *The preamble was approved.*

Articles 1 to 12

4. *Articles 1 to 12 were approved.*

Article 13

5. **Mr. D'Allaire** (Canada) said that the article was one of the most important provisions in the entire draft model law. Subparagraph (a) (ii), on notification of a proceeding giving rise to an insolvency-related judgment, read: "Was notified of the institution of that proceeding in a manner that is incompatible with fundamental principles of this State concerning service of documents". Canada would suggest that the words "fundamental principles" be replaced with "rules", since proper service of documents was essentially procedural in nature. The use of the words "fundamental principles" could open the door to objections and litigation, since such principles were difficult to identify.

6. **Mr. Coffee** (United States of America) said his delegation supported the amendment, but on the condition that, the beginning of subparagraph (a) (ii), the words "in this State" were inserted after "[w]as notified", to indicate that the subject of the subparagraph was service of documents in a specific State. That point was illustrated by the first sentence of paragraph 102 of the draft guide to enactment, which read: "Subparagraph (a) (ii) addresses notification given in a manner that was incompatible with fundamental principles of the receiving State concerning service of documents, but only applies where the receiving State is the State in which that notification was given." If the subparagraph was amended as suggested by his delegation, then it would be appropriate to refer to the "rules" in that State.

7. **Mr. Bornemann** (Germany) said that although those amendments appeared to make a substantive change in the meaning of the subparagraph, his delegation supported both amendments, because they helped to clarify the true intention of the subparagraph, which was to protect the defendant in a proceeding. As a reading of the Convention of 30 June 2005 on Choice of Court Agreement showed, the subparagraph was intended to protect the procedural framework of the receiving State. It was therefore correct to say that notice must have been given in the receiving State.

8. **The Chair** said she took it that the two amendments to subparagraph (a) (ii) proposed by the delegations of Canada and the United States were approved.

9. *It was so decided.*

10. **Mr. D'Allaire** (Canada), referring to the grounds to refuse recognition and enforcement of an insolvency-related judgment listed in the chapeau of article 13, said that subparagraph (g) (ii) concerned the situation where a court exercised jurisdiction on the basis of the party submitting to such jurisdiction,

which his delegation supported. However, it would request a drafting change to the French text, where the idea of submission should be rendered as "*se soumettre*" rather than "*faire valoir ses arguments*", as it currently stood. The Spanish version might also need to be amended accordingly.

11. The final phrase in subparagraph (g) (ii), which read: "unless it was evident that such an objection to jurisdiction would not have succeeded under that law", was superfluous and opened the door to litigation. The sole reference should be to the traditional grounds for proper exercise of jurisdiction, namely explicit consent and submission to jurisdiction, as cited earlier in the article. He sought clarification from other delegations about their understanding of that phrase and in what cases it might apply.

12. **Ms. Clift** (Secretariat) said that the translators had pointed out that the first phrase in the same subparagraph could be misconstrued because it started by referring to "the party", followed by "the defendant", as if they were two different people. She would therefore suggest replacing the words "the defendant" with "that party".

13. **Mr. Bornemann** (Germany) said that his delegation supported the drafting change proposed by the Secretariat. Although the Canadian proposal to delete the final phrase of subparagraph (g) (ii) did not change the text substantially, as a general rule, his delegation favoured making as few changes as possible in the latter stages of discussion of a text and therefore would prefer that the proposal not be approved.

14. **Mr. Grout-Smith** (United Kingdom) supported the Secretariat's proposal of a linguistic amendment to clarify the text and agreed with the representative of Germany that the Canadian proposal should not be approved.

15. **The Chair**, referring to subparagraph (g) (ii), said she took it that the drafting change proposed by the Secretariat was accepted; that the drafting change to the French text proposed by Canada was likewise accepted; and that the deletion of the final phrase as proposed by Canada was not accepted.

16. *It was so decided*.

17. **Mr. D'Allaire** (Canada) said that subparagraph (h) was intended to be applicable in States that had enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency. That meant, however, that it targeted a limited number of States and applied in a very narrow set of circumstances, a situation which might be dealt with by other means. Citing the example given in paragraph 118 of the draft guide to enactment, he said that his country had a serious problem with the fact that subparagraph (h) legitimized the opening of an insolvency proceeding in a country where the insolvency debtor had no business presence or centre of main interests. The text promoted recognition of judgments from States that should not be exercising insolvency jurisdiction because they had no connection with the insolvency debtor; it also ran counter to general insolvency law principles and set a precedent that was contrary to widely accepted bases for the exercise of insolvency jurisdiction. For all those reasons, his delegation considered that subparagraph (h) should be deleted. Canada had supported the Commission's work on asset tracing as a useful tool for protecting values of insolvent companies in a cross-border context. While there was a need to facilitate the recovery of assets by creditors, however, the draft model law was not the right instrument for doing so.

18. **Mr. Bornemann** (Germany) said that sometimes, in trying to achieve a certain objective, there was a danger of going overboard. Canada had argued that there should be grounds for refusal to recognize an insolvency-related judgment where the nexus with the exercising jurisdiction was tenuous. Yet the solution proposed was to delete subparagraph (h), which actually provided grounds for refusal. Perhaps a better solution would be simply to delete the word "unless", along with subparagraphs (i) and (ii). The remainder of subparagraph (h) set out the very solid principle, agreed upon by the Working Group, that where the opening of an insolvency proceeding was not recognized, it should also be possible not to recognize judgments that derived from such an insolvency proceeding. To delete the entire subparagraph would significantly alter the substance, but at the present stage it was undesirable to make substantive changes. He sought clarification from the representative of Canada whether his suggestion was to delete subparagraph (h) completely or only the parts that made an exception from the subparagraph being a ground for refusal.

19. **Mr. Redmond** (United States of America) said that his delegation was strongly in favour of retaining subparagraph (h). It was a discretionary provision that could be adopted only if States so desired, and it provided an additional basis for recovery of assets. The question had been extensively debated in the Working Group, and the compromise represented by subparagraph (h) had been agreed to by many delegations.

20. **Mr. D'Allaire** (Canada), responding to the representative of Germany, said that if a foreign jurisdiction was not one in which there was a centre of main interests, and the insolvent entity had not been established in the foreign jurisdiction, then the exercise of jurisdiction by the foreign court was improper. The draft model law would, in the Canadian context, be contrary to public policy. Canada therefore saw no reason for retaining subparagraph (h) as a whole. While it fully supported

the principle stated in the chapeau of subparagraph (h), it also believed that the conclusion stated therein could be achieved through another route. If judgments from courts that had not properly exercised jurisdiction were to be rejected on the basis of that provision, however, the scope should not be restricted to States that had enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency, as indicated in the text preceding the subparagraph: it should be expanded to include all States. Nonetheless, if the Commission did not approve the proposal to delete subparagraph (h) in its entirety, his delegation was prepared to delete just the piece beginning with the words "unless", as suggested by the representative of Germany.

21. **Mr. Grout-Smith** (United Kingdom) said that his delegation supported retaining subparagraph (h) in its entirety. For those who had spent time working through the ramifications of the provision, it represented a compromise solution to which many delegations had agreed. The issue was complicated for many reasons, including the decision rendered by the Supreme Court of his own country in *Rubin v. Eurofinance SA*; which greatly differed from the view taken by Canada. Determining whether the decision was right or wrong was difficult, especially if it was approached from differing angles, but the draft model law had to be neutral on that point.

22. **Mr. Meier** (Switzerland) said his delegation was strongly in favour of retaining the chapeau of subparagraph (h) and had no strong feelings about whether to delete the word "unless" and subparagraphs (i) and (ii), although it was slightly leaning towards their deletion.

23. **The Chair** said that, in view of the absence of strong support for changes to the text, she took it that subparagraph (h), as originally drafted, was approved.

24. *It was so decided*.

25. **Mr. D'Allaire** (Canada) said that his delegation wished to propose the insertion of a new subparagraph containing additional grounds for refusing enforcement of a foreign insolvency judgment, to follow subparagraph (h), and to read: "The judgment affects the rights of creditors in this State, who could have opened an insolvency proceeding in relation to the same debtor whose insolvency proceeding issued the insolvency-related judgment, and these creditors would be better off if the laws of this State apply, unless they have agreed to this treatment."

26. The insolvency courts in Canada had extensive experience in cross-border insolvency for various reasons: the Canadian economy was strongly linked to those of the United States and Mexico through a free trade agreement; many American and Mexican companies engaged in business in Canada and vice versa; and multi-jurisdictional insolvency proceedings were common. The business reality behind an insolvency proceeding was that there was an incentive for creditors to expedite the process, an incentive that worked to the benefit of everyone involved. It was quite common for Canadian creditors of insolvent entities in the United States to participate in proceedings in that country, simply to make the process more effective by ensuring that a single court resolved the matter and attempted to reorganize the company. They did so even though they could open proceedings in Canada to protect their rights, because they recognized that although covered by the Model Law on Cross-Border Insolvency, such action would entail additional costs and lengthier proceedings. In such cases, Canadian creditors were often secured creditors and, quite frequently, upon the opening of the insolvency proceeding in the United States, they would file their claim and notify the insolvency court of the existence of their security interests. They would do that in good faith, being convinced that their security interests protected their loan, and would not actively participate in the proceeding.

27. In some cases, however, by the application of Canadian law, creditors benefited from specific treatment: for example, when a security interest lapsed, it could be renewed without such action being considered preferential treatment. Similarly, a real property owner who leased property to an insolvent debtor could be paid in the ordinary course of business. Such payment would not be considered preferential treatment, and Canadian creditors might not feel the need to disclose the situation to the United States court because they were entitled to the protection of Canadian law.

28. What was now being witnessed was avoidance proceedings against such creditors in foreign jurisdictions, not just in the United States, because from the perspective of foreign law, the treatment that existed under Canadian security interest law was considered preferential. That led to difficult situations for honest lenders who had believed they were entitled to such treatment and had complied with the requirements of the foreign court in relation to the insolvency proceeding. To avoid the potential recognition of anti-avoidance or preferential reviews in such situations, there was a need for the additional exception.

29. To sum up, his delegation's proposal was to limit the recognition and enforcement of judgments that affected the rights of creditors in the receiving State, because those creditors were placed in a position where they were worse off than if the law of the receiving State had applied, unless they had agreed to such treatment. It was designed to address certain specific situations but was also broad enough to cover a variety of situations that might arise under

the laws, not only of Canada, but also of other countries.

30. He apologized for making such a late submission, which was due to consultations with stakeholders in his country, as the topic was highly specialized, and the developments included in his delegation's proposal only came to light recently. The full text of the proposal was found in document A/CN.9/956/Add.3.

31. **Ms. Clift** (Secretariat) said that it was unclear whether the reference to "this treatment" in the proposed subparagraph meant treatment under the law of the foreign State, as there was no antecedent for those words in the sentence.

32. **Mr. D'Allaire** (Canada) said that his delegation had struggled with that wording and had initially thought of referring to foreign law but had concluded that that might be too limiting. The phrase "this treatment" referred back to the first three words of the subparagraph, "[t]he judgment affects", and was intended to mean the treatment to which creditors were subject in a foreign jurisdiction.

33. **Mr. Meier** (Switzerland) said that the proposal appeared to duplicate the contents of subparagraph (f) and he would welcome clarification as to how the two differed. He suggested that the reasoning just outlined by Canada be included in the guide to enactment as an example of the application of subparagraph 13 (f).

34. **Mr. D'Allaire** (Canada) said that subparagraph (f) dealt with the issue of adequate protection which could be offered on demand by a foreign court. In that case, the court could entertain the arguments of foreign creditors and recognize that a foreign law envisaged specific treatment – for example, with regard to securities – which did not constitute preferential treatment and hence decide to provide adequate protection. The Canadian proposal, on the other hand, was aimed at a situation where a creditor, acting in good faith and having presented a claim to a foreign court and indicated the existence of a security interest, had not deemed it necessary to notify the court of specific mechanisms, such as those regarding renewal of securities, and thus had not requested adequate protection. There was a difference of sequencing between the two texts: for subparagraph (f) to apply, a claim for protection must have been submitted during the proceedings, whereas his delegation's proposal envisaged a situation that arose much later and the provision of protection to a creditor who had not made such a claim.

35. **Mr. Redmond** (United States of America) said that his delegation had a number of concerns about the possible unintended consequences of adopting the proposal. Referring to the first few words, "[t]he judgment affects the rights of creditors", he said they could apply to any judgment at all. That raised two issues. The first was that interim relief was already provided for in the draft model law. If the Canadian proposal was adopted, a judge would have to determine, before interim relief was granted, whether any creditors were adversely affected The second issue was one with which the Working Group had already grappled: how to avoid providing additional grounds for defendants to challenge the recognition of an insolvency-related judgment. The draft model law was intended to institute an expedited procedure. With the wording proposed by Canada, a defendant could argue that the judgment should not be recognized because it affected creditors. His delegation would therefore not support the incorporation of the Canadian proposal into the draft model law, although it could support the proposal by Switzerland that the wording be incorporated into the guide to enactment, because the provisions of article 13 adequately covered the situation brought up by Canada.

36. **Mr. Meier** (Switzerland) said that the Canadian proposal was silent as to the possibility of opening bankruptcy proceedings, which could become an extra ground for the exercise of jurisdiction by a foreign court. That was another unintended consequence which led his delegation to oppose the proposal.

37. **Mr. D'Allaire** (Canada), responding to the delegation of the United States, said that interim relief could indeed play a role in protecting assets, but that was a different matter. The purpose of his delegation's proposal was to include additional, very limited grounds for refusal of the recognition and enforcement of foreign judgments. On the other hand, he was sensitive to the concern expressed by the United States delegation about a potential increase in litigation: the more text that was added, the more the parties would argue and raise new objections on the basis of the text. That was why the wording should be as precise as possible, and his delegation's proposal did so: it minimized the prospect of unreasonable claims.

38. As to the comments by Switzerland, he said that because the definition of insolvency-related judgments was broad, the draft model law applied to a very broad range of judgments. Since the proposal by his own delegation was in the context of exceptions, it did not grant more scope for the exercise of jurisdiction by a foreign court.

39. **Mr. Grout-Smith** (United Kingdom) said that discussions about drafting at the current stage of proceedings were problematic. His delegation was still struggling to understand the ramifications of the Canadian proposal and was not sure it added much to the general thrust of the provisions on exceptions in article 13. Unless greater clarity was furnished on that question, his delegation would not agree to the inclusion of the Canadian proposal in the text of the model law.

40. **The Chair** said that she was reluctant to permit the text to be redrafted, because that would affect the substance of the whole text. Delegations had expressed a number of concerns about the proposal, and in the absence of strong support, she would take it that it was not approved.

41. **Mr. D'Allaire** (Canada) said, with regard to the question of redrafting, that one of the purposes of the Commission's work was precisely to review texts. The current meetings were attended by very senior officials who had perhaps been unable to follow closely the preparatory work and were now giving the text a last, careful look, bringing in new insights, to ensure that it was clear enough so that no jurisdiction interpreted it in a manner that was inconsistent with the instruments already adopted. As to the Chair's conclusion that there was no support for the proposal, he said that since some delegations had indicated they had not had time to consider it fully, one option was to leave the matter in abeyance and take it up later.

42. **The Chair** said that it was true that the Commission's task was to review texts. However, several delegations had indicated that they had difficulty understanding the Canadian proposal. Since clarity was lacking and no strong support had been expressed, she would take it that the proposal was not approved.

43. *It was so decided*.

44. **Mr. Coffee** (United States of America) said he agreed with the Chair's ruling but was grateful to the representative of Canada for raising procedural concerns. Although his own delegation had only somewhat reluctantly accepted the procedure being applied during the current session, that procedure had proved to be a useful mechanism for facilitating thorough discussion of proposals and even-handed decision-making. However, the Commission should not automatically endorse texts and should be able to engage in discussions on their substance.

45. *Article 13 was approved, with the amendments made earlier to subparagraph (a) (ii) and subparagraph (g) (ii)*.

Article 14

46. *Article 14 was approved*.

Article 15

47. **Mr. D'Allaire** (Canada) said that his delegation supported the proposal by Thailand, contained in document A/CN.9/956, that the words "shall be granted" be replaced with "may be granted", because local courts should have flexibility under the draft model law to recognize an insolvency-related judgment.

48. **The Chair** said that it was unusual for a written proposal by one delegation to be presented by another delegation and requested clarification from the delegation of Thailand.

49. **Mr. Patrachai** (Thailand) said that his delegation would not press for the change to be approved: it was just a suggestion, not a proposal.

50. **Mr. D'Allaire** (Canada) said that in that case, his own delegation would take over sponsorship of the proposal and would welcome comments on it.

51. **Mr. Meier** (Switzerland) said he was not in favour of the proposal, because a model law should make recommendations, not simply say what was possible.

52. **The Chair** said she took it that article 15 as currently drafted was approved.

53. *It was so decided*.

Article X

54. *Article X was approved*.

55. *The draft model law on recognition and enforcement of insolvency-related judgments as a whole, as amended, was adopted*.

The meeting was suspended at 11.40 a.m. and resumed at 12.10 p.m.

56. **The Chair** drew attention to the draft guide to enactment of the model law on recognition and enforcement of insolvency-related judgments, contained in document A/CN.9/WG.V/WP.157, and to the revisions to the draft guide agreed by Working Group V at its fifty-third session, contained in document A/CN.9/955. She invited the Commission to consider the draft guide, as revised by the Working Group, proceeding paragraph by paragraph.

Draft guide to enactment of the model law on recognition and enforcement of insolvency-related judgments

Paragraphs 1 to 7

57. *Paragraphs 1 to 7 were approved*.

Paragraph 8

58. **Mr. D'Allaire** (Canada) said that the final sentence of the paragraph, which read: "In that same State, orders confirming a plan of reorganization, granting a bankruptcy discharge or allowing or rejecting a claim against the insolvency estate are not considered insolvency-related judgments, even if those orders may have some of the attributes of a judgment", described a situation that should not be encouraged. Although the content of the sentence was acceptable, it sent the wrong signal at the outset of the text. To give a list of exceptions to what could be considered an insolvency-related judgment, as part of the lengthy introduction to the draft guide, was not

desirable: rather, it was broad application of the model law that should be sought. His delegation therefore proposed that the final sentence be deleted.

59. **Ms. Clift** (Secretariat) said that the final sentence referred back to the previous one, which began with the phrase "[i]n one State, for example", and would likewise have to be deleted if the final sentence was.

60. **Mr. D'Allaire** (Canada) said that an alternative solution would be to retain the final sentence and simply delete the first two examples given. The sentence, as redrafted, would then read: "In that same State, orders rejecting a claim against the insolvency estate are not considered insolvency-related judgments."

61. **The Chair** said that since no support had been expressed for either the original Canadian proposal or the second Canadian proposal to redraft the sentence, she took it that paragraph 8 as originally drafted was approved.

62. *It was so decided*.

Paragraphs 9 to 58

63. *Paragraphs 9 to 58 were approved*.

Paragraph 59

64. **Mr. Bornemann** (Germany) said that his delegation had proposed that paragraph 59 (d) be redrafted in more neutral terms because, as originally drafted, the subparagraph could have been interpreted in two ways. The Working Group had extensively discussed whether the list of types of judgments that might be considered insolvency-related should include only judgments where the cause of action had arisen before the proceedings had commenced or whether it should also include judgments where the cause of action had arisen after they had commenced. As revised, and as presented in paragraph 44 of the most recent report of the Working Group (A/CN.9/937), the subparagraph made it clear that two different approaches could be taken and that an enacting State would have to choose between the two approaches. That, to his delegation, had been satisfactory, because neither of the two approaches was given priority and thus the text was not biased in any way.

65. However, his delegation had taken another look at the text and the preliminary explanatory report on the Judgments Project of the Hague Conference on Private International Law, dated May 2018, concerning a future convention on the recognition and enforcement of foreign judgments. In paragraph 44 of the explanatory report, it was indicated that when the cause of action arose after the commencement of an insolvency proceeding, the convention itself should apply. Therefore, certain insolvency-related judgments would be eligible for recognition and enforcement under the future convention, something which conflicted with the neutral approach taken in the Commission's guide to enactment. He accordingly proposed that paragraph 59 (d) of the guide to enactment incorporate wording to ensure consistency with the position taken in other texts on the recognition and enforcement of general commercial and civil judgments, to indicate that causes of action that arose prior to the commencement of insolvency proceedings were covered by general instruments and not by special instruments addressing insolvency-related judgments.

66. **Ms. Carpus Carcea** (Observer for the European Union) said that the subparagraph could be revised to ensure consistency between the model law and the future Hague convention. However, her delegation would be reluctant to make any reference to the preliminary explanatory report, as it was not yet final. It was the delegation's understanding that even if the current text of subparagraph (d) was retained, the future convention would take precedence over the model law. Nevertheless, with a view to providing clarity for States enacting the model law, the second sentence of the revised version of subparagraph (d) might be replaced with the following: "The enacting State will need to determine, in accordance with existing international conventions, whether this category should extend to all such judgments regardless of when the cause of action arose."

67. **Mr. Meier** (Switzerland) said that his delegation agreed with the comments by the representative of Germany and endorsed the excellent proposal by the observer for the European Union, to which he would suggest adding the words "and future" before "international conventions".

68. **The Chair** said that it would be unusual for legislators to refer to instruments that did not exist. If a State decided to enact legislation, it would normally refer only to existing, not future, international law.

69. **Mr. Bornemann** (Germany) said that the proposal by the European Union was a useful one and captured very well what needed to be included in subparagraph (d). In response to the point made by the representative of Switzerland, he said that the addition of "instruments under development" after "international conventions" in the European Union proposal might help to make it clear that at the time the model law was being finalized, the Commission was aware of the work being done on a similar text by the Hague Conference and of the need for consistency or at least coherence between the two texts.

70. **Mr. D'Allaire** (Canada) said that his delegation would be reluctant to include any reference to a future

instrument. When States legislated, they took into account existing, not future, instruments. The Commission's report to the General Assembly would reflect the concerns raised by Germany and would make it clear that, when drafting the model law and the guide to enactment, the Commission had been mindful of the fact that other instruments were also under negotiation.

71. He requested confirmation from the observer for the European Union that the phrase "in accordance with existing international conventions" was not intended to limit the elements to be taken into account in decisions as to whether particular judgments were or were not to be included in the category described in the first sentence of subparagraph (d). That was a policy decision to be made by States; in doing so, one element that they might consider was the content of existing conventions.

72. **Ms. Carpus Carcea** (Observer for the European Union) said that perhaps the suggestion by Germany could better be conveyed by replacing the phrase "in accordance with existing international conventions" in her previous proposal with "in accordance with applicable international treaties or conventions". In response to the representative of Canada, she confirmed that her delegation understood the additional wording to mean that States would have to take into account the rules established in applicable instruments when they enacted the model law.

73. **Mr. Coffee** (United States of America) said that members of the Commission were representatives of sovereign States and were attending the Commission's meetings for the purpose of making decisions on their behalf. They were thus entitled to decide what the text should convey and how the model law should operate. His delegation's position was that subparagraph (d) should remain unchanged. It was true that States would ultimately need to make a decision on how to implement the model law domestically, and that a convention that might in future be adopted by the Hague Conference might be relevant. However, at the present juncture, what such a convention might say on the question at hand was unknown, nor was it known whether a given State considering enactment of the model law would be a party to the convention.

74. As the representative of Canada had pointed out, the record of the current meeting would accurately reflect the issue being discussed and address the concerns raised. His delegation would be concerned about the addition of any wording whatsoever which touched on international obligations. The idea that a State had to make a determination in accordance with its international obligations was a truism: it obviously applied to all decisions made by States. If the idea was expressed only in the present context, the implication would be that in other instances, States could perhaps make decisions that were inconsistent with their international obligations. The additional clause might therefore do more harm than good.

75. In response to a question by **the Chair**, he confirmed that the revised proposal by the European Union, referring to "applicable" instruments, was unacceptable.

76. **Mr. Bornemann** (Germany) said that his delegation had not intended to suggest that the autonomy and sovereignty of States should be limited in any way by the guide to enactment. His proposal had simply been aimed at making enacting States aware of developments at the international level, particularly the work of the Hague Conference. There was merit in such an approach, since the purpose of the guide to enactment was to provide guidance. He was in favour of the revised proposal by the European Union but perhaps, instead of "in accordance with applicable international treaties or conventions", the text could read "in consideration of existing international instruments and those under development".

77. **Mr. Grout-Smith** (United Kingdom) said that his delegation understood the concerns expressed about stating the obvious to States. It might, however, be useful to couch the proposal in slightly more neutral language. The additional clause might read: "Enacting States may also wish to have regard to the treatment of such judgments under other international instruments".

78. **Ms. Gehmacher** (Austria) said that some reference to other international instruments might provide a useful indication for States that wanted to enact the model law. Her delegation would prefer neutral wording like that proposed by the United Kingdom.

79. **Mr. Bornemann** (Germany) said that his delegation supported the proposal made by the representative of the United Kingdom, which captured the intention behind his own initial proposal.

80. **Ms. Clift** (Secretariat) said she assumed that the United Kingdom proposal should become a new sentence, after the second sentence, replacing the words "[t]he enacting State", with "[e]nacting States", to ensure concordance with the new sentence.

81. **Mr. Meier** (Switzerland) said he fully supported the proposal by the United Kingdom.

82. **Ms. Carpus Carcea** (Observer for the European Union) said her delegation supported the proposal but would suggest that it be placed at the end of the subparagraph, rather than after the second sentence.

83. **Mr. Coffee** (United States of America) said that, in a spirit of compromise, the United States would agree to the proposal by the United Kingdom and had no strong views as to where it should be placed.

84. **The Chair** said that she took it that the Commission agreed to the proposal by the United Kingdom and to its placement at the end of subparagraph (d).

85. *It was so decided*.

86. *Paragraph 59 as a whole, as amended, was approved*.

Paragraphs 60 to 69

87. *Paragraphs 60 to 69 were approved*.

Paragraph 70

88. **Mr. D'Allaire** (Canada) said that the paragraph should be deleted, and that if it was retained, the word "[a]s" should be deleted and the words "in the model law" inserted after "is grounded". The text would then read: "The notion of public policy is grounded, in the model law, in national law and may differ from State to State…" Moreover, there was no causal relationship between the first clause, as just cited, and the second, which read: "no uniform definition of that notion is attempted in article 7". Therefore, after the phrase "and may differ from State to State", there should be a new sentence, to begin with the words "No uniform definition".

89. **Mr. Meier** (Switzerland) pointed out that public policy was grounded in national law, not only in the context of the model law, but in all contexts. The insertion of the words "in the model law" was therefore unnecessary.

90. **Mr. Coffee** (United States of America) said that although he had initially had no objection to the insertion of the words "in the model law", he endorsed the position taken by the representative of Switzerland.

91. **The Chair** said she took it that the Canadian proposal, as revised by Switzerland, was approved. Paragraph 70 would thus read: "The notion of public policy is grounded in national law and may differ from State to State. No uniform definition of that notion is attempted in article 7."

92. *It was so decided*.

93. *Paragraph 70, as amended, was approved*.

The meeting rose at 1 p.m.

Summary record of the 1080th meeting
held at Headquarters, New York, on Monday, 2 July 2018, at 3 p.m.

[A/CN.9/SR.1080]

Chair: Ms. Czerwenka (Germany)

The meeting was called to order at 3.10 p.m.

Agenda item 12: Consideration of issues in the area of insolvency law (*continued*)

(a) Finalization and adoption of a model law on cross-border recognition and enforcement of insolvency-related judgments and its guide to enactment (*continued*) (A/CN.9/931, A/CN.9/937, A/CN.9/955, A/CN.9/956, A/CN.9/956/Add.1, A/CN.9/956/Add.2, A/CN.9/956/Add.3 and A/CN.9/WG.V/WP.157)

Draft guide to enactment of the model law on recognition and enforcement of insolvency-related judgments

1. **The Chair** invited the Commission to resume its consideration of the draft guide to enactment of the model law on recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law, contained in document A/CN.9/WG.V/WP.157.

Paragraphs 71 to 82

2. *Paragraphs 71 to 82 were approved.*

Paragraph 83

3. **Ms. Clift** (Secretariat) said that, at the previous meeting of the Working Group, it had been agreed that a cross-reference to article 10, paragraph 2, should be added to paragraph 83, but that the Secretariat had made a slight error in revising the paragraph reflected in document A/CN.9/955. The paragraph should indeed appear as included in document A/CN.9/WG.V/WP.157, with the cross-reference being inserted at the end of the paragraph as well as in the first sentence. The paragraph would then read: "Article 10 establishes the conditions for applying for recognition and enforcement of an insolvency-related judgment in the enacting State, as set out in paragraph 2, and the core procedural requirements. Article 10 provides a simple, expeditious structure to be used for obtaining recognition and enforcement. Accordingly, in incorporating the provision into national law, it is desirable that the process not be encumbered with requirements additional to those already included in article 10, paragraph 2".

4. **The Chair** said she took it that the Commission agreed with the proposed change.

5. *It was so decided.*

6. *Paragraph 83, as amended, was approved.*

Paragraphs 84 to 97

7. *Paragraphs 84 to 97 were approved.*

Paragraphs 98 to 104

8. **Mr. D'Allaire** (Canada) said that, at the previous meeting, a number of changes had been made to article 13 which his delegation hoped would be reflected in the guide to enactment.

9. *Paragraphs 98 to 104 were approved.*

Paragraph 105

10. **Mr. Coffee** (United States of America) drew attention to the last sentence of the paragraph, which read: "Inconsistency between the judgments arises under paragraph (c) when findings of fact or conclusions of law, which are based on the same issues, are mutually exclusive". He wondered what would happen if there were contrary findings of fact but a similar result. As that sentence would confuse matters, it might be sensible to delete it. Different findings of fact might conceivably have the same outcome.

11. **Mr. D'Allaire** (Canada) said he also thought that the sentence should be deleted, but his objection was to the concept of "mutually exclusive". It was hard to see whether it referred to the findings or the inconsistency, but in any case, the sentence was superfluous.

12. **Mr. Bornemann** (Germany) said that the sentence provided guidance on the nature of a possible inconsistency, for example between findings of fact or between conclusions of law. To dispel any confusion, it would be more appropriate to add a sentence to the effect that, when there was a divergence between findings of fact but no divergence between the conclusions, such divergence did not constitute an inconsistency within the meaning of the previous sentence. Accordingly, his delegation did not support the proposal to delete the sentence.

13. **Mr. Bellenger** (France) said that he also found the sentence obscure and agreed that it would make

better sense to refer to findings that were contradictory rather than mutually exclusive.

14. **Mr. D'Allaire** (Canada) proposed the following redrafting of the sentence: "Inconsistencies between the judgments arise under subparagraph (c) when findings of fact or law lead to different conclusions or dispositions".

15. **Mr. Bornemann** (Germany) said that his delegation could not support that proposal, since it implied that conflicts in findings of fact only mattered when they led to different conclusions in the relevant cases adjudicated.

16. **Mr. Coffee** (United States of America) said that the problem with the sentence was that it was cast in absolute terms. A solution might be simply to replace the word "arise" with "may arise".

17. **Mr. Bornemann** (Germany) said that there would be a contradiction only when differences regularly arose. He therefore suggested the following: "Inconsistencies between the judgments regularly arise …".

18. **Mr. Coffee** (United States of America) suggested in turn: "Inconsistencies between the judgments are likely to arise under subparagraph (c) when findings of fact or conclusions of law which are based on the same issues contradict".

19. **The Chair** said she took it that since there was no agreement on new wording and some members had requested more time for further consideration, paragraph 105 would be held in abeyance.

20. *It was so decided*.

Paragraphs 106 to 129

21. *Paragraphs 106 to 129 were approved*.

22. **Ms. Clift** (Secretariat) said that the model law still included an article 9 bis, which meant that the articles of the model law would need to be renumbered, along with the paragraphs of the guide to enactment. In addition, the list of references appearing in the guide to enactment at the end of each article would need to be updated to reflect the discussion of those articles in the most recent report of Working Group V (A/CN.9/937), as well as the discussion in the current session of the Commission. Changes would also need to be made in the guide to reflect the amendments to article 13 agreed at the current meeting.

Draft decision on the adoption of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments and Guide to Enactment

23. **Mr. D'Allaire** (Canada) said that the fourth preambular paragraph of the draft decision (A/CN.9/LI/CRP.5) referred to the general absence of an applicable international convention or other legal regime to address the recognition and enforcement of insolvency-related judgments, whereas the UNCITRAL Model Law on Cross-Border Insolvency already contained rules in that regard. The preambular paragraph thus seemed to disregard that Model Law and, to prevent unfortunate interpretations, could perhaps be deleted.

24. **Ms. Clift** (Secretariat) said that, during the discussion on the opening paragraphs of the guide to enactment, it had been agreed that paragraphs 2 and 3 referred to the origins of the work on the topic in the context both of certain decisions of the Supreme Court of the United Kingdom and of the general lack of applicable international conventions or other regimes specifically dealing with insolvency-related judgments. The delegation of Switzerland had insisted on the importance of indicating that the origins lay not just in the decisions of certain courts, but in the general absence of applicable international rules. That was why the paragraph in question had been included in the draft decision, which in any case merely reflected what was stated in paragraphs 2 and 3 of the guide, which the Commission had approved.

25. **Mr. Bornemann** (Germany) said that, while the paragraph might be improved, it should not be deleted in its entirety, since it conveyed an important message which should be acknowledged. One possible solution might be to rephrase the paragraph to indicate that existing instruments on the recognition and enforcement of judgments regularly excluded insolvency-related judgments from their scope of application.

26. **Mr. D'Allaire** (Canada) said that such a statement did not have the same weight in the guide and in the draft decision. The rewording suggested by the representative of Germany would be perfectly satisfactory.

27. **The Chair**, after consulting with the Secretariat, said that it might be better to replace the word "instruments" with "conventions", so that that the proposed new wording would be: "Considering that existing international conventions on the recognition and enforcement of judgments generally exclude from their scope insolvency-related judgments".

28. **Ms. Carpus Carcea** (Observer for the European Union) said that she supported the amendment proposed by the representative of Germany.

29. **Mr. Coffee** (United States of America) said that his delegation supported the new wording proposed by the representative of Germany, with the use of the word "conventions" in lieu of "instruments" as proposed by the Chair.

30. **Mr. Bornemann** (Germany) said that he had intentionally proposed the more open term of

"instruments" rather than "conventions" so that it could include other similar instruments that had been developed, for example within the European Union.

31. **Ms. Clift** (Secretariat) said that the intention behind the proposal to refer to "conventions" was to avoid any suggestion that the Model Law on Cross-Border Insolvency did not exclude insolvency-related judgments from its scope. It might be wiser to delete the paragraph altogether.

32. **Mr. Bornemann** (Germany) said that a way around the problem might be to refer to international instruments on the recognition and enforcement of judgments in civil and commercial matters, since it was precisely such instruments that regularly excluded insolvency-related judgments from their scope of application, thereby avoiding any suggestion that the Model Law on Cross-Border Insolvency fell under that category.

33. **The Chair** said that the matter would be held in abeyance.

34. **Mr. D'Allaire** (Canada) drawing attention to paragraph 3 of the draft decision, said that in the French version of the text, the recommendation was that, when revising or adopting legislation relevant to insolvency, States should take into account ["*tenir compte de*"] the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments, which was not as strong as the English version, where the recommendation was for States to "give favourable consideration to" the Model Law. The French version should be aligned with the English version accordingly.

35. **The Chair** said she took it that the Commission supported the stronger language contained in the English version of paragraph 3 and that the Secretariat would accordingly align all the other language versions of that paragraph with the English version.

36. *It was so decided*.

The meeting was suspended at 4.20 p.m. and resumed at 5 p.m.

37. **The Chair** invited the Commission to resume its consideration of issues held in abeyance.

Paragraph 105 of the guide to enactment

38. **Mr. Coffee** (United States of America) said that the agreed wording for the last sentence of the paragraph was as follows: "Under subparagraph (c), inconsistencies between judgments occur when findings of fact or conclusions of law, which are based on the same issues, are different".

39. **The Chair** said she took it that the Commission agreed with that wording.

40. *It was so decided*.

41. *Paragraph 105, as amended, was approved*.

42. *The draft guide to enactment, as amended, was adopted*.

Fourth preambular paragraph of the draft decision on the adoption of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments and Guide to Enactment

43. **Mr. Bornemann** (Germany) said that the agreed wording for the preambular paragraph was as follows: "Considering that international instruments on the recognition and enforcement of judgments in civil and commercial matters exclude from their scope insolvency-related judgments".

44. **The Chair** said she took it that the Commission wished to adopt, as amended, the draft decision on the adoption of the Model Law on the Recognition and Enforcement of Insolvency-Related Judgments and Guide to Enactment.

45. *It was so decided*.

(b) Progress report of Working Group V (A/CN.9/931 and A/CN.9/937)

46. **Ms. Clift** (Secretariat) said that the Working Group had completed its work on the model law on cross-border recognition and enforcement of insolvency-related judgments and its guide to enactment but still had work to do on the topic of enterprise groups. The related draft model law and its guide to enactment were expected to be available to the Commission for finalization and adoption at its next session. The Working Group had started work on the insolvency treatment of micro, small and medium-sized enterprises. The Secretariat would be preparing material on the topic for it to consider at its December 2018 session.

The meeting rose at 5.10 p.m.

Summary record (partial) of the 1081st meeting held at Headquarters, New York, on Tuesday, 3 July 2018, at 3 p.m.

[A/CN.9/SR.1081]

Chair: Ms. Czerwenka (Germany)

The meeting was called to order at 3.20 p.m.

Agenda item 20: Adoption of the report of the Commission (*continued*) (A/CN.9/LI/CRP.1/Add.4, A/CN.9/LI/CRP.1/Add.6, A/CN.9/LI/CRP.1/Add.7 and A/CN.9/LI/CRP.1/Add.10)

1. **The Chair** drew attention to the sections of the draft report relating to the celebration of the sixtieth anniversary of the New York Convention, contained in document A/CN.9/LI/CRP.1/Add.4; electronic commerce, contained in document A/CN.9/LI/CRP.1/Add.6; security interests, contained in document A/CN.9/LI/CRP.1/Add.7; and consideration of issues in the area of insolvency law, contained in document A/CN.9/LI/CRP.1/Add.10.

Document A/CN.9/LI/CRP.1/Add.4

2. **Ms. Clift** (Secretariat) said that, since the approval of document A/CN.9/LI/CRP.1/Add.4, it had been decided that the proceedings of the commemoration of the sixtieth anniversary of the New York Convention would be published. Consequently, the following sentence should be added at the end of paragraph 9: "It therefore requested the Secretariat to publish the conference proceedings electronically and to disseminate them broadly to any interested parties".

3. **The Chair** said she took it that the Commission agreed to add that new sentence to paragraph 9.

4. *It was so decided*.

5. *Document A/CN.9/LI/CRP.1/Add.4, as orally amended, was approved*.

Document A/CN.9/LI/CRP.1/Add.6

6. **Mr. Castellani** (Secretariat) said that, in view of the mandate given to the Secretariat by the Commission to monitor the field of paperless trade facilitation and cross-border single-window facilities and to cooperate with other relevant bodies, which the Secretariat had dutifully executed, the following sentence should be added at the end of the document: "With respect to ongoing work in the field of paperless trade facilitation, including electronic cross-border single-window facilities, the Commission was informed that the Secretariat was carrying out that work in cooperation with the United Nations Economic Commission for Europe, the United Nations Economic and Social Commission for Asia and the Pacific and other international governmental and non-governmental organizations".

7. **The Chair** said she took it that the Commission agreed to add that sentence to the document.

8. *It was so decided*.

9. *Document A/CN.9/LI/CRP.1/Add.6, as orally amended, was approved*.

Document A/CN.9/LI/CRP.1/Add.7

10. *Document A/CN.9/LI/CRP.1/Add.7 was approved*.

Document A/CN.9/LI/CRP.1/Add.10

11. **Mr. D'Allaire** (Canada) said that his delegation proposed that the first sentence of paragraph 6 be amended to read as follows: "A proposal to delete the words at the end of subparagraph (g)(ii) commencing with the word 'unless' was made. It was indicated that this additional text might be superfluous as it was difficult to envisage a situation where the exclusion could be applied in practice. It was said that, if it was not possible to come up with a practical example, this phrase should be deleted. This proposal did not receive sufficient support".

12. **The Chair** said she took it that the Commission agreed to the proposed amendment.

13. *It was so decided*.

14. **Mr. D'Allaire** (Canada) said that his delegation also proposed the following rewording of the second sentence of paragraph 6: "Further proposals to delete subparagraph (h) in its entirety or to retain the chapeau but delete subparagraphs (h) (i) and (ii), were made. Reference was made to document A/CN.9/956/Add.3 in that respect and it was stated that subparagraph (h) legitimizes the exercise of insolvency jurisdiction in situations that are not widely accepted, such as in situations where the exercise of court jurisdiction is based on the mere presence of the debtor's assets in the jurisdiction. This proposal did not receive sufficient support".

15. **Mr. Coffee** (United States of America) said that the proposed addition needed to be balanced by inserting the following sentence before the last sentence: "In response, it was stated that subparagraph (h) would provide a useful tool in the recovery of assets".

16. **The Chair** reminded delegations that the report should not be too long and that they should not seek to rewrite it by restating all the arguments or introducing elements of the discussion that might have been omitted. Those who wished to have a more detailed account of the proceedings or any researcher who wished to conduct a study on the Commission's work should refer to the summary records and possibly the sound recordings.

17. **Mr. D'Allaire** (Canada) said that he supported the inclusion of the additional text proposed by the representative of the United States. As for the concern over length, while his delegation was mindful of the Chair's reminder, it also felt that it might make better sense to shorten the discussion on the proposed guide to enactment rather than on the proposed model law, which was more important and yet was covered in only five paragraphs.

18. His delegation also wished to propose additional text for paragraph 7 to substantiate more fully the reasons behind the proposal to add a further subparagraph to article 13. While the reasons for the rejection of the proposed text were outlined in paragraph 8, it might be useful for the reader to understand why the proposal had been made in the first place. He accordingly proposed that the following text be inserted immediately after the proposed subparagraph in paragraph 7: "It was indicated that this additional subparagraph would be a complement to article 13, subparagraph (f), as it would cover situations where adequate protection was not specifically requested but was nonetheless needed by creditors in the receiving State to ensure that they are not worse off than they would have been had they been subject to local insolvency proceedings. In support of this proposal, reference was made to document A/CN.9/956/Add.3".

19. **The Chair** said she took it that the Commission agreed to make the proposed amendments to paragraphs 6 and 7.

20. *It was so decided*.

21. **Ms. Laborte-Cuevas** (Philippines) said there was a typing mistake in paragraph 11: "received" should be corrected to "receive".

22. **Mr. Bornemann** (Germany) said that in the third sentence of paragraph 12, the word "alternative" should be deleted, as it was superfluous and misleading: the approach in question was the second approach referred to in the paragraph.

23. **The Chair** said she took it that the Commission agreed to those changes and wished to approve the document in its entirety, as thus amended.

24. *Document A/CN.9/LI/CRP.1/Add.10, as orally amended, was approved.*

The discussion covered in the summary record ended at 4.05 p.m.

Summary record (partial) of the 1082nd meeting held at Headquarters, New York, on Thursday, 5 July 2018, at 10 a.m.

[A/CN.9/SR.1082]

Chair: Ms. Czerwenka (Germany)

The discussion covered in the summary record began at 11.45 a.m.

Agenda item 21: Adoption of the report of the Commission (*continued*) (A/CN.9/LI/CRP.1/Add.8 and A/CN.9/LI/CRP.l/Add.9)

1. **The Chair** drew attention to the sections of the draft report relating to the work programme, as contained in document A/CN.9/LI/CRP.1/Add.8 and date and place of future meetings, as contained in document A/CN.9/LI/CRP.1/Add.9.

Document A/CN.9/LI/CRP.1/Add.8

2. **Ms. Sabo** (Canada) said that the section of the report under consideration did not reflect both sides of the discussion on the various projects. The following sentence might therefore be usefully added to the end of paragraph 6: "Some doubt was expressed as to the need for contractual networks and it was suggested that the Secretariat review existing legal structures to determine whether there was a need for contractual networks".

3. **Mr. Meier** (Switzerland) said that the report was drafted in such a way that not only paragraph 6, but also all the other paragraphs up to and including paragraph 15 contained summaries of the proposals, but no summary of the related discussions. If the proposal of the representative of Canada were to be taken up, similar summaries would need to be added to each of those paragraphs. The Commission should therefore consider first whether it wished to apply such a general principle.

4. **Ms. Clift** (Secretariat) said that the intention of the report was exactly as described by the representative of Switzerland. To keep down the length of the report, the Secretariat had confined itself to summarizing the proposals as it understood them and had then set out the conclusions reached. All the comments made during the discussions were, of course, included in the audio recordings.

5. **Mr. Bellenger** (France) said that the members of the Commission had not in fact made critical evaluations of the various projects but, as requested by the Chair, had simply determined an order of priority. At that stage in the proceedings, there had been no discussion; the conclusions set out in the report faithfully reflected those proceedings.

6. **Ms. Sabo** (Canada) said that, in the light of what had just been said, her delegation withdrew its proposal.

7. **Mr. Soh** (Singapore) said that, notwithstanding what had been said, the use of the word "conclusion" in the last sentence of paragraph 6 gave the impression that a consensus had been reached on the proposed work. In the interests of balance, that word should be removed.

8. **The Chair** said that she too had initially understood that sentence to refer to the discussion. It should be made clear that the view it expressed was still that of the Government of Italy. She suggested that the beginning of the sentence be changed to "The delegation observed …".

9. *It was so decided.*

10. **Ms. Carpus Carcea** (Observer for the European Union), recalling that the European Union had proposed an alternative project focusing on the law applicable to insolvency proceedings, said that a new paragraph could be added after paragraph 15 and called 15 bis, which would read as follows: "In that context, the delegation of the European Union presented an alternative proposal to dedicate future work to the applicable law related to insolvency. Several delegations stressed that the issue of applicable law was an important matter that warranted consideration".

11. **The Chair** said that, since it had just been agreed that the report would not reflect the discussion on proposals but just the proposals themselves, the second sentence of the additional paragraph proposed by the European Union might well be omitted.

12. **Ms. Cap** (Austria) said that her delegation supported the inclusion of both sentences of the proposed paragraph, while remaining open on the possibility of omitting the second one. However, paragraph 8 of the report similarly appeared to reflect the discussion on the proposal concerned. As the report in fact contained a mix of descriptions and discussions of proposals, that second sentence could be retained.

13. **Mr. Meier** (Switzerland) said that his delegation also supported the proposal, while not agreeing with the representative of Austria in regard to paragraph 8, which simply summed up the position

of Switzerland. On the other hand, paragraph 9 did mention that Belgium supported a proposal presented by three other countries; elsewhere in the report as well, there were references to the support shown for proposals. In view, moreover, of the extent of the support expressed for the proposal of the European Union, it would make sense to retain the second sentence.

14. **Mr. Coffee** (United States of America) said that, since the delegation of Canada had withdrawn its proposal for the reasons stated, it would be more consistent with that reasoning to at least preserve some ambiguity by saying "it was stressed", rather than "several delegations stressed".

15. **The Chair** said she took it that the Commission agreed to the inclusion after paragraph 15 of the new paragraph proposed by the delegation of the European Union, as revised by the delegation of the United States.

16. *It was so decided.*

17. **Ms. Sabo** (Canada) said that, in the second sentence of paragraph 17 (b), the mention of "particularly challenging topics, such as" should be removed, since that was not the reason why those topics had not been retained. They had been objected to for a host of other reasons, particularly because they were not within the Commission's mandate. The end of the sentence should be amended to: "and avoid privacy and data protection issues".

18. **The Chair** said she took it that the Commission agreed to make the proposed amendment.

19. *It was so decided.*

20. **Mr. Meier** (Switzerland), referring to paragraph 17 (a), said that while it was true that considerable support had been expressed for work on warehouse receipts, the referral of that work to a working group had not been envisaged. He therefore proposed the deletion of the words "in order to refer work to a working group".

21. **Mr. Coffee** (United States of America) said that the decision had been to request the Secretariat to undertake preparatory work on the topic and, following a full discussion, to assign the issue to the next available working group. The words proposed for deletion should more properly be replaced with: "for work to begin in the next available working group after the topic of judicial sale of ships has been assigned to a working group".

22. **Ms. Cap** (Austria) said that she had the same recollection of the decision. More generally, it would be desirable to reflect the discussion on the various levels of priority assigned to possible future projects and their degree of maturity. She proposed the following fuller rewording of the chapeau of that paragraph: "Regarding the other topics discussed, the Commission came to the conclusion that the preparatory work on those matters was less mature and, given the limited resources of the Secretariat, should be given less priority. More preparatory work by the Secretariat would be needed before the Commission could decide on further steps on those matters. Accordingly, the Commission decided that: …".

23. **The Chair** said that it was her understanding, based on the earlier discussion, that in asking the Secretariat to conduct preparatory work on warehouse receipts, the Commission would leave open its decision as to when that work should be referred to a working group: the work would be undertaken simply with a view to its being taken up later by a working group, having regard to the Secretariat's limited resources.

24. **Ms. Sabo** (Canada) said that the current discussion reflected a lack of clarity in the earlier discussion on priorities and the difficulty encountered by the Commission in applying the principle of an order of priority for the assignment of work to working groups. In the light of the Chair's comments, she found merit in the suggestion of the representative of the United States but could accept the text as it stood since, while reflecting the decision to refer the work to a working group, it did not say when that would happen.

25. **Mr. Meier** (Switzerland) said that subparagraph (a) was worded in such a way as to highlight the importance that must be given to the topic by the Secretariat. The question raised by the representative of Israel at an earlier meeting, in particular, was whether it was currently the right time to be mandating working groups, given that other priorities might present themselves in the future. The rewording of the chapeau proposed by the representative of Austria offered an excellent compromise solution. The amendment proposed to subparagraph (a) by the representative of the United States did not reflect the discussion. He proposed the following wording for that subparagraph: "The Secretariat must take the necessary time and resources to conduct exploratory and preparatory work on warehouse receipts". The priority, albeit a lesser priority, to be given to the work would thus be clear, while at the same time it would be indicated that the work would be contingent on available time and resources, without any referral to a working group.

26. **Mr. Maradiaga** (Honduras) said he agreed with the representative of Canada: the current wording of the subparagraph was acceptable and in accordance with what was required of the Secretariat.

27. **Mr. Coffee** (United States of America) said that he deferred to the Chair's recollection of the earlier discussion and would therefore not insist on his

proposed new wording. His delegation nevertheless objected to the reformulation proposed by the representative of Switzerland. The amendment to the chapeau proposed by the representative of Austria was acceptable, so long as there was no change in the current wording of subparagraph (a).

28. **The Chair** said she took it that the Commission agreed to the amended wording of the chapeau of paragraph 17 proposed by the representative of Austria, on the understanding that subparagraph 17 (a) remained unchanged.

29. *It was so decided.*

30. **Ms. Cap** (Austria) said that subparagraph 17 (d) was misleading and did not reflect the agreement reached that the preparatory work should be limited to the area of insolvency. She therefore proposed that the words "in the area of insolvency" be inserted after "proposal on asset tracing" and that the phrase "and extending the focus of the work beyond the relevance of the topic to insolvency" be deleted.

31. **The Chair** said she took it that the Commission agreed to the amendment of subparagraph 17 (b) proposed by the representative of Austria.

32. *It was so decided.*

33. *Document A/CN.9/LI/CRP.1/Add.8, as orally amended, was approved.*

Document A/CN.9/LI/CRP.1/Add.9

34. **The Chair** said that, as noted in paragraph 5 (b) of the document, Working Group II would not be holding a session in Vienna in the second half of 2018. It remained to be decided how the Commission would use the remaining week that had thus become available, but that should not prevent the Commission from approving the document.

35. *Document A/CN.9/LI/CRP.1/Add.9 was approved.*

Agenda item 19: Consideration of revised UNCITRAL texts in the area of privately financed infrastructure projects (A/CN.9/939, A/CN.9/939/Add.1, A/CN.9/939/Add.2, A/CN.9/939/Add.3 and A/CN.9/957)

36. **The Chair** drew attention to the updates to the Legislative Guide on Privately Financed Infrastructure Projects proposed by the Secretariat and contained in documents A/AC.9/939, A/CN.9/939/Add.1, A/CN.9/939/Add.2 and A/CN.9/939/Add.3, as well as the comments by the World Bank on the topic contained in document A/CN.9/957.

Document A/CN.9/939

37. **Mr. Estrella Faria** (Secretariat), introducing the note by the Secretariat (A/CN.9/939), said that the procedure for finalizing the Guide required a decision by the Commission. Since the beginning of the current year and following consultations, the Secretariat had been drafting chapters of the Guide with a view to broadening its scope. Regionally, there had been a perception that the Guide was too narrowly focused on new large-scale infrastructure investment not confined to new infrastructure developed for public use, and that it should also cover what had come to be called public-private partnerships. A distinction was drawn between concession and non-concession types of arrangements in the Guide.

38. Updates had also been made necessary by two significant developments. One had been the adoption in 2003, one year after the adoption of the original Guide, of the United Nations Convention against Corruption, which had required Member States to put in place the necessary institutional framework and tools to fight corruption, not only in public procurement but also in public administration. While such matters might be considered unrelated to the traditional mandate of the Commission, they could not be ignored in a guide dealing with public-private partnerships. The important elements thus added were based on lessons learned over 20 years of practice with public-private partnerships, as communicated to the Secretariat by a number of organizations, including the World Bank. One such lesson was that most cases of unsuccessful public-private partnerships resulted from poor planning, which itself was partially due to inadequate preparatory arrangements by the host Government.

39. The second significant development making updates necessary was within the Commission itself, where the UNCITRAL Model Law on Public Procurement not only streamlined procurement procedures but also included new procedures that had not been contemplated in the original Model Law on Procurement of Goods, Construction and Services, which it had replaced. The need had then been felt to realign the text of the Guide to avoid duplication. In the revised chapters of the Guide, the Commission therefore stressed the need for project preparation and combating corruption within the framework of the new Model Law.

40. The Commission had before it a revised introduction to the Guide, reflecting its revised terminology and expanded range of public-private partnership (PPP) projects, together with revised drafts of chapter I, which contained the general principles that should underpin the process of awarding and managing PPP contracts; chapter II, which emphasized the need for proper evaluation of expected project costs with a view to avoiding unforeseen public expenditure; and chapter III, which aligned the Guide with the Model Law.

41. The Secretariat, in revising the Guide, had taken into account the views of outside experts in other organizations. It looked to the Commission to review the revised Guide and to give it feedback. It was important for it to know if the Commission agreed with the approach taken, in which case the Secretariat would revise the remaining chapters for the Commission to adopt the entire text in 2019.

42. **Ms. Sabo** (Canada) said that, while she agreed with the Secretariat's approach, account needed to be taken of the time available, particularly in the light of the number of projects that the working groups could be expected to have completed by the following year.

43. **Mr. Soh** (Singapore) said that his delegation did not object to that approach but remained mindful of some broader issues. The Commission was, as a matter of principle, required to approve all the chapters of the revised Guide. So far, the Commission had seen drafts of only three chapters and should be able to count on having all the necessary time to consider and comment on the remaining chapters.

The meeting rose at 1.05 p.m.

Summary record (partial) of the 1083rd meeting held at Headquarters, New York, on Thursday, 5 July 2018, at 3 p.m.

[A/CN.9/SR.1083]

Chair: Ms. Czerwenka (Germany)

The discussion covered in the summary record began at 3.55 p.m.

Agenda item 19: Consideration of revised UNCITRAL texts in the area of privately financed infrastructure projects (*continued*) (A/CN.9/939, A/CN.9/939/Add.1, A/CN.9/939/Add.2, A/CN.9/939/Add.3 and A/CN.9/957)

1. **The Chair** invited the Commission to resume its consideration of the updates to Legislative Guide on Privately Financed Infrastructure Projects proposed by the Secretariat and contained in document A/CN.9/939, A/CN.9/939/Add.1, A/CN.9/939/Add.2 and A/CN.9/939/Add.3.

Document A/CN.9/939 (continued)

2. **Mr. Douajni** (Cameroon) asked if the representative of Singapore could clarify the comments he had made at the end of the previous meeting (A/CN.9/SR.1082) in response to the approach taken by the Secretariat in updating the Guide.

3. **Mr. Soh** (Singapore) said his delegation generally supported that approach but that some decisions needed to be taken about available resources and how they were to be used: if it continued to approve three chapters a year, it would take the Commission considerably more time than was foreseen to approve the final text. He also wondered about the interpretation to be given to the Commission's decision in 2017 to update the text of the Guide, particularly on the question of how far the updates were to go. There was a thin line between reviewing the current text and expanding it to include new recommendations.

4. **Ms. Joubin-Bret** (Secretary) said that, at the end of 2017, following a number of expert meetings and several rounds of consultations, it had become apparent that the amount of time that the Secretariat had put into the project would not be adequately reflected in a mere change of name from "privately financed infrastructure projects" to "public-private partnerships" and that all the experts' inputs should be duly taken into account and consolidated in an up-to-date version of the Guide. The project had been ongoing for 15 years, during which there had been many developments in the area of publicly and privately financed infrastructure projects. The aim had been to arrive at an UNCITRAL product, not a Secretariat product. Accordingly, the Secretariat had prepared for review by the Commission a document that incorporated the experts' input and consisted for the time being of an introductory chapter and four other chapters. One additional chapter had been drafted but could not be available for reasons of translation; drafts of two other revised chapters and probably a conclusion were still to be prepared. Consequently, the work ahead could reasonably be envisaged within the desired time frame. The goal was to have by the end of 2019 a product that could be finalized by the Commission. Some expert group time would be required to validate the substantive content of the revisions proposed by the Secretariat.

5. **Ms. Sabo** (Canada) said that her delegation fully supported the work and mandate of the Secretariat but remained flexible as to the time frame for completion of the project. Given that, as agreed, it had not gone through a working group, it was important for States to have sufficient time to review and comment on the text; failing that, the approval process might have to be carried over to 2020, which was also acceptable.

6. **Mr. Estrella Faria** (Secretariat), echoing the remarks of the Secretary, said that it had indeed become clear in the course of the work that there were areas of the Guide that required extensive redrafting and/or expansion, not just an update. Only chapter VII called for no more than an update, aimed at reflecting relevant instruments adopted since the publication of the original Guide. In other chapters, for example chapter III, the issues were more complex and had required numerous alignments, notably with cross-references to the UNCITRAL Model Law on Public Procurement, so that the two instruments could be read in tandem. Chapters I and II had required more extensive amendments.

7. It had been decided that chapter I should reflect principles that had been proclaimed by the United Nations since the adoption of the original instrument and had not at that time carried the same level of international authority, in particular the principles underpinning the 2003 United Nations Convention against Corruption. Chapter II was an update in the sense that it reflected experience that had not existed at the time, notably in respect of failed infrastructure projects. Draft revised chapter VI had already been prepared; new drafts of chapters IV and V were

expected in early fall 2018. If the Secretariat could abide by the desired standards of efficiency and if it were possible to hold a meeting of experts in, for instance, December 2018, to take up any issues remaining from the current meeting and to validate the new draft chapters, a full set of revised texts should be available by January or February 2019.

8. **Mr. Bellenger** (France) said that the timetable proposed by the Secretariat was acceptable and that his delegation would be happy to participate in the work going forward, in particular by designating an expert for the expert group meeting envisaged for later in the year.

9. **The Chair** said she took it that the Commission wished to take note of the progress achieved so far in updating the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects and supported the approach proposed by the Secretariat for the continuation and completion of that work, it being understood that the draft instrument as a whole was expected to be submitted to the Commission for approval at its 2019 session.

10. *It was so decided*.

Agenda item 21: Adoption of the report of the Commission (*continued*) (A/CN.9/LI/CRP.1, A/CN.9/LI/CRP.l/Add.13 and A/CN.9/LI/CRP.1/Add.15)

Document A/CN.9/LI/CRP.1

11. **Ms. Sabo** (Canada) said she assumed that paragraph 10 would be completed once the Group of Latin American and Caribbean Countries had decided on the person to be proposed for the position of Rapporteur.

12. **Ms. Cerrato** (Honduras) said that consultations on the subject were ongoing within the Group and that the name of the person so designated would be communicated directly to the Secretariat.

13. **The Chair** said she took it that the Commission wished to approve the document, subject to the completion of paragraph 10.

14. *It was so decided.*

15. *Document A/CN.9/LI/CRP.1 was approved*.

Document A/CN.9/LI/CRP.1/Add.13

16. *Document A/CN.9/LI/CRP.1/Add.13 was approved.*

Document A/CN.9/LI/CRP.1/Add.15

17. *Document A/CN.9/LI/CRP.1/Add. 15 was approved.*

The meeting rose at 5.50 p.m.

Summary record (partial) of the 1085th meeting*
held at Headquarters, New York, on Friday, 6 July 2018, at 3 p.m.

[A/CN.9/SR.1085]

Chair: Ms. Czerwenka (Germany)

The meeting was called to order at 3.10 p.m.

Agenda item 21: Adoption of the report of the Commission (*continued*) (A/CN.9/LI/CRP.1, A/CN.9/LI/CRP.1/Add.11, A/CN.9/LI/CRP.1/Add.14, A/CN.9/LI/CRP.1/Add.16, A/CN.9/LI/CRP.1/Add.17 and A/CN.9/LI/CRP.1/Add.18)

1. **The Chair** invited the Rapporteur to introduce the draft report of the Commission on the work of its fifty-first session.

2. **Mr. Cuellar Torres** (Colombia), Rapporteur, introduced documents A/CN.9/LI/CRP.1, A/CN.9/LI/CRP.1/Add.11, A/CN.9/LI/CRP.1/Add.14, A/CN.9/LI/CRP.1/Add.16, A/CN.9/LI/CRP.1/Add.17 and A/CN.9/ LI/CRP.1/Add.18, which together would form the draft report of the Commission on the work of its fifty-first session.

Document A/AC.9/LI/CRP.1/Add.11

3. *Document A/AC.9/LI/CRP.1/Add.11 was approved.*

Document A/AC.9/LI/CRP.1/Add.14

4. *Document A/AC.9/LI/CRP.1/Add.14 was approved.*

Document A/AC.9/LI/CRP.1/Add.16

5. **Mr. Meier** (Switzerland) said that as paragraph 5 introduced the analysis conducted by the Commission, it should be placed after paragraph 6, to clarify that it was the Commission that had requested the Secretariat to prepare the 2019 session.

6. **The Chair** said that she took it the Commission agreed with the proposal to invert the order of paragraphs 5 and 6.

7. *It was so decided.*

8. **Mr. Coffee** (United States of America), referring to the question that had been raised by his delegation and that was captured in paragraph 13, said that since his delegation had only inquired about the criteria for posting documents on the Commission's website, but not about making them available to the members of Working Group III, it suggested ending the first sentence after the word "website" and deleting the rest of the sentence.

9. **The Chair** said she took it that the Commission agreed to the suggested change.

10. *It was so decided.*

11. **Mr. Estrella Faria** (Secretariat) said that in paragraph 20, the numbers in the parenthetical text of the third line should be changed to read "17 States respondents gave 5 out of 5, and 4 States respondents gave 4 out of 5". The first line of the paragraph should also be corrected to state that "the request had elicited 21 responses".

12. **Mr. Meier** (Switzerland) said that the last sentence of paragraph 21 should form a new paragraph and that she would even add two adjectives, "deep" and "excellent", to highlight the Commission's appreciation for the work of the Secretariat in servicing the Commission. The final paragraph, paragraph 22, would then read: "The Commission expressed its deep appreciation to the Secretariat for its excellent work in servicing UNCITRAL".

13. **The Chair** said she took it that the Commission agreed with that suggestion.

14. *It was so decided.*

15. *Document A/AC.9/LI/CRP.1/Add.16, as orally revised, was approved.*

Document A/AC.9/LI/CRP.1/Add.17

16. **Mr. Bellenger** (France), referring to the second sentence of paragraph 14, said that the word "resources" should be replaced with "human resources", since the resources referred to were primarily human resources. He also suggested a drafting change to the French text whereby the expression "des ressources qui seraient nécessaires" would be replaced with "des ressources humaines qui lui seraient nécessaires".

17. **The Chair** said that it was her understanding that based on the suggested changes, the last part of the sentence would read: "… and to consider carefully the level of Secretariat human resources it would need for the efficient management …".

* No summary record was issued for the 1084th meeting.

18. **Ms. Sabo** (Canada) said that the change proposed for the French version was not needed in English. Her delegation proposed rewriting that portion of the sentence to read: "…and to consider carefully the level of human resources the Secretariat would need for the efficient management …".

19. **The Chair** said she took it that the Commission agreed with the changes proposed by the representative of France for the French version and by the representative of Canada for the English version.

20. *It was so decided.*

21. *Document A/AC.9/LI/CRP.1/Add.17, as orally revised, was approved.*

Document A/AC.9/LI/CRP.1/Add.18

22. **Mr. Bellenger** (France) said that for the sake of clarity, his delegation proposed replacing the word "caractère" with "nature" in the third sentence of paragraph 3 of the French version.

23. **The Chair** said it was her understanding that the modification only concerned the French version.

24. *Document A/AC.9/LI/CRP.1/Add.18 was approved.*

25. The draft report of the Commission on the work of its fifty-first session, as amended, was approved.

The discussion covered in the summary record ended at 3.40 p.m.

Summary record of the 1086th meeting
held at Headquarters, New York, on Monday, 9 July 2018, at 10 a.m.

[A/CN.9/SR.1086]

Chair: Ms. Czerwenka (Germany)

The meeting was called to order at 10.20 a.m.

Agenda item 19: Consideration of revised UNCITRAL texts in the area of privately financed infrastructure projects (*continued*) (A/CN.9/939, A/CN.9/939/Add.1, A/CN.9/939/Add.2, A/CN.9/939/Add.3, A/CN.9/957, A/CN.9/LI/CRP.9)

1. **The Chair** invited the Commission to resume its consideration of the updates to the Legislative Guide on Privately Financed Infrastructure Projects proposed by the Secretariat and contained in documents A/CN.9/939, A/CN.9/939/Add.1, A/CN.9/939/Add.2 and A/CN.9/939/Add.3, as well as comments on the topic by the World Bank contained in document A/CN.9/957, and comments by Italy contained in document A/CN.9/LI/CRP.9.

Document A/CN.9/939 (continued)

2. **Mr. Estrella Faria** (Secretariat), recalling the genesis of the development of the Legislative Guide on Privately Financed Infrastructure Projects (A/CN.9/939), said that the idea of developing the Guide dated back to 1992 when, in view of the dismemberment of the Soviet Union and the trend away from planned economies towards market-oriented economies, the Commission had decided that it was important to take up work in an area which at the time was called "privatization". Following that decision, the Secretariat had started considering what areas to study on the topic of privatization that was in line with the Commission's mandate, which primarily concerned aspects of private commercial law which had an impact on international trade. In the process, it had identified the concept of build-operate-transfer contracts, which had been employed successfully in Turkey and in the Philippines for large public infrastructure projects.

3. Although the United Nations Industrial Development Organization had also started work on the same topic at that time, its methods were different from those of the Commission, in that it basically retained outside experts who worked with the Secretariat to draft a text, whereas the Commission drafted its texts through the intergovernmental process. After identifying the build-operate-transfer concept, the Secretariat then went on to determine which aspect of the concept would be in line with the Commission's mandate. It was after that exercise that it had identified the topic of privately financed infrastructure projects, with an emphasis on new investments for the development of large infrastructure. The Secretariat had made clear at the time that the topic did not involve outright privatization, in the form of the simple divestiture and sale of State assets, or the use of concessions for the exploitation of natural resources. The primary aim of the topic had been to study long-term transactions that required intensive capital investment and would lead to the operation of a public infrastructure facility by a private sector entity. In most of those cases, the private entity recovered its investment by collecting fees from users or customers of the facility.

4. At the time, the Commission had determined that the subject matter had not been ripe for a model law and had elected instead to develop a legislative guide, which it published in 2001 as the Legislative Guide on Privately Financed Infrastructure Projects. The document, which had been aimed at legislators, and in which the Commission had described problems and proposed solutions in the form of legislative recommendations and explanatory commentaries thereto, taking care not to be overly prescriptive, had not been meant as a guide on contract negotiation or contract management. Two years following its publication, the Commission had decided to add model legislative provisions to the Guide, something that was more user-friendly and more easily convertible into domestic legislation. The Commission had decided, however, to retain both instruments, with the intention of consolidating them in due course. That possibility of consolidation had therefore provided a reason for updating the Guide

5. Around the same time, the Commission had also started updating the UNCITRAL Model Law on Procurement of Goods, Construction and Services, culminating in the adoption of the UNCITRAL Model Law on Public Procurement, which incorporated new procurement methods in addition to the ones that had originally been included in the old Model Law. One such method had been inspired by the innovative selection process set out in the Guide, which the Commission had developed because it had deemed the selection methods in the old Model Law too rigid, in view of the variety of investments and commercial arrangements used to secure the repayment of investments by private entities in large-scale infrastructure projects. The adoption of the Model Law on Public Procurement had provided a

second reason for updating the Guide with cross-references to the Model Law.

6. The third reason for updating the Guide was to expand its scope, because it applied only to concession PPP infrastructure arrangements, in which a private entity undertook a project through a concession from the Government and then recovered its investment by charging user fees. It did not apply to non-concession PPPs, in which only the contracting authority or government agency paid for the facilities, as with the construction of hospitals, government buildings, correctional facilities and courthouses. The Guide therefore needed to be expanded to reflect the wealth of both positive and negative experiences that had been recorded since the early 1990s with both types of projects. The negative experiences included court cases brought by private companies against Governments prompted by a change in circumstances or legislation, and cases brought by Governments against private partners prompted by dissatisfaction with cost overruns and greater operational and commercial risks than had been originally anticipated. The Guide also needed to provide guidance, especially for more extensive contract planning and preparation before contract award.

7. The United Nations Convention against Corruption, adopted the same year as the model legislative provisions, had imposed on Member States obligations concerning transparency and good governance to curb and prevent corruption. Although preventing corruption did not fall under the Commission's mandate, the importance of the Convention for the international community and the General Assembly meant that the Commission could not ignore it and needed to mainstream anti-corruption measures in various areas of its work by developing guidance to prevent corruption from affecting the award of PPP contracts.

8. The above considerations and the general approach to the amendments being proposed by the Secretariat had been summarized in document A/CN.9/939. The Commission might wish to consider whether it agreed with that approach, which included in particular the suggestion to expand the terminology used in the Guide and its scope, replacing the term "privately financed infrastructure projects" with "public-private partnerships (PPPs)" and accepting all the resulting changes to the title of the Guide and the text; adding a definition of PPPs that broadened the scope of the Guide; and abandoning the use of the term "concession", in recognition of arrangements that did not involve the use of concessions; reflecting the underlying principles of the United Nations Convention against Corruption in chapters I and II of the text; and expanding chapter II, which had addressed the topics of project risk and risk allocation and would be revised to address project planning and preparation; and aligning the selection process in chapter III with the Model Law on Public Procurement.

9. The Commission had before it most of the proposed updates to the Guide, with the exception of updates to several chapters that were not expected to require many changes. Lastly, he suggested that the Commission might wish to consider whether it would be appropriate to retain only the model legislative provisions, and not the legislative recommendations, in the final updated Guide, since most of the legislative recommendations had been incorporated in the model legislative provisions, and in view of the confusion caused by the existence of the legislative recommendations side-by-side with the model legislative provisions.

10. **The Chair**, recalling that the Commission had already endorsed the general policy proposals made by the Secretariat for amending the Guide, as reflected in paragraph 3 of document A/CN.9/LI/CRP.1/Add.18, invited members to make any comments on the updates proposed by the Secretariat.

11. **Mr. Wallace** (United States of America) said that, while the recommendations covered by model legislative provisions could be omitted, he was curious to know what the Secretariat would proposed to do with the recommendations that dealt with more constitutional and structural matters and had not been transformed into model legislative provisions.

12. **Mr. Estrella Faria** (Secretariat) said that the Secretariat had presented concrete proposals in that regard in the annex to document A/CN.9/939, where it had provided a table of legislative recommendations that had not been transformed into model legislative provisions originally, reminding the Commission why they had not been so transformed. It would therefore advocate that they be deleted, since the subject matter of those recommendations was discussed extensively in the Guide and did not warrant specific model legislative provisions.

13. **Ms. Joubin-Bret** (Secretary of the Commission) said that, although the legal instruments drafted by the Commission needed to be timeless, not driven by the fashion of the day, the Secretariat had considered using the updating of the Legislative Guide as an opportunity to highlight the role of PPPs in infrastructure development and their contribution to the achievement of the Sustainable Development Goals. It had, however, decided not to include any reference to the Goals in the text itself because they were more circumstantial than legal in nature. She would welcome the members' views regarding the possible addition of linkages to Sustainable Development Goals in the text. She would also welcome suggestions for making the

updated Guide more attractive to more stakeholders within the United Nations and among States.

14. **Mr. Maradiaga** (Honduras), welcoming the updates proposed by the Secretariat, said that aligning the Guide with existing anti-corruption instruments would be useful. He also agreed that the contribution that PPPs were making to the achievement of Sustainable Development Goals should be reflected in the Guide.

15. **Mr. Dayaratne** (Sri Lanka) said that his Government had recently adopted guidelines pertaining to PPPs and would be paying close attention to the outcome of the Commission's work on the topic.

16. **Mr. Montemaggi** (Italy) said that the updates would help to enhance transparency and good governance in the field of PPPs. In that connection, he welcomed the proposal to align the Guide with the Model Law on Public Procurement and the United Nations Convention against Corruption.

17. *Document A/CN.9/939 was approved.*

Document A/CN.9/939/Add.1

18. **Mr. Estrella Faria** (Secretariat) said that document A/CN.9/939/Add.1 contained the revised introduction and background information on PPPs. It was rather unfortunate that, owing to various publishing restrictions within the United Nations, it had been impossible for the Commission to have a marked-up copy of the original document A/CN.9/939, which would have shown clearly where any changes had been made. Many editorial changes had been made to the original text to make it clearer, but in the interests of time, he would only highlight the paragraphs where substantive changes had been made.

19. Introducing section A of the document, which contained the introduction, he said that paragraphs 8 and 9 included substantial changes that reflected the expanded scope of the Guide to cover non-concession PPPs. In addition, paragraph 11 reflected substantive changes to the definition of "public infrastructure" and "public services", and the definition of "public private partnership" had been added in paragraphs 14 to 17. To reflect the expansion of the scope of PPPs covered in the Guide to include non-concession arrangements, the definition of "concession" in paragraphs 18 and 19 had been revised to indicate that that term was no longer used in the Guide, unless required by context. Instead, the act whereby a public authority entrusted a private entity with carrying out an infrastructure project was referred to in the revised Guide as the "public-private partnership contract".

20. **The Chair** invited the members to make any substantive comments they had concerning the updates proposed by the Secretariat.

21. **Mr. Soh** (Singapore), supported by **Mr. Wallace** (United States of America), proposed replacing the term "private partner" with "private party" throughout the text, as many of the arrangements covered by the term "public-private partnership" in the revised Guide were not true partnerships in the legal sense. He also proposed replacing the word "attract" in paragraph 4 with the more neutral term "facilitate", such that the first sentence would read: "The purpose of the Guide is to assist in the establishment or adaptation of a legal framework to facilitate private investment in public infrastructure and services through public-private partnerships (PPPs)".

22. **Mr. Ge** Xiaofeng (China) proposed replacing the words "to attract private investment in public infrastructure and services" in paragraph 4 with something along the lines of "to attract private participation in the construction of public infrastructure and the provision of public services in order to improve the efficiency and quality of public services", thereby reflecting the Guide's broader purpose of strengthening public services. In addition, in paragraph 15, he proposed replacing the words "does not provide any service to the public" with "does not charge any fees directly to the public", to clarify that the distinction between concession and non-concession PPPs was not based on whether the private entity provided a public service, but rather on how the private entity recovered its investment.

23. **The Chair** said it was her understanding that the changes suggested by the representatives of China and Singapore were drafting changes which might need to be completed in a more focused setting than in a plenary. She suggested that the matter be held in abeyance.

24. *It was so decided.*

25. **Mr. Estrella Faria** (Secretariat) introducing section B of the document, said that it had been included mainly to enable the reader to understand the economic and political considerations that shaped the development of PPPs, and to highlight the different financing structures used, as they would have implications for the policy decisions that the legislator would have to make. In line with the advice of the World Bank, which had played a key role in drafting the Guide and had supported the restructuring of infrastructure sectors in countries throughout the world, section B also contained information on the role of a country's market structure and competition policies in shaping private participation in infrastructure development.

26. The discussion of the scope for competition in the telecommunications, energy and transport sectors contained in paragraphs 28 to 30 of the original version of the Guide had been significantly reduced in the revised version, and paragraph 35 of the

original version, which dealt with unbundling in the telecommunications sector, had been eliminated, in order to reflect technological progress made in those areas. In addition, paragraph 60 of the revised version contained updated wording reflecting the expansion of the scope of PPPs covered by the Guide beyond concessional arrangements.

27. *The meeting was suspended at 11.30 a.m. and resumed at 12 p.m.*

28. **Mr. D'Allaire** (Canada) said that his delegation proposed that in the first sentence of paragraph 32 of the document, the words "other factors" be replaced by the phrase "other barriers to entry", and that the second sentence be amended by replacing the words "[h]owever, rapid technological progress and innovation" with the words "however, a number of factors, such as technological progress and innovation, the growing need for infrastructure funding and financing, limited government revenues, and the need to deliver public infrastructure more efficiently".

29. **Ms. Joubin-Bret** (Secretary of the Commission) suggested that the phrase "barriers to entry or operation" might be preferable to "barriers to entry".

30. **Mr. D'Allaire** (Canada) said that under Canadian competition law, "barriers to entry" covered barriers to operation. His delegation therefore had no objection to that change. It did, however, find paragraphs 35 and 36 lengthy and at times confusing and not providing sufficient clarity about competition policy in respect of vertical and horizontal integration, which obviously had to be reflected in the text.

31. His delegation therefore suggested deleting paragraph 36 and reformulating paragraph 35 as follows: "Vertical or horizontal integration of market players, including infrastructure companies, can significantly lessen competition in a market. Integration can also enhance efficiency, thereby promoting competition. As such, a case-by-case economic assessment is generally required to determine whether particular integration is on balance pro- or anti-competitive. Integrated companies might abuse their position in a market by weeding out competitors or excluding others from entering the market. Vertical integration is the common control of two businesses that are at different stages of production – for example, a manufacturer of electrical equipment and a firm providing engineering and installation of electrical networks. Horizontal integration is the merging together of businesses that are at the same stage of production, such as two transportation companies. This situation is compounded by the presence of monopolistic elements in infrastructure services, such as the single rail or road infrastructure. Given the difficulty for some types of infrastructure to allow competition, some countries have found it necessary to separate the monopolistic element (for example, the electrical grid used to supply electricity) from competitive elements in given infrastructure sectors (for example, energy production)."

32. **Mr. Wallace** (United States of America) said that his delegation could not consider such a lengthy and substantive proposal unless it was submitted in writing.

33. **The Chair** suggested that the Commission might wish to request that the Secretariat examine ways to improve the drafting of paragraph 35 without changing its substance.

34. **Mr. Estrella Faria** (Secretariat) said that the Commission might also wish to consider whether or not it was necessary to retain paragraph 36, recalling that the Commission had given the Secretariat permission to organize colloquiums or expert group meetings later in the year, which could include a meeting on PPPs. The Secretariat could therefore prepare a revised version of the text that took into account the suggestions and concerns that had been expressed, including by the delegations of Canada and Singapore, for consideration at an expert group meeting.

35. **Mr. Wallace** (United States of America) said that paragraph 36 was descriptive and would be unnecessary if States were now sufficiently familiar with the concept of unbundling.

36. **Mr. Estrella Faria** (Secretariat) said that if the Secretariat were asked to examine the necessity of including paragraph 36, it would do so by consulting the World Bank, which had originally drafted the paragraph.

37. **The Chair** said she took it that the Commission wished to accept the proposed changes to paragraph 32 and to request the Secretariat to revise the wording of paragraph 35, for consideration at a future expert group meeting, and to examine the relevance of retaining or deleting paragraph 36.

38. *It was so decided.*

39. *Document A/CN.9/939/Add.1, as orally amended, was approved.*

Document A/CN.9/939/Add.2

40. **Mr. Estrella Faria** (Secretariat), introducing the document, which concerned revised chapters I and II, said that the outdated language in the opening of the existing Legislative Guide had been amended for stylistic reasons and to convey the message more effectively. Apart from the changes indicated in the text in square brackets, section B had been completely rewritten to reflect the broader principles emanating from the Sustainable Development Goals

and the United Nations Convention against Corruption.

41. The reference in the existing Guide to the need for a fair, transparent and predictable framework for PPPs had been expanded significantly to include the need to also help in promoting the public interest. That idea had stemmed from the experiences of the World Bank and other multilateral financial institutions, which had determined that the primary objective of PPPs was to promote the public good. That had been meant to counter the impression, formed by some negative past experiences, that PPPs were little more than a means of squeezing money out of the public sector. While it might be a truism that the first principle of legislation on PPPs should be to uphold the public interest, the Secretariat felt that that idea should be clearly set out in national legislation, as indicated in paragraphs 5 and 6.

42. Paragraphs 3 and 4 contained new material pertaining to the Sustainable Development Goals, which had not been in existence at the time of adoption of the original Guide, while paragraphs 8 and 9, newly added to the section on transparency, incorporated the advice set out in the Guide to Enactment of the UNCITRAL Model Law on Public Procurement. The section on fairness in the existing Guide had been expanded to address stability and predictability in two additional paragraphs; the initial paragraph of that section, apart from its first sentence, had essentially remained the same. Paragraphs 11 through 18 were entirely new and were based on the principles set out in the United Nations Convention against Corruption and the Guide to Enactment of the Model Law on Public Procurement. Paragraph 19 had been moved from another section of the existing Guide, while paragraph 20 was entirely new.

43. The paragraphs on constitutional law and PPPs appeared as they had in the existing Guide, apart from the addition in paragraph 22 of the phrase "uncertainties regarding the legal basis for PPPs", in place of the original formulation, "uncertainties regarding the extent of the State's authority". The paragraphs on general and sector-specific legislation had not been revised extensively, apart from an amendment to paragraph 24 that clarified the interplay between general and sector-specific legislation. The first paragraph in the section on the purpose and scope of PPPs, contained in paragraph 33, had been amended to specify that the Guide would cover not only infrastructure but also provisional operation of infrastructure by the private sector, reflecting the broader scope of the revised Guide. Other amendments had resulted from changes in terminology. A similar change had been made to the first sentence of paragraph 37, corresponding to paragraph 32 of the existing Guide, to clarify the distinction between concession PPPs and non-concession PPPs.

44. Lastly, the preamble to the model legislative provisions had been redrafted extensively, a second option had been added in the preamble and the definitions had been amended to the extent necessary to reflect changes in terminology.

45. **The Chair** sought comments from the members on the changes proposed by the Secretariat.

46. **Mr. D'Allaire** (Canada) said that the assertion made in the first sentence of paragraph 12 that a stable legal framework would allow to predict the outcome of judicial decisions seemed presumptuous. He wondered whether the tone of that statement might be softened and would be willing to suggest appropriate wording to that end, if necessary. With regard to paragraph 18, he sought further clarification from the Secretariat about the last sentence, which read: "The efficiency of a country's overall institutional and administrative resources is essential to ensure the sustainability of PPP projects and a country is well advised to follow best practices to assess them".

47. **Mr. Estrella Faria** (Secretariat) said that the Secretariat would look into the wording of paragraph 12 as suggested by the representative of Canada, and that the footnote attached to the final sentence of paragraph 18 provided a cross-reference to a tool developed by the International Monetary Fund to help countries evaluate the strength of their public investment management practices, an area beyond the scope of the Commission's mandate. The statement in question, based on wording used by the Fund, had been formulated vaguely on purpose in order to avoid the indelicate and potentially offensive assertion that inefficient, corrupt or incompetent Governments could not manage successful PPPs. Experts consulted by the Commission had encouraged it to direct readers to the tools developed by the Fund to promote the sustainability of PPP projects, and to the support that the Fund could provide to Governments in that respect.

48. **Mr. D'Allaire** (Canada) said that the statement in paragraph 22 that uncertainties regarding the legal basis for PPPs might delay their implementation, was unclear. Given that it appeared in a section on constitutional law governing PPPs, it seemed to him that in many situations, if something was unconstitutional, it would not only delay the implementation of the partnership but would simply not allow it. He wondered whether he was misreading the statement.

49. **Mr. Estrella Faria** (Secretariat) said that there was little difference between the current text and the original text; the main idea being to highlight the idea of uncertainty in the Constitution. It was quite possible that the descriptive statement was not applicable in many countries because the Constitution had been clarified. In the 1990s,

however, there had been many cases where the lack of clarity under constitutional law regarding the extent of State authority to invite the private sector to provide a particular type of service had led to litigation and significant cost overruns. In countries where the constitutional law was clear on the topic, the point made by the representative of Canada would be well taken. Government involvement in such deals was clearly unconstitutional and simply did not take place. Given that the issue might have been resolved in some countries but not in others, it had been decided that, on balance, there would be no harm in retaining the notion of uncertainty in the text.

50. The Secretariat proposed no substantive amendments to paragraphs 33 to 51. At the time of drafting of the original Guide, experts and advisors had said that the extensive discussion on how regulatory authorities were set up should be omitted, as it entered into domestic, administrative and regulatory matters not normally dealt with by the Commission. However, the World Bank had also maintained that countries had to build up their regulatory capacity. There had been two schools of thought on the matter: one view, endorsed by lawyers and advisors, held that all regulation should be written into contracts, while the opposing view was that countries should be encouraged to have functioning regulation. The latter view, in favour of a discussion on regulation of infrastructure service by regulatory structures, had prevailed. Despite the eagerness of some private sector experts and advisors to eliminate the discussion in question, the Secretariat had elected to retain it because it had not heard otherwise from the World Bank and other public sector experts that it had consulted on the matter.

51. **Mr. Wallace** (United States of America), endorsing the position expressed by the Secretariat, said that many in the private sector and beyond had held the naïve view that all issues relating to regulation could be encapsulated in a contract.

52. **The Chair** said she took it that the Commission wished to retain the revised paragraphs as proposed by the Secretariat.

53. *It was so decided.*

54. **Mr. Wallace** (United States of America), referring to the general provisions, drew attention to paragraph (e) of model provision 2, in which the term "private partner" was defined as a private entity. He took it that whichever expression between "private party" and "private partner" that the Commission decided to adopt would be used consistently throughout the text.

55. **Mr. Estrella Faria** (Secretariat) said that a second option had been incorporated into the preamble to accommodate the civil law legislative drafting tradition, which usually featured an opening article stating the purpose of the law in lieu of an extensive preamble.

The meeting rose at 1 p.m.

Summary record of the 1087th meeting
held at Headquarters, New York, on Monday, 9 July 2018, at 3 p.m.

[A/CN.9/SR.1087]

Chair: Ms. Czerwenka (Germany)

The meeting was called to order at 3.05 p.m.

Agenda item 19: Consideration of revised UNCITRAL texts in the area of privately financed infrastructure projects (*continued*) (A/CN.9/939, A/CN.9/939/Add.1, A/CN.9/939/Add.2, A/CN.9/939/Add.3 and A/CN.9/957)

1. **The Chair** invited the Commission to resume its consideration of the updates to the Legislative Guide on Privately Financed Infrastructure Projects proposed by the Secretariat and contained in documents A/CN.9/939, A/CN.9/939/Add.1, A/CN.9/939/Add.2 and A/CN.9/939/Add.3, as well as comments on the topic by the World Bank contained in document A/CN.9/957.

Document A/CN.9/939/Add.2 (continued)

2. **Mr. Estrella Faria** (Secretariat) said that revised chapter II, as set out in document A/CN.9/939/Add.2, contained a great deal of new material for the Commission to consider. It reflected the strong feelings of the experts who had been consulted over several years that planning and preparation were critical to the proper implementation of public-private partnership (PPP) projects. In incorporating the new material, however, the Secretariat had worked hard to keep within the boundaries of the Commission's trade law-related mandate. Hence, it had not address in detail the set-up of units or structures that were needed or advisable to have in a country. It had also done its utmost to respect the diversity of legal, historical and administrative traditions in the world. It had avoided prescribing what countries needed to do and had formulated the advice received from experts as best practices to be shared. The segments dealing with administrative coordination in the old chapter I had been moved to the current chapter II to ensure that planning and preparation went hand in hand with all the administrative measures that would need to be put in place for the proper implementation of such PPP projects.

3. Some advice received from the experts concerned what in some countries was known as PPP units. In international practice, there had been much discussion about the value of creating such units to build up and share knowledge, thereby helping other administrative structures in a country understand the PPP process. Although the advice from the experts was reflected in the updates to the Guide, the Secretariat had been careful to avoid any suggestion that there should be a central body for PPP implementation in any given country. It was acknowledged that depending on the institutional and constitutional set-up in a country, there might be different levels of authority with equal power to enter into PPPs. To suggest that there should be only a single unit with authority across the country would be to ignore the wide variety of administrative realities in the world.

4. One element that had already existed in the Guide but which, according to the experts, deserved to be expanded, was the general responsibility of the contracting authorities or public sectors for testing the assumptions of a project prior to its preparation, and long before the selection of a private partner. Experience had shown that very often, projects were carried out based on unrealistic assumptions – about the price to be charged to the public, the cost of the project or the level of risk that the different parties would assume. Governments often ended up assuming a level of residual or vicarious financial liability that far exceeded the cost of carrying out the project themselves. Such an eventuality was avoided not through corrective measures during contract implementation, but through proper planning and preparation of the project.

5. Detailing the updates to the Guide proposed in document A/CN.9/939/Add.2, he said that paragraphs 1 to 12 constituted entirely new material, with some minor holdovers. Paragraphs 15 to 21 also consisted of new text, essentially reflecting the nature and extent of pre-project assessment and planning that needed to be carried out by the Government, including the "value for money" test, a hypothetical comparator whereby the Government envisaged the costs of the project over its entire life cycle and compared them with the cost if it carried out the project itself. That calculation included not only the cost of construction and operation, but also the cost to the public in terms of tariffs and other prices charged by the operator of the facility throughout its life cycle. The experts at the World Bank had strongly advised the inclusion of that test, because it had an impact on the selection process and on some of the contractual arrangements that might be negotiated: for example, whether an exclusive concession would be accorded or competition between different

operators would be permitted and whether the project was to be renewable or periodically put up for bidding by different operators.

6. Paragraphs 25 to 28 were new and concerned preparations for the procurement and selection phase. They had been included in the text because the experts had pointed out that having a standing body for overseeing PPPs in a country facilitated knowledge-sharing and standardization. Over time, there had been a very strong shift towards PPPs that contained standardized text and standard contracts and clauses during the bidding phase. According to the experts, setting the rules of the game at a very early stage helped to circumscribe the risks that a Government had to take on in connection with PPP projects and to avoid situations where a company was selected and then, during negotiations, was still able to extract from the Government concessions and guarantees, making the project costlier than if the Government had carried it out itself.

7. The rest of the updated Guide remained essentially the same as the original Guide. The Secretariat would only be making changes to adjust the terminology as a consequence of other amendments that might be approved by the Commission.

8. **The Chair** sought comments from the members on the changes proposed by the Secretariat.

9. **Ms. Pasaogullari** (Turkey) said that the information contained in the Guide was quite helpful to countries that were considering new sectors for PPPs. Turkey had been using PPP models for the past 30 years, and in the past 10 years it had begun focusing on the transportation, health and energy sectors. From the Government's perspective, project preparation and contract management were crucial. However, "value for money" and project preparation feasibility studies were important not only for the first phase of the project but for all phases of the project. Long-term financial institutions and non-traditional lenders such as institutional investors and new capital markets looking for refinancing options for an existing PPP project throughout its life cycle would still turn to the studies conducted for the first phase of the project. When a project was in its operational phase, the "value for money" elements considered during the first phase still played an important role. Because lenders involved in the project after the tendering process were more conservative in evaluating risks, "value for money" reassessments were very important for all the project stakeholders.

10. **Mr. Estrella Faria** (Secretariat) said that the Secretariat had taken note of that comment and agreed that there was a need, not just at the planning and preparation stage, but also throughout the life cycle of projects, to ensure their constant "value for money" reassessment. Although that idea was reflected somewhat in chapter III, the Secretariat would do its utmost to state it more clearly in chapter IV when it was prepared.

11. **Ms. Joubin Bret** (Secretary of the Commission) said that the possibility of revisiting a project at various stages of its development was very important in shaping not only the Government's expectations but also the legitimate expectations of investors. It was also one of the areas where the prevention of investment disputes came into play.

Paragraphs 1 to 14

12. *Paragraphs 1 to 14 were approved.*

Paragraph 15

13. **Mr. D'Allaire** (Canada), said that the extent to which the risks of a project were "downloaded" or transferred to the private parties involved was touched upon in subparagraph (a), but was not expressed very clearly.

14. **The Chair** asked whether the Canadian delegation had any specific changes to propose or had just been making a general remark.

15. **Mr. D'Allaire** (Canada) said that his delegation had no problem with the text but would like the Secretariat to clarify where and how to assess the risk that had been "downloaded" from the public entity to the private party involved in a PPP project.

16. **Mr. Wallace** (United States of America) said that it was true that Governments must be analytical and realistic as to the risks they were undertaking, because PPP projects had historically been considered non-recourse projects, where the element assessed was not the creditworthiness of the investor or the Government, but the project itself and the revenue it generated. For both concession and non-concession projects, Governments often assumed what was referred to as "contingent liabilities", but those liabilities had never been analysed sufficiently. He therefore supported the representative of Canada if that was the concern that he was raising, because it was important to know whether those projects cost more in private hands than in public hands.

17. With reference to risks being "downloaded" to the private party, he suggested using the expression "legal obligations" rather than "risks" and to have those obligations spelled out clearly in the contractual arrangement involved. A private party would then have an incentive and a need to protect itself by assuming only the "risk" that corresponded to the legal obligations that it was prepared to undertake.

18. **Mr. Estrella Faria** (Secretariat) said that the Secretariat was not supposed to have opinions, but if it did it would agree that "risk" was a term with which

economists, business managers and financiers worked, while lawyers dealt with "legal obligations", which were in fact the lawyers' translation of what they had identified as the risks and who bore the liability or cost of any aspect of the project. That information would be spelled out in the law and in the contractual obligations, as discussed in the later chapters of the Guide. The part of the Guide now being discussed corresponded to the pre-contractual or pre-legal phase of a project, however.

19. On the point raised by the representative of Canada, he drew attention to the strategic footnote in paragraph 16 pointing to a publication by the International Monetary Fund, which had developed a methodology for financial risk assessment. It comprised indicators and factors that formed a matrix detailing who bore the risk relating to construction, catastrophic events risk and so on. Perhaps paragraph 15 should be expanded to make it clear that a variety of factors went into the calculation of fiscal risk, and a cross-reference might be inserted to the discussion later in the text spelling out those risks and the usual allocation patterns.

20. **Mr. Wallace** (United States of America) said that although the Guide was intended not to be overly prescriptive, it might be true that paragraph 15 should be made more specific. Perhaps the Commission should urge Governments to be realistic about the risks involved when they undertook a PPP project and to ensure that officials responsible for setting up the projects had a moral obligation to present the real cost of projects to the Government.

21. **Ms. Joubin Bret** (Secretary of the Commission) said she agreed with that point in theory, but what happened in practice, in the implementation of projects over time, was that a number of unanticipated risk factors might come into play. In Argentina, for example, huge problems had occurred when PPPs had been used for public service delivery, and the results did not correspond to the feasibility and risk determined at the initial stage of the projects. That was why there was a need to be prudent about risk assessment.

22. **Mr. Wallace** (United States of America) said he completely agreed but pointed out that Argentina had linked its currency to the United States dollar for far too long, with the unfortunate tolerance of the International Monetary Fund. While such situations were hard to anticipate, the Government could still be warned, on a project by project basis, to make its estimates as realistic as possible.

23. **The Chair** said she took it that the Secretariat would look into the question of risk assessment to see if the text could be adjusted to address the concerns raised.

24. *It was so decided.*

Paragraphs 16 to 18

25. *Paragraphs 16 to 18 were approved.*

Paragraphs 19 and 20

26. **Mr. D'Allaire** (Canada) said that the heading that preceded paragraphs 19 and 20, "[t]he issue of the exclusivity", could perhaps be changed to "[i]mpact on competition", to more accurately describe the subject matter. Every element that should be taken into account in project assessment could not be listed, of course, but in Canada, it was standard practice for the impact on gender and on minority groups to be reviewed in connection with any Government decision. It might therefore be useful to include a catch-all category after paragraph 20 to cover all the elements, other than those of economy and efficiency, fiscal risk, welfare and social impact and exclusivity or competitiveness, that could be taken into account in project assessment.

27. In response to a question by **the Chair**, he suggested that the Secretariat be requested to find a title for an additional, general category of assessments that would make it clear that the previous four categories were not intended to be limitative.

28. **The Chair** said she took it that paragraphs 19 and 20 were approved, subject to the suggestion made by Canada.

29. *It was so decided.*

Paragraphs 21 to 31

30. *Paragraphs 21 to 31 were approved.*

31. **Mr. Wallace** (United States of America), referring to title of section E, "Government support", pointed out that the concept of government support was intimately linked to the discussion about fiscal risk assessment.

Model legislative provisions 5 to 7

32. *Model legislative provisions 5 to 7 were approved.*

33. *Document A/CN.9/939/Add.2, as amended, was approved.*

Document A/CN.9/939/Add.3.

34. **Mr. Estrella Faria** (Secretariat) said that in revised chapter III, contained in document A/CN.9/939/Add.3, the Secretariat was primarily proposing, not entirely new text, but rather a sequence of changes to better align the Guide with the UNCITRAL Model Law on Public Procurement. When the original Guide had been drafted, there had been a consensus that cross-references could not simply be made to the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services. The Commission had agreed that the main

procurement methods contemplated in the Guide – open tendering for the procurement of goods and requests for proposals for the procurement of services – were inadequate for the selection of a concessionaire, as the term was understood then, or for PPPs as currently understood. In both cases, it had been contemplated under the Model Law that a procuring entity would put out a contract for bids or issue requests for proposals on the basis of a set of technical specifications it had drafted. That had been understandable in the context of that Model Law, because the procuring entity had been contemplated therein as an owner of a construction project, thus performing the traditional government procurement function.

35. The trend in countries with the greatest experience in PPPs, however, was that instead of automatically using specifications from the Government or the procuring entity, it was useful to encourage the private sector to come up with alternative solutions. Under the 1994 Model Law, that had not been possible, because both procurement methods had been based on the concept of bidding against a fixed set of specifications. Moreover, there had been a strong preference for awarding the contract to the lowest bidder in both cases, especially with the tendering method for procurement of goods. The consensus had been that the lowest bid was entirely inappropriate and inefficient as the sole basis for awarding a PPP contract. The projects were too complex and had considerable implications for a very long period of time for the Government to base its choice of concessionaire solely on the toll that would be charged by the latter. It had also been pointed out that in many countries, there was a practice called "lowballing", whereby companies operating under a procurement system that automatically awarded the contract to the lowest bidder artificially lowered their prices during the bidding phase, secure in the knowledge that once they had received the contract, they could start renegotiating various terms. That practice ended up completely subverting the economic logic for awarding the contract to the company in the first place.

36. The Working Group had accordingly devised a method to encourage a much more sophisticated evaluation of proposals, in which the technical and financial aspects of the projects were assessed separately; the financial aspects were supposed to include not only the unit price but also risk allocation and all other long-term cost factors. That method had eventually become, with some alterations, one of those used in the UNCITRAL Model Law on Public Procurement. The objective now was to align the Guide with that Model Law and to ensure that texts that already existed in the Model Law were not reproduced in the Guide. Accordingly, the Secretariat had had to extensively redraft paragraphs 1 to 4 of the Guide, under "General remarks". Paragraph 3 had been redrafted to show that the Guide covered much more than infrastructure projects. Since it was no longer necessary to explain the peculiarity of that procurement method, as the Model Law on Public Procurement prescribed a standard procurement method, subparagraphs (a), (b) and (c) of the old paragraph 3 had been deleted.

37. Paragraphs 5 to 25 consisted of minor amendments to the previous text, to improve the wording and adapt it to the new scope of the Guide. Paragraph 27, on early information on forthcoming PPP projects, was new and fit well with the new emphasis on proper planning. The World Bank and other institutions had strongly suggested that Governments that engaged in PPPs be encouraged to have a broader pipeline of projects, to help the market prepare for bidding for PPP contracts. Paragraphs 28 to 50 were essentially the same as in the earlier text, with some minor amendments.

38. More extensive amendments had been included in paragraphs 51 to 57, reflecting the comments by experts from the World Bank that the appeal in the Guide for the use of open competitive proceedings should be strengthened and the possibility of direct negotiation of contracts reduced to an exception. One of the countries with the most experience with PPPs had traditionally been France: for over 200 years, it had entrusted the private sector with delivery and management and distribution of potable water, and it also had a long tradition of privately operated toll roads. But up until 2000, France had excluded all concessions from the application of the general public procurement law and had permitted direct negotiation of major contracts. It had thus been particularly difficult in the past to reconcile the Guide, which strongly advocated competition, with the longstanding legal and industrial traditions of a country like France.

39. In the meantime, however, because of European legislation, things had changed in France: there was now greater latitude for bidding, and direct award of contracts had become an exception. The Guide had now been simplified because it was no longer necessary to make excuses for advocating competition and for not recognizing the possibility of direct negotiation. Accordingly, paragraphs 58 to 63 reflected the possibility to choose between single-stage bidding without pre-selection for very simple projects; a two-stage procedure of the type originally formulated in the Guide, leading to the issuance of one set of specifications; and a request for proposals with dialogue, in which a full set of single specifications was not necessarily issued at the end, a method derived from the Model Law on Public Procurement.

40. **Mr. Wallace** (United States of America) said that reference had just been made to the inadequacy of normal procurement procedures: tendering with

specifications prepared by the owner, or requests for procurement of services, in which there were no specifications, but instead, terms of reference. A PPP could be seen as a super-service, because it was meant to create, operate, maintain and handle the treasury for and regulation of a project. Although it still had construction elements, in that the facility needed to be built to provide such service, the fact that it was a service was even more visible in the case of non-concession infrastructure, where contractors might be running a prison, a hospital or schools, and thus were providing a service. Governments and donors were somewhat wary of the selection of service providers, however, because there were no specifications or tendering process. Governments could not lay down the requirements for selection, yet they and the owner had much more discretion – discretion that could be abused. Accordingly, while going towards competitive dialogue and moving away from tendering, it was important to keep in mind that real risks were involved. Although the Secretariat had indicated that there was no need to refer to the Model Law on Public Procurement in the Guide because many of its provisions had been transposed onto the Guide, he felt that as many other elements contained in the Model Law had not been replicated in the Guide, including the provisions on advertising, reference must still be made to the Model Law, albeit slightly less than otherwise.

Paragraphs 1 to 13

41. *Paragraphs 1 to 13 were approved, subject to a minor editorial amendment to the Chinese text of paragraph 2.*

Paragraphs 14 and 15

42. **Ms. Maslen** (World Bank) drew attention to document A/CN.9/957, in which the World Bank commented on the subject of transparency that was addressed in paragraph 14. It pointed out that there was a trend for countries to have laws requiring disclosure of awarded contracts for transparency and accountability purposes. The publication of awarded contracts, after the deletion of proprietary or sensitive information, could also be useful for public scrutiny and monitoring of performance.

43. **Mr. Ge** Xiaofeng (China) said that paragraph 15 should include additional text with regard to electronic procurement, which would make for more transparent procedures. After the words "maintain a record of the selection proceedings" at the end of the first sentence, a phrase should be included to emphasize the need for full disclosure of such proceedings and the performance of the contract in question. Similarly, some reference should be made to the use of open tendering under certain circumstances for some PPP projects, especially those where criteria and specifications could be clarified in advance.

44. **Mr. Wallace** (United States of America), citing the first sentence of the World Bank's comments in A/CN.9/957, which referred to transparency in the performance of awarded contracts, and the remarks just made by China, said that some clarification about ensuring transparency with respect to the performance of a contract would be welcome.

45. **Ms. Maslen** (World Bank) said that performance was monitored by the regulating authority or supervising body. The publication of awarded contracts and the involvement of stakeholders helped with public scrutiny of PPP projects.

46. **Mr. Soh** (Singapore) said that while his delegation supported transparency, a distinction should be made between general principles of procurement and issues more specific to PPPs. For instance, he doubted that the Commission wanted to get into the legal issues and potential disputes that might arise from the publication of statements as to whether a contracting party had fulfilled its obligations.

47. **Ms. Pasaogullari** (Turkey), responding to the comment by the United States about transparency in the operational stage of projects, said that for the operation of special-purpose-vehicle PPP projects under which the Turkish Government assumed direct or contingent liability through the guarantees it provided, the Government was asked to publish transparent information on the annual payment that it made directly to the company for the project. Based on studies on contingent liability and debt management being conducted in close coordination with the World Bank and the International Monetary Fund technical assistance programmes, Governments in emerging countries that provided guarantees for PPP projects were asked to report annually and in a transparent manner any payments made in respect of such liabilities.

48. **Mr. Estrella Faria** (Secretariat), responding to the point raised by China concerning smaller PPPs, referred to the statement in paragraph 34 that "[i]n the case of smaller projects or less complex projects, however, the contracting authority may wish to stimulate greater competition among potential bidders and invite proposals from all those who meet the required qualifications." According to the Guide, the contracting authority had the power not to go through a pre-selection process, which involved a subjective evaluation of the capabilities of companies, and to apply a much broader and more open system. The second sentence of paragraph 52 also suggested that in some cases the use of open tendering might be possible, especially for smaller PPPs. Perhaps some clarification could be included in

paragraph 52 to address the point made by the representative of China.

49. **Mr. Ge** Xiaofeng (China) said that paragraph 52 was in the section entitled "Procedures for requesting proposals". However, a reference to open tendering, which was a very important selection procedure, should be made in the section entitled "General remarks".

50. **The Chair** said she took it that paragraphs 14 and 15 were approved, on the understanding that the Secretariat would clarify the wording on transparency with respect to performance, in line with the discussion initiated by the World Bank, and include the references to open tendering and electronic means of procurement, as requested by China.

51. *It was so decided.*

Paragraph 16

52. *Paragraph 16 was approved.*

Paragraph 17

53. **Ms. Maslen** (World Bank) drew attention to the final sentence of paragraph 17, which referred to "competitive procedures acceptable to the World Bank" that should be used for the award of subcontracts "when the private partner in a PPP had not been selected using competitive procedures". The overall risks of using private partners that had not been selected through competitive procedures should be noted, however, because when such partners were seeking subcontractors, they did not necessarily have any incentive to keep prices low.

54. **Mr. Estrella Faria** (Secretariat) said the final two sentences of paragraph 17 had been carried over from the earlier version of the Guide. However, they added very little to the discussion on the use of competitive selection procedures in PPPs and could perhaps be deleted.

55. **The Chair** said she took it that the Commission wished to approve paragraph 17, with the deletion of the final two sentences.

56. *It was so decided.*

Paragraph 18

57. *Paragraph 18 was approved.*

Paragraph 19

58. **Mr. Ge** Xiaofeng (China) said that the final sentence of the paragraph was problematic. It stated that open tendering without a pre-selection phase might be used for small-scale projects for which proposals might be sought from all qualified bidders. However, if a project, even a small-scale one, was complex and challenging and many bidders took part in the bidding process, pre-selection was certainly desirable. Alternatively, if it was necessary to choose among too many qualified bidders for a small project, then the selection process would not be very efficient or cost-effective. The final sentence therefore needed further review and should perhaps be rephrased.

59. **Mr. Estrella Faria** (Secretariat) proposed reverting to the original wording of the final sentence by deleting the phrase at the very end, "except perhaps for small-scale projects where the contracting authority may wish to seek proposals from all qualified bidders".

60. **The Chair** said she took it that with that deletion, paragraph 19 was approved.

61. *It was so decided.*

Paragraphs 20 to 22

62. *Paragraphs 20 to 22 were approved.*

Paragraph 23

63. **The Chair** drew attention to the comments by the World Bank, set out in document A/CN.9/957, which were to be taken into account by the Secretariat. On that understanding, she took it that paragraph 23 was approved.

64. *It was so decided.*

Paragraphs 24 to 33

65. *Paragraphs 24 to 33 were approved.*

Paragraphs 34 to 36

66. **Ms. Maslen** (World Bank) said that her delegation's written comments on paragraph 36, contained in document A/CN.9/957, were intended to suggest that publications other than *Development Business* of the United Nations, such as international newspapers and industry journals, could be effective media for publicizing pre-selection proceedings to a broad audience.

67. **Mr. Ge** Xiaofeng (China) said that the word "pre-selection" used in paragraph 34 was inconsistent with the terminology in article 18 of the Model Law on Public Procurement, which referred to "pre-qualification". The distinction was that in pre-qualification proceedings, as long as the qualification criteria were met, all bidders were admitted to the tendering phase. However, in pre-selection proceedings, covered in article 49 of the Model Law, even if the criteria were met, the pre-selection process had to take place in order to select the potential bidders. In the penultimate sentence of paragraph 34, it was indicated that proposals would be invited from all those who met the required qualifications, without ranking them. That more closely resembled the wording of article 18. The current wording of paragraph 34 might lead to confusion for the reader, and whether the subject of the

paragraph was pre-qualification or pre-selection might need to be clarified.

68. The merits of using a quantitative rating system were set out in paragraph 35. However, according to the experience gained in China, it was impossible to make a ranking of potential suppliers for some projects because the qualifications of all the potential suppliers were roughly the same. Under such circumstances, perhaps a provision could be included on random selection or selection by drawing lots for the purpose of generating a list of potential suppliers. The procedure should be fair and just and should conform to the reality of the pre-selection process.

69. **Mr. Estrella Faria** (Secretariat) said that paragraph 34 was not intended to blur the distinction made in the Model Law on Public Procurement between pre-qualification and pre-selection. The concept of pre-selection had not existed in the earlier texts. The final two sentences in paragraph 34 had been added based on advice from experts who had argued that in some cases it might be useful for contracting authorities to be able to engage in open tendering without having to go through a pre-selection process. If there seemed to be no compelling reason to retain the two final sentences of paragraph 34, however, they could simply be deleted.

70. **Mr. Wallace** (United States of America) said that implicit in the point made by the Chinese delegation about paragraph 34 was a conceptual and linguistic problem with the distinction between pre-selection and pre-qualification. In the pre-qualification process, if a potential supplier met certain objective requirements, it was qualified to participate further in the procurement proceedings. In the pre-selection process, however, qualification was not sufficient: there might be too many potential suppliers, and then some might be approved for further participation, and some not. He requested clarification from the Secretariat as to why the concept of pre-selection had been introduced, wondering whether it was because, when proposals for the procurement of services were involved, there was not always a separate qualification phase. If so, then the word "selection" was in itself misleading, and perhaps when the entire text was revised, both the wording and the underlying concepts could be clarified.

71. **Mr. Estrella Faria** (Secretariat) said that as he recalled it, the concept of pre-selection had been introduced because that pre-qualification had been considered a nearly automatic process. Any contractor that could demonstrate that it met certain criteria regarding sufficient capital, qualified employees and so on was admitted to the bidding process. That could lead to a situation, as mentioned by the representative of China, where there was potentially a very large number of bidders, making the selection process excessively lengthy. The idea of pre-selection had been to include additional criteria involving a subjective evaluation of the ability of the potential contractors to perform a contract of a specific type, based on their past experience, the technology that they deployed, their operation of a similar infrastructure, or their track record on environmental protection, for example. That would facilitate ranking them or limiting the number of bids to be considered.

72. Regarding the comments on paragraph 35 by China, he said the text was not new. It came from the earlier version of the Guide and described a practice used in some countries, as indicated by the opening phrase, "[i]n some countries". The paragraph reflected in particular the guidance given in the past to procurement authorities in the United Kingdom. The text was not a recommendation but rather a description of how some countries applied selection procedures.

73. **The Chair** said she took it that the Commission wished to delete the two final sentences in paragraph 34, to request the Secretariat to revise the wording of paragraph 35 to reflect the practice of random selection of potential suppliers, as proposed by China, and to endorse the changes to paragraph 36 proposed by the World Bank.

74. *It was so decided.*

Paragraphs 37 and 38

75. *Paragraphs 37 and 38 were approved.*

Paragraph 39

76. **Mr. Montemaggi** (Italy) said that the paragraph should contain an express reference to the non-discriminatory nature of the pre-selection criteria, which must not be used to automatically exclude economic operators from certain jurisdictions. The pre-selection criteria must also be proportionate to the subject matter of the PPP. In the third sentence, the importance of ethical requirements was not stated forcefully enough, especially in light of the European experience, in particular the European Union directive on the award of concession contracts, article 38 of which laid out a list of specific ethical requirements. Paragraph 39 could also be improved through a reference to the fight against corruption.

77. In response to questions by **the Chair**, he felt that the Secretariat would be able to find the right wording and location in the paragraph to indicate that pre-selection criteria should not be discriminatory. A new sentence might also need to be inserted to make it clear that the need to meet ethical standards was not among "more recent developments", as the third sentence put it, but was part of a long tradition, particularly in the European Union.

78. **The Chair** said she took it that paragraph 39 was approved, subject to the addition by the Secretariat of wording as requested by Italy.

79. *It was so decided.*

Paragraphs 40 and 41

80. *Paragraphs 40 and 41 were approved.*

Paragraph 42

81. **Ms. Maslen** (World Bank) said that in its written comments, the World Bank referred to the fourth sentence of the paragraph, which suggested that it was "generally advisable" for a contracting authority to require members of bidding consortiums to assume joint and several liability for obligations under a PPP contract. That suggestion was at cross-purposes with what consortium members would probably do: they would most likely create a separate legal entity, namely a special purpose vehicle, and would accordingly not be amenable to assuming joint and several liability. In fact, some members might be looking for flexibility to exit the project after a reasonable period. She was not sure how the text could accommodate that concern.

82. **Mr. D'Allaire** (Canada) said the solution could be to make the sentence less definitive, perhaps by saying that the contracting authority "might wish" to consider requiring members of consortiums to undertake to bind themselves jointly and severally, instead of that it was "generally advisable" for them to do so. The next sentence could be expanded to indicate that an independent legal entity could be created to carry out a project, but also to restructure the allocation of liability. With those changes, the paragraph would be less one-sided.

83. **Mr. Wallace** (United States of America) said that the owner, namely the Government, was entitled to hold an entity liable and to protect itself. Joint and several liability was one way for it to do so. Alternatively, it could require the creation of a special purpose vehicle, but that did not entirely resolve the question of who had what rights within such a vehicle.

84. **The Chair** said she took it that the third and fourth sentences were to be rephrased in the light of the concerns raised by the World Bank, while taking into account the point made by the United States of America.

85. *It was so decided.*

Paragraph 43

86. **Mr. Ge** Xiaofeng (China) said that the paragraph addressed the situation where a company, directly or through subsidiary companies, joined more than one consortium to submit proposals for the same project. According to the text, such a situation should not be allowed, since it raised the risk of collusion between competing consortiums, and violation of that rule should cause the disqualification of the consortium and the individual member companies. However, new text had then been added: "save for exceptional situations in which participation in multiple consortia might be authorized, for instance, because the project in question requires know-how or a proprietary method or technology that only one or a few companies possess." His delegation queried the need for that addition. The reference to "exceptional situations" gave the contracting authority supplementary discretionary power that might be abused.

87. **Mr. Estrella Faria** (Secretariat) said that the wording had been added based on the opinion of the World Bank that the categorical prohibition contained in the original text should be made less stringent. The "exceptional situations" were those in which the project would be impossible to implement without the know-how or technology that only one or a few companies possessed. Such situations had been known to arise in practice and were clearly described as an exception to the general rule about disqualification. Perhaps the wording could be tightened by replacing the phrase "might be authorized, for instance, because" with "might be authorized when".

88. **Mr. Ge** Xiaofeng (China) said that if the necessary technology was only in the hands of one or a very limited number of companies, there could not be any competition whatsoever. The scenario then resembled a single-bidder situation and fell into the category of direct negotiations. Nevertheless, he would not press for any modification of the current text of paragraph 43.

89. **Mr. Estrella Faria** (Secretariat) said that the text was perhaps not clear, and he was grateful to the representative of China for drawing attention to the problem. The situation envisaged was not when a licence or copyright was the main object of the contract, but rather, when one element of a project, but not the main one, called for a certain technology. The example could be given of a toll road for which a particular type of radar had to be installed for traffic control purposes, and there was only one company that produced that type of radar.

90. **The Chair** said she took it that paragraph 43 was approved with no changes.

91. *It was so decided.*

Paragraphs 44 to 48

92. *Paragraphs 44 to 48 were approved.*

Paragraph 49

93. **Mr. Ge** Xiaofeng (China), said that the paragraph described the general rule whereby if a consortium was to participate in the selection phase, it must have been shortlisted during the pre-selection phase. Clearly, a change in the membership of the consortium would be unfair to other bidders. However, the final clause of the paragraph set out an exception: "unless the contracting authority can satisfy itself that a new consortium member meets the pre-selection criteria to substantially the same extent as the exiting member of the consortium and the results of the pre-selection would remain the same should the new consortium member have participated originally in the consortium". In his delegation's view, any change in the membership of the consortium after the closing of the pre-selection phase and based on an assessment by the contracting authority would cause other bidders to question the trustworthiness of the pre-selection process.

94. **Mr. Estrella Faria** (Secretariat) said that with the addition of the final clause, the paragraph was more restrictive than the previous text. It now included the condition that the results of the pre-selection must remain the same as if the new member had participated in the consortium from the start. A change in the membership of the consortium would not be admissible if it altered the results of the pre-selection process by including a company that fell short of the pre-selection criteria.

95. **Mr. Ge** Xiaofeng (China), referring to the phrase "the results of the pre-selection would remain the same should the new consortium member have participated originally in the consortium", said it was unclear whether the word "originally" meant before or after the pre-selection phase. It would be difficult to know whether the results would be the same as if the new member had participated "originally" in the consortium if the new member joined the consortium after the closing of the pre-selection phase. Perhaps the point should be clarified for the reader.

96. **Mr. Estrella Faria** (Secretariat) said that as he understood it, the situation envisaged involved the application of a quantitative ranking system using various criteria for pre-selection that were set out in the pre-selection documentation. A consortium was ranked according to experience – in operating a particular type of infrastructure, for example. If it was pre-selected, and then it announced a change in its composition where the member that had the most experience in operating the particular type of infrastructure was replaced by one that had far less experience, the pre-selection results would be overturned. The consortium would never have gained such a high rank if the new company, and not the departing one, had been a member from the start. The new clause was intended to avert such a situation. Thus, it was not sufficient for a new member just to meet the pre-selection criteria; it had to meet them in such a way that the consortium would have been pre-selected if the new member had been in it at the time of the pre-selection.

97. **Mr. Wallace** (United States of America) said that having heard the explanation by the Secretariat, he thought the final clause should be deleted, because the preceding phrase, "unless the contracting authority can satisfy itself that a new consortium member meets the pre-selection criteria to substantially the same extent as the exiting member of the consortium", sufficed to cover the situation. It should also be recalled that the situation described was during pre-selection, not the final evaluation and award of the contract, which was a much more important period.

98. **Mr. Ge** Xiaofeng (China) said that he endorsed the proposal to delete the final clause. However, in developing the Guide, a premium must be placed on transparency, impartiality and fairness of the procedures. On that basis, the phrase "unless the contracting authority can satisfy itself" was a matter of concern, because the notion of satisfaction was difficult to reconcile with those of transparency and impartiality. It would be difficult for bidders who had gone through the pre-selection process, as well as for those who had not qualified to place bids, to have confidence in what would "satisfy" the contracting authority.

99. **The Chair** said that since the Chinese delegation objected to subjective wording in the final sentence, perhaps the phrase "the contracting authority can satisfy itself that" should be deleted. The clause would then read: "unless a new consortium member meets the pre-selection criteria to substantially the same extent as the exiting member of the consortium".

100. **Mr. D'Allaire** (Canada) endorsed the Chair's suggestion and said he had no strong views about the proposal by the United States, although there seemed to be some value in retaining the final clause, which reinforced the preceding wording.

101. **Mr. Coffee** (United States of America) said that his delegation remained uncomfortable with the inclusion of the final clause and thought further consideration should be given to its deletion. In the example given by the Secretariat, if the replacement member of a consortium was ranked only marginally lower than the departing member, but the cumulative ranking of the consortium qualified it to bid, the final clause, particularly the words "the results of the pre-selection would remain the same", appeared to exclude the consortium from participation in the selection phase.

102. In response to a question by **the Chair**, he said that before considering any specific textual amendments, he would like to hear from the

Secretariat what would happen in the scenario he had just described.

103. **Mr. Estrella Faria** (Secretariat) said that the World Bank had objected to the original wording of paragraph 49, which seemed to concentrate on the individual qualifications of members of a consortium instead of the overall ranking of the consortium. The idea had been to make it abundantly clear that it was not sufficient for a departing company to be substantially equivalent to its replacement, but that the change in membership of a consortium must not upset its overall ranking. That was why the final clause had been proposed, although perhaps its wording might be improved. The Secretariat was willing to consult with the World Bank to that end, if the Commission so desired.

104. **Mr. Soh** (Singapore) said that unless one knew exactly how the scoring or evaluation of consortiums had been carried out, it would be difficult to determine objectively that the results of the pre-selection were the same. Therefore, some subjective element would have to come into play, and the text that the Chair had said should be deleted should be retained.

105. **The Chair** suggested that the final part of paragraph 49 should be left in abeyance pending further consultations at a meeting to be held later in the year.

106. *It was so decided.*

Paragraph 50

107. Paragraph 50 was approved.

Paragraphs 51 to 63

108. **Mr. Ge** Xiaofeng (China) said that in paragraph 51, it was indicated that the procedures for requesting proposals followed the main features of the requests for proposals with dialogue provided in the Model Law on Public Procurement. However, section C dealt with both proposals with dialogue and two-stage procedures. As he understood it, two-stage procedures included both proposals with dialogue and proposals without dialogue. The old Guide was indeed clearer, in that it referred to single-stage and two-stage procedures for requesting proposals. In the revised Guide, in paragraphs 54 to 57, the reference to two-stage procedures included two-stage tendering as set out in the Model Law, but paragraph 51 only concerned requests for proposals with dialogue. He wondered whether the inconsistent wording in that section, and especially in paragraph 51, could be clarified.

109. **Mr. Estrella Faria** (Secretariat) said that he fully agreed with the representative of China that paragraph 51 was not only unclear but inaccurate. The phrase "[a]s stated above, the procedures follow the main features of the request for proposals with dialogue" in the Model Law was incorrect. Paragraph 51 was the introduction to a section that set out a range of procedures that the contracting authorities might wish to use, depending on the circumstances. The words "the main features of the request for proposals with dialogue" could be deleted and replaced with "main features of procurement methods provided in the Model Law".

110. **Mr. Ge** Xiaofeng (China) said that he agreed, but that single-stage bidding and the two-stage procedure should also be more clearly delineated in the text.

111. **The Chair** said that those comments would be taken up by the Secretariat.

The meeting rose at 6.05 p.m.

Summary record of the 1088th meeting
held at Headquarters, New York, on Tuesday, 10 July 2018, at 10 a.m.

[A/CN.9/SR.1088]

Chair: Ms. Czerwenka (Germany)

The meeting was called to order at 10.10 a.m.

Agenda item 19: Consideration of revised UNCITRAL texts in the area of privately financed infrastructure projects (*continued*) (A/CN.9/939, A/CN.9/939/Add.1, A/CN.9/939/Add.2, A/CN.9/939/Add.3, A/CN.9/957 and A/CN.9/LI/CRP.9)

1. **The Chair** invited the Commission to resume its consideration of the proposed updates to chapter III of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects proposed by the Secretariat and contained in documents A/CN.9/939, A/CN.9/939/Add.1, A/CN.9/939/Add.2 and A/CN.9/939/Add.3, as well as comments on the topic by the World Bank, contained in document A/CN.9/957 and by Italy, contained in document A/CN.9/LI/CRP.9.

Document A/CN.9/939/Add.3 (*continued*)

Paragraphs 52 to 57

2. *Paragraphs 52 to 57 were approved.*

Paragraphs 58 to 63

3. **Ms. Maslen** (World Bank) said that it might be useful to find appropriate wording to be included in those paragraphs to emphasize that contracting authorities should ensure that all potential suppliers and contractors received the same information, to ensure a level playing field.

4. **The Chair** said she took it that the Commission endorsed the proposal and that the Secretariat would reflect it in the text.

5. *It was so decided.*

Paragraphs 64 to 78

6. **Mr. Estrella Faria** (Secretariat) said that the aim of that part of the Guide had been to better align the text with the UNCITRAL Model Law on Public Procurement, because the selection process envisaged in the original Guide had been one where a contracting authority would issue an initial request for proposals with a description of its procurement needs, enter into a dialogue with potential bidders, and at the end issue a revised request for proposals that might even include detailed input specifications. The Model Law on Public Procurement, however, contemplated even greater flexibility in the requests for proposals with dialogue procedure.

7. The proposed amendments concerning the content of requests for proposals were therefore intended, in line with the Model Law, to give the procuring entity the flexibility to choose between a dialogue that would lead to a single set of specifications, including possibly concrete input specifications, and a dialogue based on each bidder's proposed technical solutions throughout the project, at the end of which each bidder would submit a best and final offer. The amendments were designed to show that a contracting authority might use different methods to arrive at a request for proposals based on various factors, especially feasibility and other studies carried out during the project preparation phase, and ownership of the infrastructure. There were new texts in paragraphs 64, 67 and 69 and extensive changes to paragraph 74. The second part of paragraph 79, which covered the information exchanged between parties, clarifications and possible changes to the bidding documents, was brought into line with the Model Law.

8. In the section dealing with evaluation criteria for public-private partnerships (PPPs), paragraphs 81 to 86 were not substantially different from those of the original Guide, because consultations had not revealed any need to update the criteria. The only exception was paragraph 86, which was new to that section of the Guide but had been taken from elsewhere in the original text. Paragraphs 87 to 90 had not changed significantly. Paragraphs 91 to 93 were completely new, but the content had been taken from the Guide to Enactment of the UNCITRAL Model Law on Public Procurement, to align the two texts. Paragraphs 94 and 97 were entirely new; all other changes in paragraphs 94 to 97 were minor.

Paragraphs 64 to 65

9. *Paragraphs 64 to 65 were approved.*

Paragraph 66

10. **Ms. Maslen** (World Bank) said that the World Bank had suggested in document A/CN.9/957 that there should be a reference, in paragraph 66 or elsewhere, to developing a data room (virtual or physical) for the sharing of information.

11. **The Chair** said that she took it that the Commission wished to endorse the proposal and that the Secretariat would reflect it in the text.

12. *It was so decided.*

Paragraphs 67 to 73

13. *Paragraphs 67 to 73 were approved.*

Paragraph 74

14. **Ms. Maslen** (World Bank) said that it might be useful to include a full PPP agreement with the request for proposals, so that the parties were aware of the proposed terms in advance. That would minimize the possibility of the preferred bidder re-opening discussions on the main terms of the contract and drawing out the negotiations.

15. **Mr. Estrella Faria** (Secretariat) said that when the original Guide had been drafted, most common law countries had had relatively little experience with such agreements. The usual practice in civil law countries, many of which had experience with such agreements, had been to include the draft contract in the request for proposals, but common law countries, such as the United Kingdom, had suggested at the time that standardization and pre-agreed terms should be avoided. However, experience had shown that greater clarity in the bidding process was preferable in order to avert a situation in which the preferred bidder, following a lengthy selection process, began making demands and upsetting the balance struck in the original offer. That could be avoided by preparing a draft contract that set forth as many of the terms as possible, as also recommended in the revised chapter II of the Guide. Nevertheless, it was only possible when a country had the necessary institutional and administrative structures in place and had acquired the knowledge needed to standardize contract terms efficiently.

16. **Mr. Soh** (Singapore) said that, while he agreed in principle that there should be minimal scope for re-negotiation, a request for proposals would in theory not be a request if all the terms were pre-established. He had no objection to pre-defining contract terms to the extent possible, but there should be some flexibility; he wondered whether some non-negotiable terms could be specified, while the rest of the terms remained negotiable.

17. **Ms. Pasaogullari** (Turkey), referring to the portion of the Guide dealing with the modification of requests for proposals, said that in Turkey, procurement was governed by administrative law, while the conclusion of contracts and modifications thereto were governed by private law. Therefore, when the Government concluded a procurement contract with a private company, modifications thereto were governed by both administrative and private law. Given the size of some infrastructure projects, it was common for both the private company and the Government to seek modifications to the terms of the contract, to ensure the long-term success of the project. The aim of the PPP regime was to ensure that there was a balance between procurement under the administrative law regime and contracting under the private law regime. She wondered whether the Secretariat had had similar aim when revising the Guide.

18. **Mr. Estrella Faria** (Secretariat) said that the issue had been debated at length when the first edition of the Guide had been prepared. Some of the experts had been surprised to discover that there were countries in which such deals were governed partly by administrative law and partly by private law, while in other countries they fell entirely under private law. Contract modification was important both at the bidder selection stage, which was a purely administrative law process when it might be possible for the Government as procuring entity to lay down non-negotiable terms, and during the performance of the contract, when it might be possible to re-negotiate the terms. In some civil law countries that followed the continental European administrative law tradition, the terms of a contract could be modified during its performance if changes in economic circumstances threatened the economic balance of the contract. In those countries, that arrangement was governed by administrative law. In France, for instance, until very recently, contract modification had generally been permitted under administrative law and prohibited under civil and commercial law, following the strict pacta sunt servanda rule of English law. It was explained in chapter IV of the Guide that a claim for contract modification might be stronger in certain legal regimes than in others regardless of their legal tradition, and that the scope of such claims could be circumscribed by legislation.

19. **Mr. D'Allaire** (Canada) said that, while the proposal made by the World Bank to mention in the Guide that the terms of a contract should be disclosed along with the request for proposals, he agreed with the representative of Singapore that the Guide should be flexible and should reflect other practices. The example mentioned by the representative of Singapore was interesting, but perhaps some of the recent comments made by the Secretariat could also be considered.

20. **Mr. Estrella Faria** (Secretariat) said that a simple solution could be to expand the list in paragraph 75 to include draft contracts, and perhaps to adjust the end of paragraph 77 to read: "indicating those terms that are deemed non-negotiable by the contracting authority".

21. **The Chair** said she took it that the Commission would make the necessary adjustments to reflect the comments made.

22. *It was so decided.*

Paragraphs 75 to 80

23. *Paragraphs 75 to 80 were approved.*

Paragraphs 81 to 82

24. **Mr. D'Allaire** (Canada), referring to paragraph 81, said that the first sentence, which read: "[a]s a general principle, it is important for the contracting authority to achieve an appropriate balance between evaluation criteria relating to the physical investment […] and evaluation criteria relating to the operation and maintenance of the infrastructure and the quality of services to be provided by the private partner", appeared to be true when taken at face value. However, depending on the circumstances, other elements might need to be taken into consideration, such as the financing on offer. It was not clear that the sentence, which was being presented as a general principle, was accurate in all cases. In addition, it referred to an appropriate balance between two elements, but depending on the procurement in question, that balance might shift in one direction or the other. The term "balance" might therefore not be appropriate in the circumstances. The Secretariat should revise that sentence and make it more neutral, perhaps by removing the reference to "appropriate balance".

25. Regarding paragraph 82 (g), which read: "[t]he contracting authority should have the right to re-confirm the qualification of bidders at the evaluation stage", his delegation was unsure whether the idea there was to assess whether the bidders still qualified, or whether to re-qualifying them fully.

26. **Mr. Estrella Faria** (Secretariat) said that the representative of Canada was entirely correct that the first sentence of paragraph 81 did not in fact provide a proper introduction to the material that followed. By his recollection, the experts had indicated at the time when the original Guide had been drafted, when there had been relatively little experience with PPP projects, that some contracting authorities in some countries had tended to view such partnerships only in terms of the Government as owner of the construction project, and thus over-emphasized the quality of the construction, to the detriment of the long-term sustainability and operation of the project. That was what had given rise to the notion of "appropriate balance", which had been intended to stress to procuring entities that appropriate consideration should be given to aspects other than construction, since the project was an entire package that would have significant long-term implications. Perhaps that sentence could be expanded into a proper introduction, since the Guide did indeed later refer to the importance of financial and other aspects. The Secretariat would be happy, in consultation with the experts, to try to find a better explanation.

27. Regarding paragraph 82 (g), the original text had been slightly different, reading: "[w]hen no pre-selection was made by the contracting authority prior to the issuance of the RFP, the contracting authority should not accept a proposal if the bidders who had submitted the proposal are not qualified". It had been pointed out to the Secretariat that such wording was inconsistent with the overall approach adopted in the chapter, namely to strongly advocate pre-selection, and that even if the qualifications of a company had been checked during the pre-selection phase, the procuring entity should still have the right to re-check whether the company remained qualified at the evaluation stage. However, if that was not clear from the text, the Secretariat would be happy to see what could be done.

28. **Mr. D'Allaire** (Canada) said that he fully agreed with the Secretariat's comments. His delegation had not understood the text, particularly paragraph 81, to have the meaning outlined, so it might need to be amended.

29. **The Chair** said she took it that the Secretariat would consider the matter further in consultation with the experts, but that no changes would be made for the time being.

30. *It was so decided.*

Paragraph 83

31. **Ms. Maslen** (World Bank) said that, as noted in its comments set out in document A/CN.9/957, the World Bank felt that when evaluating the financial and commercial aspects of proposals, in addition to the matters raised in subparagraphs (a) to (f), it would be useful to also evaluate the proposed financiers on their due diligence and their commitment to the project, to ensure that they could not derail the project, since their involvement would increase once the project development phase was over. The second part of her delegation's written comment on transparency, contained in document A/CN.9/957, could be discounted, at least insofar as it related to paragraph 83.

32. **Mr. D'Allaire** (Canada) said that the examples provided in the paragraph were useful for the reader, but some of them were too simplistic or restrictive, such as those in subparagraph (a). Subparagraph (b) referred to the present value of direct payments by the contracting authority, if any. However, the text that followed was possibly counter-intuitive. Subparagraph (c) referred to the costs for design and construction activities, annual operation and maintenance, only to then refer again to the present value of capital costs. The difficulty that that created was that capital costs were frequently incurred at the outset, such that the present value of capital costs was often the value that was paid when the contract was signed. There seemed to be some overlap between

subparagraphs (b) and (c). He wondered whether the Secretariat could examine the paragraph more closely to see if the examples led to conclusions that were too restrictive and to ensure that it covered all relevant situations.

33. **The Chair** asked whether the representative of Canada could provide specific examples of changes he would like to see. Otherwise, it might be best to leave the text as it stood, given that the Secretariat had already explained that the wording came from the original version of the Guide.

34. **Mr. D'Allaire** (Canada) said that, at the stage of evaluating the financial and commercial aspects of proposals, the aim was to establish the cost. Assessment of the terms of the procurement itself would have already been performed elsewhere, yet the text in subparagraph (a) seemed to include comparative elements, whereas the only concern should be the financial aspect, namely the present value of the proposed tolls. Regarding subparagraph (b), the sentence in italics should be sufficient, because the rest of the text simply re-stated the first sentence. In addition, the last clause, which read: "for the facility to be constructed according to the prescribed minimum design and performance standards, plans and specifications", concerned an issue that had been assessed elsewhere. It should therefore be deleted. Much of subparagraph (c) seemed to be a repetition of subparagraphs (a) and (b); subparagraph (c) should deal with nothing other than annual operating and maintenance costs. He did not have any specific wording to propose, but he wondered whether the Secretariat could review the content and determine whether it was indeed repetitive.

35. **Ms. Pasaogullari** (Turkey), addressing the issues raised by the representative of Canada, said that it was her understanding that each of the subparagraphs in question could be applied to different PPP models used in Turkey, depending on whether direct or contingent liability was assumed. For instance, when a build-lease-operate model was used for health-care projects, the operating company or special project vehicle was responsible for maintaining the health-care equipment. As such equipment was required to be renewed every five years, the operating company incurred a maintenance cost for the renewal of the equipment. Maintenance cost was therefore different from capital cost, which also included the cost of construction of the project.

36. For a social infrastructure project, where there was a direct lease payment from the Government, the main revenue was the payment made by the Government, not the fee charged to the customer. Subparagraph (b) was therefore different from subparagraph (a), as her delegation understood it. Evaluation of financial and commercial aspects of proposals concerned all aspects of the project, not only cost. From the lender's perspective, it was important to determine whether the project was bankable, namely whether, leaving aside the construction, the operating period was long enough to allow for collection of tolls for the lender to be repaid in a timely manner.

37. **The Chair** said that, since clarification had been provided regarding the substance of paragraph 83, she took it that no modifications to the paragraph were required.

38. *It was so decided.*

Paragraphs 84 to 90

39. *Paragraphs 84 to 90 were approved.*

Paragraphs 91 to97

40. **Mr. Ge** Xiaofeng (China) said that it was stated in the first sentence of paragraph 91, in reference to the two-stage tendering procedure, that the contracting authority, upon receipt of the final proposals, would proceed to their evaluation and ranking with a view to finalizing the PPP contract. However, it was his understanding that evaluation and ranking should take place during the second stage of the two-stage procedure, with the authority and the bidders discussing the terms and conditions of the PPP contract during the first stage. However, paragraph 91 concerned dialogue with bidders that responded to a request for proposals. The first sentence of the paragraph seemed inconsistent with paragraph 96, where reference was made to consecutive negotiations leading to a contract. Meanwhile, draft model provision 17 (d) provided that "[i]n the second stage of the proceedings, the contracting authority shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with model provision 14", which also seemed to clash with the first sentence of paragraph 91.

41. It was also indicated in the last sentence of the paragraph 91 that the Model Law on Public Procurement set out two requirements for the format of dialogue: that it should be held on a concurrent basis and that the same representatives of the contracting authority should be involved to ensure consistent results. Furthermore, the Model Law provided that the content of the dialogue should remain confidential. He wondered how that was physically possible, given that the dialogues would be conducted concurrently with the same bidders.

42. **Mr. Estrella-Faria** (Secretariat) said that the intention of the first sentence of paragraph 91 had been to introduce in the Guide requests for proposals with dialogue as one of the possible methods of procurement, to align it with the Model Law on Public Procurement. It was simply meant to say that

if the contracting authority had used the two-stage tendering procedure set out in the Model Law, then at that point it could proceed directly to evaluation and ranking, as described in paragraphs 95 and 96. If, however, the contracting authority had used the request for proposals with dialogue procedure, it would then enter into the dialogue phase, described in paragraph 92. As the representative of China had pointed out, the phrase "finalizing the PPP contract" in paragraph 91 was not entirely consistent with the text of paragraph 96, and thus the wording of that sentence and that of paragraph 96 might need to be changed to bring them into line with model provision 17.

43. With respect to the second point made by the representative of China, he said that he did not know what safeguards had been envisaged during the drafting of the Model Law on Public Procurement regarding possible leakage of information. The Secretariat would study the issue further, and, in the meantime, he wondered whether China might wish to propose text to address the matter.

44. **Mr. Ge** Xiaofeng (China) said that it might be unnecessary to retain the first sentence of paragraph 91, because section 6 dealt only with the topic of dialogue with bidders, following which the contracting authority would request all suppliers or contractors remaining in the proceedings to present a best and final offer before the award of the contract, and not with evaluation and ranking as part of the two-stage tendering procedure. In his view, paragraph 91 would still be clear and accurate without that first sentence. With respect to paragraph 96, he had seen nothing in the model provisions concerning consecutive negotiations, the subject of that paragraph. Indeed, the reference in model provision 13 was merely to the need to invoke article 48 of the Model Law on Public Procurement, to allow the contracting authority to fully satisfy its procurement needs. Yet, article 48 did not specify a procedure for consecutive negotiations. Regarding the issue of leakage of information, he said that he did not have specific wording to propose and trusted the Secretariat's experience in that area.

45. **Mr. Estrella-Faria** (Secretariat) said that subparagraphs (a) and (b) of model provision 22 dealt with consecutive negotiations. Subparagraph (a) provided that "[t]he contracting authority shall rank all responsive proposals", which applied only to situations involving the two-stage procedure. The request-for-proposal procedure, by contrast, led to a "best and final offer". In the procedure described in model provision 22, the contracting authority ranked the response proposals and accepted the best; then, if negotiations with the best candidate failed, negotiations with the others proceeded. If that presentation was not clear, the Secretariat could study the matter further and also ensure that the proper cross-references were included in the text.

46. **Mr. Ge** Xiaofeng (China) said that the wording of model provision 22 addressed his concerns with paragraph 96. He wondered, however, if the first sentence of paragraph 91 could be deleted.

47. **The Chair** said she took it that the Commission wished to delete the first sentence of paragraph 91 and that the Secretariat would make the necessary drafting adjustments to the rest of the text.

48. *It was so decided.*

49. **Mr. Ge** Xiaofeng (China), drawing attention to the second sentence of paragraph 94, which read: "[i]n order to promote the transparency of the selection process and to avoid improper use of non-price evaluation criteria, a detailed justification may be particularly important where the awarding committee recommends selecting a proposal based on technical aspects rather than on the price", said that based on the corresponding text in the previous Guide, if a proposal other than that of the lowest bidder was selected, a justification of the reasons for that selection must be stated. The phrase "based on technical aspects" might therefore be problematic. Indeed, according to article 11.5 of the Model Law on Public Procurement, the procuring entity used two sets of criteria to decide on the supplier: price and price in conjunction with other, non-price, criteria, including technical aspects. Based on that understanding, the selection of a winning bidder was based on price and non-price criteria, but when the text in paragraph 94 referred to cases in which a proposal was selected based on technical aspects rather than on price, the elements of "price" and "technical aspects" were set against each other. The wording could perhaps be changed to "primarily based on technical aspects rather than merely on price", or a similar formulation, which would bring the text into line with the original Guide.

50. **The Chair** said she took it that the Commission agreed with that proposal.

51. *It was so decided.*

52. **Mr. Estrella-Faria** (Secretariat), introducing the updates to section D (Contract award without competitive procedures), said that paragraphs 98 et seq. had been revised extensively to reflect a stricter pro-competition approach in the revised Guide. As a case point, the opening paragraph of the section D in the old Guide (paragraph 85), read: "[i]n the legal tradition of certain countries, privately-financed infrastructure projects involve the delegation by the contracting authority of the right and duty to provide a public service. As such, they are subject to a special legal regime that differs in many respects from the regime that applies generally to the award of public contracts for the purchase of goods, construction or

services". That provision described the regime prevailing in France and in countries with regimes based on French administrative law. The text in the rest of the section was a delicate attempt to explain that where a country had the necessary checks and balances and was satisfied that it could award contracts without competition while preserving transparency, integrity and fairness, it could do so without running afoul of the Guide.

53. However, that flexibility had been heavily criticised and since the legal regime that was being accommodated at the time had in the meantime evolved in a different direction, embracing the competitive procurement process in the PPP context, as prescribed by European Union regulations, there was no longer a need to preserve the cautious approach of the original Guide. Accordingly, in the revised Guide, very little of the information contained in paragraphs 86 and 87 of the original Guide was retained. The first sentence of paragraph 96 now read: "[t]he Guide strongly recommends the use of competitive, structured procedures for the award of PPP contracts, as such procedures are widely recognized as being best suited for promoting the objectives of economy and efficiency ("value for money"), integrity and transparency …", and only in exceptional cases was the award of contracts without competition allowed. There were fewer amendments to the text now reflected in paragraphs 100 through 106, because they discussed valid safeguards for the exceptional circumstances in which a non-competitive contract award might be granted.

54. *Paragraphs 91 to 97 were approved.*

Paragraphs 98–105

55. **Mr. Leong** (Singapore) said that his delegation understood that the phrase "strongly recommends" was included in paragraph 98 to highlight the fact that competitive procedures promoted the value-for-money objective. However, in the interests of flexibility for enacting States, perhaps the wording could be made more neutral by removing the word "strongly". The same point arose in paragraph 99. The statement contained in paragraph 88 of the original text that "the host country may wish to prescribe the use of competitive selection procedures" had been changed in paragraph 99 of the revised text to: "the Guide strongly recommends that the law should prescribe the use of competitive selection procedures". Similarly, the wording from paragraph 89 of the original Guide that "it might be generally desirable that the law identify exceptional circumstances" had been changed in paragraph 100 of the revised guide to "the law should identify the exceptional circumstances". It might be desirable to revert to the original wording in order to afford States the flexibility to decide whether they wished to prescribe such laws.

56. **Mr. Coffee** (United States of America), supported by **Mr. Montemaggi** (Italy) said that paragraphs 98 and 99 contained important recommendations on competition and therefore should be left unchanged.

57. **The Chair** said that the point raised by the representative of Singapore was mainly a drafting issue. She asked whether the representative of Singapore could accept the current text which included the word "strongly", in view of the comments made by the representatives of the United States and Italy.

58. **Mr. Leong** (Singapore) said that his delegation did not object strongly to the current text.

59. **The Chair** said that it was her understanding that the representative of Singapore had suggested to delete the word "strongly" in paragraphs 98 and 99 and to change the wording of the phrase "the law should identify the exceptional circumstances" in paragraph 100, to make the recommendation less strong. As a compromise, she suggested that the Commission accept the suggestion of the representative of Singapore with respect to paragraphs 98 and 99 but keep the text of paragraph 100 unchanged.

60. *It was so decided.*

61. **Ms. Maslen** (World Bank), referring to paragraph 100, said that her delegation wished to share the best-practice observation that any decision by a contracting authority to award contracts without competitive procedures should be subject to review or approval by a supervisory body or agency. Concerning subparagraph 100 (d), which mentioned situations in which, due to patented technology or unique capabilities, only one source was capable of providing a required service, she said that, as that was a rare occurrence, it was not a robust basis for non-competitive awards; the wording of that subparagraph should perhaps be changed.

62. **Mr. Coffee** (United States of America) said he thought paragraph 102 addressed the point raised by the representative of the World Bank by providing that "a threshold requirement found in many countries is that a contracting authority must obtain the approval of a higher authority prior to engaging in selection through negotiations outside structured competitive procedures. Such provisions generally require the application for approval to be in writing and to set forth the grounds necessitating the use of negotiation."

63. **Ms. Maslen** (World Bank) said that the text in paragraph 102 seemed to address her first comment, but her delegation would take a closer look at its

wording, along with that of paragraph 100 (d), to see if any amendments were needed.

64. **Mr. Ge** Xiaofeng (China) said that the exceptional circumstance under which a contracting authority might be authorized to select a private partner without using competitive selection procedures, set out in paragraph 100, subparagraph (e), namely that an invitation to the pre-selection proceedings or a request for proposals had been issued but no applications or proposals had been submitted or all proposals had been rejected and, in the judgment of the contracting authority, issuing a new request for proposals would be unlikely to result in a project award, appeared to his delegation to reflect a two-stage tendering scenario. Besides, that was not one of the circumstances authorizing direct negotiation set out in model provision 23. There was therefore inconsistency between paragraph 100 (e) and model provision 23. As he understood it, in case of a failed request for proposals or failed pre-selection proceedings, the procurement procedure could be adjusted so that the contracting authority could enter into direct negotiations with the bidders. However, that was not spelled out clearly in the text. He wondered whether it could not be specified in the text that a new request for proposals or competitive selection measures or other alternative procedures should first be considered before resorting to any exceptional circumstances.

65. **Mr. Estrella Faria** (Secretariat) said that he agreed with the representative of China that there was inconsistency between paragraph 100 (e) and model provision 23, because the model provision did not refer to the exceptional circumstance set out in paragraph 100 (e) of direct negotiations in case of a failed request for proposals or failed pre-selection proceedings. In that connection, the Commission had an interesting policy decision to make: delete paragraph 100 (e) and retain the wording of model provision No. 23 or keep both provisions.

66. **Mr. Wallace** (United States of America) said that his delegation agreed with the remarks made by the representative of China, as well as with the suggestion made by the Secretariat. It would be helpful to delete paragraph 100 (e), the content of which was easily abused and had consistently been a source of concern.

67. **The Chair** suggested that paragraph 100 (e) be put in square brackets for consideration at the next expert group meeting.

68. **Mr. Ge** Xiaofeng (China) said that section D, entitled "Contract award without competitive procedures", dealt with situations where the contracting authority could enter into direct negotiations with bidders without evaluating or ranking them, whereas in paragraph 103 it was stated that the contracting authority was required to solicit proposals from a minimum number of bidders, three being as well a common number. Similarly, the content of section C, entitled "Criteria for comparison and evaluation of offers", was inconsistent with the competitive procedure set out in the Model Law on Public Procurement. Such inconsistencies were bound to create problems at some point and should be addressed.

69. **Mr. Estrella Faria** (Secretariat), introducing the section of the Guide dealing with transparency, said that the wording of paragraphs 101 to 105 were the same as in the previous Guide, except for the final sentence of paragraph 105, and had been taken from the relevant portions on competitive negotiations in the Model Law on Procurement of Goods, Construction and Services, which had been transposed into article 51 of the Model Law on Public Procurement. The idea behind those provisions had been that if a country were to use direct negotiations with a bidder, it would be encouraged to introduce a minimum level of transparency and structure into those negotiations by following procedures similar to those that would have applied in the case of competitive negotiations. As the representative of China had pointed out, that appeared to be at variance with the phenomenon described in the Guide, because if a contract were awarded to a company, it did not follow necessarily that there were three others with which to negotiate. The topic should perhaps be discussed at an expert group meeting.

70. **The Chair** said she took it that the Commission wished to keep the text in abeyance and to refer it to an expert group.

71. *It was so decided.*

72. *Paragraphs 98 to 105 were approved.*

Paragraphs 106 and 107

73. **Mr. Wallace** (United States of America), addressing paragraph 107 and model provision 30, both concerning the notice of contract award, said that the representative of the World Bank had suggested during the discussion on paragraph 15 that "publicity with respect to performance" be included as one way to promote transparency and accountability. Assuming that elements of that suggestion were retained, the Commission might wish to modify paragraph 107 and model provision 30 accordingly.

74. **Ms. Maslen** (World Bank) said that, in light of the comments made by the representative of the United States, she realized that her comment about "publication relating to performance" might have been somewhat confusing. Her point had simply been that an expression such as "publication of an awarded contract" might be clearer than "publication relating to performance". In any event, she would seek

clarification from experts at the World Bank and revert to the Commission.

75. **The Chair** said she took it that the Commission would take up that issue again at the next expert group meeting following its reconsideration by the World Bank.

76. *It was so decided.*

Paragraphs 108 to 128

77. **Mr. Estrella Faria** (Secretariat), introducing section E, dealing with unsolicited proposals, said that it had been the subject of extensive debate during the preparation of the original Guide, with some members opposing the use of unsolicited proposals, in the belief that States should always encourage competition, while others felt that Governments might not always be aware of opportunities for infrastructure development and that ideas might arise and be developed by the private sector. The agreement reached had been that if countries were to be allowed to use such proposals, then procedures should be put in place for their handling in a way that promoted efficiency, transparency and integrity and curbed corruption, to the extent possible.

78. In substance, the procedures had not been changed when compared to the original text since, despite years of debate, the Secretariat had not received any remarks as to the appropriateness of the procedures mentioned in the text. The procedures, it could then be surmised, were sound and reasonable. The intent of any amendments made was, following the advice of World Bank experts, to stress, as had been done with direct contract awards, that unsolicited proposals should be used only in exceptional circumstances.

79. Paragraph 108 had been amended in that vein through the addition of the last two sentences. The beginning of the second sentence of paragraph 110 and the first and second sentences of paragraph 111 were new. The last sentence of paragraph 117 was also new. It had been added to reflect the enhanced advice on project planning and preparation that in an ideal world the Government should anticipate its own infrastructure needs and should not rely so much on the imagination and creativity of the private sector. The remaining changes were simply as a consequence of other changes that had been made throughout the Guide.

80. **Mr. Leong** (Singapore), referring to paragraph 111, asked the Secretariat clarify the meaning of the phrase "so as to avoid their use to circumvent public investment management mechanisms", and to explain why the reference to "public investment management mechanisms" should not be considered too narrow, since countries might use unsolicited proposals not just to circumvent such mechanisms, but to meet other needs.

81. **Mr. Estrella Faria** (Secretariat) said that the sentence in question had been proposed by the World Bank at the time of drafting of the original Guide. To his understanding, the reference to public investment management mechanisms had been intended to avoid situations where a country with a public infrastructure development policy and a mechanism for managing and controlling public investment in infrastructure used unsolicited proposals as a way of circumventing the laws governing the fiscal implications of infrastructure development projects. It was also his understanding that the World Bank had indicated that unsolicited proposals had been found, in practice, to generate significant contingent liabilities for the host country that had not been properly anticipated in a longer-term public expenditure and budget control system. That was something that Governments should bear in mind when considering whether to use of unsolicited proposals.

82. **Mr. D'Allaire** (Canada) said that his delegation shared the views expressed by the representative of Singapore. The phrase "public investment management mechanisms" was somewhat broad and not restricted to what had been mentioned by the Secretariat.

83. **Mr. Soh** (Singapore) said that it was unfortunate that delegations did not have the benefit of background documents to refer to with respect to many of the proposals that had been made. In future, it would be preferable to have more background texts.

84. **The Chair** suggested that given the views expressed and in view of the proposals made by the World Bank, the Secretariat could review whether a redrafting of the text was necessary.

85. *It was so decided.*

Paragraphs 112 to 129

86. **Mr. Wallace** (United States of America) said that a provision similar to that contained in paragraph 102 concerning non-competition – that is, the requirement of higher approval in writing – should perhaps be included in paragraph 118 or elsewhere in section E, or even elsewhere in the Guide.

87. **The Chair** said it was her understanding that the Secretariat agreed with the proposal made by the representative of the United States and would see how it could be reflected in the text.

88. **Ms. Maslen** (World Bank) said that paragraph 124 referred to the handling of unsolicited proposals that did not involve proprietary concepts or technology. The World Bank was sceptical that competition could truly exist in such a situation. There were few cases where competitive bids were submitted by bidders other than the proponent of an

unsolicited project, as there was a perception of a lack of a level playing field and the likelihood that the project would go to the proponent. With regard to paragraph 126, she said the Bank felt that while project proponents would always be keen to stress the innovative aspects of a project, it was seldom the case that a project was in fact that innovative – that premise should be used with great caution. She would seek clarification from the Bank team and perhaps suggest cautionary wording to that end.

89. *Paragraphs 112 to 128 were approved.*

Paragraph 129 to 139

90. **Mr. Estrella Faria** (Secretariat) said that sections F, G and H were virtually unchanged, with only terminological changes introduced. With respect to chapter I, the first paragraph had been retained while the other three paragraphs had been deleted and replaced with a text taken directly from the Guide to Enactment of the Model Law on Public Procurement

91. **Mr. Wallace** (United States of America), said that the last clause of model provision 29, which stated that no party to the negotiations "shall disclose to any other person any technical, price or other information … without the consent of the other party", was unclear. To his understanding, it meant that a government official negotiating with two parties should not disclose to either party the content of his or her negotiation with the other party. However, that was not clearly stated in model provision 29 and was not mentioned at all in paragraph 129. Perhaps the Commission would address that discrepancy at some point.

92. **Mr. D'Allaire** (Canada) said that the important issue of confidentiality had been handled with surprising brevity in the Guide. Sharing the cost structure among bidders, for example, could be considered anti-competitive behaviour, and sometimes trade secrets were involved. More guidance should be provided.

93. **The Chair** said the Secretary had responded positively to the idea of expanding on that section. Accordingly, the concerns expressed by the representatives of Canada and the United States of America would be taken up by the Secretariat.

94. **Mr. Ge** Xiaofeng (China) said that paragraph 130 concerned procedures for publicizing the notice of project award for PPP contracts that might be of public interest, regardless of whether the contracting authority had selected the private partner through competitive selection procedures, direct negotiations, an unsolicited proposal or any other method. To increase transparency, he suggested indicating in the Guide that the information disclosed to the public should include the grounds on which the contracting authority opted for one method over any other, especially for unsolicited proposals.

95. **Mr. Wallace** (United States of America) said that paragraph 133 (a) might address the suggestion raised by the representative of China, as it provided that, in the case of unsolicited proposals and other contract awards that did not involve competitive procedures, it might be useful for the record of proceedings to include a statement of the grounds and circumstances on which the contracting authority relied to justify the direct negotiation.

96. **Mr. Estrella Faria** (Secretariat) said that paragraph 133 (a) did indeed stipulate that the grounds should be stated in the record of proceedings but, as he understood it, the representative of China was requesting the Commission to introduce a higher level of transparency by including the statement of the grounds in the notice of project award, which was available to the public at large, unlike the record of proceedings, which the contracting authorities were currently required to keep and were accessible only in accordance with the rules and regulations on consulting public records in the given country.

97. **Mr. Wallace** (United States of America) said that it was his understanding that the very purpose of keeping records was to allow not only bidders but also the media and the public to have access to that information. He suggested making that point abundantly clear in section H, which indeed concerned transparency and accountability, rather than in section G.

98. **The Chair** said that it was her understanding that section H dealt with the record of selection, not with the accessibility of those records, and that taking on the proposal by the representative of the United States would entail a redrafting of the text at the current stage, which would not be advisable.

99. **Mr. Wallace** (United States of America) said that his comment was not intended to have the text redrafted, but rather to highlight the historical purpose of record-keeping, especially in light of the comments made by the representative of China.

100. **The Chair** said she took it that the Secretariat would amend paragraph 130 in line with the suggestion by the representative of China.

101. *It was so decided.*

Paragraphs129 to 139 were approved.

Model provisions

102. **Mr. Soh** (Singapore) asked why paragraphs (e) and (f) of model provision 18 of the old Guide, had been removed from model provision No. 23 of the revised version.

103. **Mr. Estrella Faria** (Secretariat) said that he was unsure whether paragraph (f) had been removed by the Secretariat by mistake or in response to a request to delete it and would seek further

clarification in that regard. Paragraph (e) had been deleted because it had been pointed out to the Secretariat that the issue of unsolicited proposals had been dealt with appropriately in model provisions 25 et seq. and that the original Guide had only created confusion by including it in model provision 23, which dealt with direct negotiations.

104. *The model provisions were approved.*

105. *Document A/CN.9/939/Add.3, as amended, was approved.*

Document A/CN.9/LI/CRP.9

106. **Mr. Montemaggi** (Italy), introducing the two proposals submitted by his delegation and contained in document A/CN.9/LI/CRP.9 for consideration in light of the upcoming work on updating chapter IV of the Guide, said that the first proposal concerned the phenomenon of subcontracting which – according to Italian experience – created risks for competition and transparency and might be a way to bypass the requirements concerning contract execution. Although subcontracting was addressed in paragraphs 99 to 104 of the old Guide, in the revised version reference was made to the phenomenon only in paragraph 17 of document A/CN.9/939/Add.3.

107. His delegation therefore suggested that basic provisions be introduced in the revised Guide to ensure transparency in the subcontracting chain. Private partners selected through any of the procedures described in chapter III should be required to declare any recourse which they had to subcontracting and to provide the contracting authority with full information on who would execute a concession contract. The private partner should also have a duty to disclose any situation in which, under applicable national laws, the contracting authority was entitled to request that a subcontractor be replaced. The review exercise could also strengthen the protection of small and medium-sized enterprises in the subcontracting chain by requiring the contracting authority to honour payments to the subcontractor if the private partner defaulted on payments.

108. Turning to the proposal concerning renegotiation of contracts, he said that during the performance stage of a contract, experience had shown that public authorities and private contractors might seek to stray away from the provisions of a contract by changing some of its key features. Model provision 40 of the old Guide set forth the conditions under which concession contracts could be negotiated but did not stipulate the types of modifications which could be deemed admissible for legitimately changing a contract without reopening a tendering process. In its revision exercise, the Secretariat could draw inspiration from Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. That Directive stipulated that modifications were admissible provided that they: introduced conditions that, had they been part of the initial concession award procedure, would have allowed for the admission of applicants other than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the concession award procedure; changed the economic balance of the concession in favour of the concessionaire in a manner which was not provided for in the initial concession; or extended the scope of the concession considerably. Limiting contractual modifications could also be a way to ensure that the contracting authority was not excessively tied up with its current contractor and could therefore properly renegotiate the terms and conditions of the contract.

109. **Mr. D'Allaire** (Canada) said that, with regard to subcontracting, Canada already followed the transparency requirements with respect to the identity of the subcontractors recommended by Italy and agreed that such requirements could be recommended as good practices. Under Canadian law, subcontractors were also required, of course, to comply with laws of general application. He recommended that the Commission proceed with caution and give further thought to the proposal to guarantee direct payments to small and medium-sized enterprises in case of default. Canada welcomed the contribution by the representative of Italy to the important topic of the renegotiation of contracts, although it was already covered in the Guide.

110. **Mr. Soh** (Singapore) said that the Commission had originally set out to review the arrangements for PPPs in the Guide. The topics referred to by the representative of Italy, though important, were general procurement issues that went beyond the scope of the current review exercise. For example, Singapore and various other States already ensured that direct payments to the subcontractor were honoured in cases of default, but that concerned other topics such as attribution of contractual rights and adjudication rather than PPP contracts as such.

111. **The Chair** said she took it that the Commission wished to take note of the suggestions made by Italy and that those issues might be referred to an expert group in the future.

112. *It was so decided.*

113. *Document A/CN.9/LI/CRP.9 was approved.*

Closure of the session

114. After the customary exchange of courtesies, **the Chair** declared the fifty-first session of the Commission closed.

The meeting rose at 12.40 p.m.

II. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW*

(A/CN.9/949)

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III. CHECK-LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Document symbols	*Title or description*	*Location in present volume*
	A. List of documents before the Commission at its fifty-first session	
	1. General series	
A/CN.9/927/Rev.1	Provisional agenda, annotations thereto and scheduling of meetings of the fifty-first session	Not reproduced
A/CN.9/928	Report of Working Group I (MSMEs) on the work of its twenty-ninth session (Vienna, 16–20 October 2017)	Part two, chap. I, A
A/CN.9/929	Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (Vienna, 2–6 October 2017)	Part two, chap. II, A
A/CN.9/930/Rev.1 and Add.1/Rev.1	Report of Working Group III (ISDS) on the work of its thirty-fourth session – Part 1 and Part II (Vienna, 27 November-1 December 2017)	Part two, chap. III, A
A/CN.9/931	Report of Working Group V (Insolvency Law) on the work of its fifty-second session (Vienna, 18–22 December 2017)	Part two, chap. V, A
A/CN.9/932	Report of Working Group VI (Security Interests) on the work of its thirty-second session (Vienna, 11–15 December 2017)	Part two, chap. VI, A
A/CN.9/933	Report of Working Group I (MSMEs) on the work of its thirtieth session (New York, 12–16 March 2018)	Part two, chap. I, D
A/CN.9/934	Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, 5–9 February 2018)	Part two, chap. II, D
A/CN.9/935	Report of Working Group III (ISDS) on the work of its thirty-fifth session (New York, 23–27 April 2018)	Part two, chap. III, D
A/CN.9/936	Report of Working Group IV (Electronic Commerce) on the work of its fifty-sixth session (New York, 16–20 April 2018)	Part two, chap. IV, A
A/CN.9/937	Report of Working Group V (Insolvency Law) on the work of is fifty-third session (New York, 7–11 May 2018)	Part two, chap. V, G
A/CN.9/938	Report of Working Group VI (Security Interests) on the work of its thirty-third session (New York, 30 April–4 May 2018)	Part two, chap. VI, C
A/CN.9/939 and Add.1–3	Public-private partnerships (PPPs): proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects	Part two, chap. VII, A
A/CN.9/940	Note by the Secretariat on a draft legislative guide on key principles of a business registry	Part two, chap. I, G

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A/CN.9/942	Note by the Secretariat on settlement of commercial disputes: international commercial mediation: draft convention on international settlement agreements resulting from mediation	Part two, chap. II, F
A/CN.9/943	Note by the Secretariat on settlement of commercial disputes: international commercial mediation: draft model law on international commercial mediation and international settlement agreements resulting from mediation	Part two, chap. II, G
A/CN.9/944/Rev.1	Note by the Secretariat on possible future work on cross-border issues related to the judicial sale of ships: proposal from the Government of Switzerland	Part two, chap. VIII, A
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A/CN.9/946	Note by the Secretariat on promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts	Part two, chap. X
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A/CN.9/955	Note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law	Part two, chap. V, L
A/CN.9/956 and Add.1–3	Note by the Secretariat on the finalization and adoption of a model law on cross-border recognition and enforcement of insolvency-related judgments	Part two, chap. V, M

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	and its guide to enactment: compilation of comments on the draft model law as contained in an annex to the report of Working Group V (Insolvency Law) on the work of its fifty-second session (A/CN.9/931)	
A/CN.9/957	Note by the Secretariat on public-private partnerships (PPPs): proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects: comments by the World Bank	Part two, chap. VII, B
A/CN.9/958/Rev.1	Note by the Secretariat on technical cooperation and assistance	Part two, chap. IX, B
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A/CN.9/960	Note by the Secretariat on the work programme of the Commission: legal aspects of smart contracts and artificial intelligence: submission by the Czechia	Part two, chap. VIII, E
A/CN.9/961	Note by the Secretariat on possible future work: proposal by the Government of Belgium: future work for Working Group II	Part two, chap. VIII, F
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A/CN.9/LI/CRP.2	Draft decision – Convention on International Settlement Agreements Resulting from Mediation	Not reproduced
A/CN.9/LI/CRP.3	Draft decision – Celebration of the sixtieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards	Not reproduced
A/CN.9/LI/CRP.4	Draft decision on the adoption of the legislative guide on key principles of a business registry	Not reproduced
A/CN.9/LI/CRP.5	Draft decision on the adoption of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments and Guide to Enactment	Not reproduced
A/CN.9/LI/CRP.6	Other business: methods of work: proposal submitted by the governments of France, Germany, Israel, Switzerland and the United States of America	Not reproduced
A/CN.9/LI/CRP.7	Consideration of issues in the area of micro, small and medium-sized enterprises (MSMEs): proposal submitted by the governments of Germany and Spain with regard to the draft Legislative Guide on key principles of a business registry (A/CN.9/WG.I/WP.109) prepared by Working Group I (currently document A/CN.9/940)	Not reproduced
A/CN.9/LI/CRP.8	Consideration of issues in the area of micro, small and medium-sized enterprises (MSMEs): UNCITRAL draft Legislative Guide on Key Principles of a Business Registry (A/CN.9/940):	Not reproduced

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	Comments of Colombia and the United States of America	
A/CN.9/LI/CRP.9	Consideration of revised UNCITRAL texts in the area of privately financed infrastructure projects: submission by Italy:the proposed approach with reference to Chapter III of the Legislative Guide: some considerations on subcontracting	Not reproduced
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A/CN.9/WG.I/WP.105	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/WP.106	Note by the Secretariat on a draft legislative guide on key principles of a business registry	Part two, chap. I, B
A/CN.9/WG.I/WP.107	Note by the Secretariat on reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs)	Part two, chap. I, C
	2. Restricted series	
A/CN.9/WG.I/XXIX/CRP.1 and Add.1–4	Draft report of Working Group I (MSMEs) on the work of its twenty-ninth session	Not reproduced
A/CN.9/WG.I/XXIX/CRP.2	Basis to start discussing a new draft of Recommendation 9, listing core functions of a business registry	Not reproduced
A/CN.9/WG.I/XXIX/CRP.3	Proposal for a revised text of paragraph 122	Not reproduced
	3. Information series	
A/CN.9/WG.I/XXIX/INF/1	List of participants	Not reproduced
	C. List of documents before the Working Group on MSMEs at its thirtieth session	
	1. Working papers	
A/CN.9/WG.I/WP.108	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/WP.109	Note by the Secretariat on a draft legislative guide on key principles of a business registry	Part two, chap. I, E
A/CN.9/WG.I/WP.110	Note by the Secretariat on reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs)	Part two, chap. I, F
	2. Restricted series	
A/CN.9/WG.I/XXX/CRP.1 and Add.1–4	Draft report of Working Group I (MSMEs) on the work of its thirtieth session	Not reproduced
A/CN.9/WG.I/XXX/CRP.2	Proposal by the delegation of the United States of America on a new recommendation concerning women's equality of rights for registering and starting a business	Not reproduced
	3. Information series	
A/CN.9/WG.I/XXX/INF/1	List of participants	Not reproduced

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	D. List of documents before the Working Group on Dispute Settlement at its sixty-seventh session	
	1. Working papers	
A/CN.9/WG.II/WP.201	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.202 and Add.1	Note by the Secretariat on settlement of commercial disputes: international commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation	Part two, chap. II, B
A/CN.9/WG.II/WP.203	Note by the Secretariat on settlement of commercial disputes: comments by the Government of the United States of America	Part two, chap. II, C
	2. Restricted series	
A/CN.9/WG.II/LXVII/CRP.1 and Add.1–4	Draft report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session	Not reproduced
A/CN.9/WG.II/LXVII/CRP.2	Draft convention	Not reproduced
	3. Information series	
A/CN.9/WG.II/LXVII/INF/1	List of participants	Not reproduced
	E. List of documents before the Working Group on Dispute Settlement at its sixty-eighth session	
	1. Working papers	
A/CN.9/WG.II/WP.204	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.205 and Add.1	Note by the Secretariat on settlement of commercial disputes: international commercial mediation: preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation	Part two, chap. II, E
	2. Restricted series	
A/CN.9/WG.II/LXVIII/CRP.1 and Add.1–4	Draft report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session	Not reproduced
A/CN.9/WG.II/LXVIII/CRP.2	Draft convention and draft revised model law	Not reproduced
A/CN.9/WG.II/LXVIII/CRP.3	Proposal by Switzerland and the United States of America: possible future work of Working Group II: expedited dispute resolution tools	Not reproduced
	3. Information series	
A/CN.9/WG.II/LXVIII/INF/1	List of participants	Not reproduced
	F. List of documents before the Working Group on ISDS at its thirty-fourth session	
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A/CN.9/WG.III/WP.141	Annotated provisional agenda	Not reproduced
A/CN.9/WG.III/WP.142	Note by the Secretariat on possible reform of investor-State dispute settlement (ISDS)	Part two, chap. III, B
A/CN.9/WG.III/WP.143	Possible reform of investor-State dispute settlement (ISDS): submissions from International Intergovernmental Organizations	Part two, chap. III, C

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	2. Restricted series	
A/CN.9/WG.III/XXXIV/CRP.1 and Add.1–3	Draft report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session	Not reproduced
A/CN.9/WG.III/XXXIV/CRP.2	Comments by the delegation of the United States of America	Not reproduced
	3. Information series	
A/CN.9/WG.III/XXXIV/INF.1	List of participants	Not reproduced
	G. List of documents before the Working Group on ISDS at its thirty-fifth session	
	1. Working papers	
A/CN.9/WG.III/WP.144	Annotated provisional agenda	Not reproduced
A/CN.9/WG.III/WP.145	Possible reform of investor-State dispute settlement (ISDS): submission from the European Union	Part two, chap. III, E
A/CN.9/WG.III/WP.146	Note by the Secretariat on possible reform of investor-State dispute settlement (ISDS): submissions from International Intergovernmental Organizations and additional information: appointment of arbitrators submissions from International Intergovernmental Organizations	Part two, chap. III, F
A/CN.9/WG.III/WP.147	Note by the Secretariat on possible reform of investor-State dispute settlement (ISDS): comments by the Government of Thailand	Part two, chap. III, G
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A/CN.9/WG.III/XXXV/CRP.1 and Add.1–4	Draft report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session	Not reproduced
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	H. List of documents before the Working Group on Electronic Commerce at its fifty-sixth session	
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A/CN.9/WG.IV/WP.150	Note by the Secretariat on legal issues related to identity management and trust services: terms and concepts relevant to identity management and trust services	Part two, chap. IV, D
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	I. List of documents before the Working Group on Insolvency Law at its fifty-second session	
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A/CN.9/WG.V/WP.149	Annotated provisional agenda	Not reproduced
A/CN.9/WG.V/WP.150	Note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft model law	Part two, chap. V, B
A/CN.9/WG.V/WP.151	Note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law	Part two, chap. V, C
A/CN.9/WG.V/WP.152	Note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: draft legislative provisions	Part two, chap. V, D
A/CN.9/WG.V/WP.153	Note by the Secretariat on insolvency law: directors' obligations in the period approaching insolvency: enterprise groups	Part two, chap. V, E
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A/CN.9/WG.V/WP.155	Annotated provisional agenda	Not reproduced
A/CN.9/WG.V/WP.156	Note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft model law	Part two, chap. V, H
A/CN.9/WG.V/WP.157	Note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law	Part two, chap. V, I
A/CN.9/WG.V/WP.158	Note by the Secretariat on facilitating the cross-border insolvency of enterprise groups: draft legislative provisions	Part two, chap. V, J

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A/CN.9/WG.V/WP.159	Note by the Secretariat on insolvency of micro, small and medium-sized enterprises	Part two, chap. V, K
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A/CN.9/WG.V/LIII/CRP.1 and Add.1–4	Draft report of Working Group V (Insolvency Law) on the work of its fifty-third session	Not reproduced
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A/CN.9/WG.VI/WP.74	Annotated provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.75	Note by the Secretariat on a draft practice guide to the UNCITRAL Model Law on Secured Transactions: annotated list of contents	Part two, chap. VI, B
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A/CN.9/WG.VI/XXXII/CRP.1 and Add.1–4	Draft report of Working Group VI (Security Interests) on the work of its thirty-second session	Not reproduced
A/CN.9/WG.VI/XXXII/CRP.2	Comments by the delegation of the United Kingdom of Great Britain and Norther Ireland	Not reproduced
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	L. List of documents before the Working Group on Security Interests at its thirty-third session	
	1. Working papers	
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A/CN.9/WG.VI/XXXIII/CRP.2	Proposal by the United States of America and Mexico for UNCITRAL work on warehouse receipts	Not reproduced
	3. Information series	
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IV. LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW REPRODUCED IN PREVIOUS VOLUMES OF THE *YEARBOOK*

The present list indicates the particular volume, year, part and chapter where documents relating to the work of the United Nations Commission on International Trade Law were reproduced in previous volumes of the *Yearbook*; documents that do not appear in the list here were not reproduced in the *Yearbook*. The documents are divided into the following categories:

1. Reports on the annual sessions of the Commission
2. Resolutions of the General Assembly
3. Reports of the Sixth Committee
4. Extracts from the reports of the Trade and Development Board, United Nations Conference on Trade and Development
5. Documents submitted to the Commission (including reports of the meetings of Working Groups)
6. Documents submitted to the Working Groups:
   (a) Working Group I:

   Time-Limits and Limitation (Prescription) (1969 to 1971); Privately Financed Infrastructure Projects (2001 to 2003); Procurement (2004 to 2012); MSME's (as of 2014)

   (b) Working Group II:

   International Sale of Goods (1968 to 1978); International Contract Practices (1981 to 2000); Arbitration and Conciliation / Dispute Settlement (as of 2000)

   (c) Working Group III:

   International Legislation on Shipping (1970 to 1975); Transport Law (2002 to 2008); Online Dispute Resolution (2010 to 2016); Investor-State Dispute Settlement Reform (as of 2017)

   (d) Working Group IV:

   International Negotiable Instruments (1973 to 1987); International Payments (1988 to 1992); Electronic Data Interchange (1992 to 1996); Electronic Commerce (as of 1997)

   (e) Working Group V:

   New International Economic Order (1981 to 1994); Insolvency Law (1995 to 1999); Insolvency Law (as of 2001)[*]

   (f) Working Group VI:

   Security Interests (2002 to 2018)[**] **
7. Summary records of discussions in the Commission
8. Texts adopted by Conferences of Plenipotentiaries
9. Bibliographies of writings relating to the work of the Commission.

[*] For its 23rd session (Vienna, 11-22 December 2000), this Working Group was named Working Group on International Contract Practices (see the report of the Commission on its 33rd session A/55/17, para.186).

[**] At its 35th session, the Commission adopted one-week sessions, creating six working groups.

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1. Reports on the annual sessions of the Commission		
A/7216 (first session)	Volume I: 1968 1970	Part two, I, A
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A/8717 (fifth session)	Volume III: 1972	Part one, II, A
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5. Documents submitted to the Commission, including reports of meetings of working groups		
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A/CN.9/871	Volume XLVII: 2016	Part two, VI, D
A/CN.9/872	Volume XLVII: 2016	Part two, IX, A
A/CN.9/873	Volume XLVII: 2016	Part two, VIII
A/CN.9/874	Volume XLVII: 2016	Part three, II
A/CN.9/875	Volume XLVII: 2016	Part two, XI
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A/CN.9/879	Volume XLVII: 2016	Part two, II, J
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A/CN.9/882 and Add.1	Volume XLVII: 2016	Part two, IX, C
A/CN.9/883	Volume XLVII: 2016	Part two, IX, D
A/CN.9/884 and Add.1–4	Volume XLVII: 2016	Part two, VI, G
A/CN.9/885 and Add.1–4	Volume XLVII: 2016	Part two, VI, H
A/CN.9/886	Volume XLVII: 2016	Part two, VI, I
A/CN.9/887 and Add.1	Volume XLVII: 2016	Part two, VI, J
A/CN.9/888	Volume XLVII: 2016	Part two, III, G
A/CN.9/889	Volume XLVII: 2016	Part two, VII, D
A/CN.9/890	Volume XLVII: 2016	Part two, VII, E
A/CN.9/891	Volume XLVII: 2016	Part two, VII, F
A/CN.9/892	Volume XLVII: 2016	Part two, VII, G
A/CN.9/893	Volume XLVII: 2016	Part two, VII, H
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A/CN.9/896	Volume XLVIII: 2017	Part two, II, A
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A/CN.9/904	Volume XLVIII: 2017	Part two, V, C
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A/CN.9/908	Volume XLVIII: 2017	Part two, XI
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A/CN.9/911	Volume XLVIII: 2017	Part two, VI, A
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A/CN.9/913	Volume XLVIII: 2017	Part two, VI, C
A/CN.9/914 and Add.1–6	Volume XLVIII: 2017	Part two, V, E
A/CN.9/915	Volume XLVIII: 2017	Part two, VI, D
A/CN.9/916	Volume XLVIII: 2017	Part two, VI, E
A/CN.9/917	Volume XLVIII: 2017	Part two, VI, F
A/CN.9/918 and Add.1–10	Volume XLVIII: 2017	Part two, VI, G
A/CN.9/919	Volume XLVIII: 2017	Part two, VII
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A/CN.9/921 and Add.1–3	Volume XLVIII: 2017	Part two, III, K
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A/CN.9/924	Volume XLVIII: 2017	Part two, VI, I
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6. Documents submitted to Working Groups		
(a) Working Group I		
(i) Time-limits and Limitation (Prescription)		
A/CN.9/WG.1/WP.9	Volume II: 1971	Part two, I, C, 1
(ii) Privately Financed Infrastructure Projects		
A/CN.9/WG.I/WP.29 and Add.1–2	Volume XXXIV: 2003	Part two, I, B
(iii) Procurement		
A/CN.9/WG.I/WP.31	Volume XXXVI: 2005	Part two, II, B
A/CN.9/WG.I/WP.32	Volume XXXVI: 2005	Part two, II, C
A/CN.9/WG.I/WP.34 and Add.1–2	Volume XXXVI: 2005	Part two, II, E
A/CN.9/WG.I/WP.35 and Add.1	Volume XXXVI: 2005	Part two, II, F
A/CN.9/WG.I/WP.36	Volume XXXVI: 2005	Part two, II, G
A/CN.9/WG.I/WP.38 and Add.1	Volume XXXVII: 2006	Part two, III, B
A/CN.9/WG.I/WP.39 and Add.1	Volume XXXVII: 2006	Part two, III, C
A/CN.9/WG.I/WP.40 and Add.1	Volume XXXVII: 2006	Part two, III, D
A/CN.9/WG.I/WP.42 and Add.1	Volume XXXVII: 2006	Part two, III, F
A/CN.9/WG.I/WP.43 and Add.1	Volume XXXVII: 2006	Part two, III, G
A/CN.9/WG.I/WP.44 and Add.1	Volume XXXVII: 2006	Part two, III, H
A/CN.9/WG.I/WP.45 and Add.1	Volume XXXVII: 2006	Part two, III, I
A/CN.9/WG.I/WP.47	Volume XXXVIII: 2007	Part two, II, B
A/CN.9/WG.I/WP.48	Volume XXXVIII: 2007	Part two, II, C
A/CN.9/WG.I/WP.50	Volume XXXVIII: 2007	Part two, II, E
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A/CN.9/WG.I/WP.52 and Add.1	Volume XXXVIII: 2007	Part two, II, G
A/CN.9/WG.I/WP.54	Volume XXXIX: 2008	Part two, II, B
A/CN.9/WG.I/WP.55	Volume XXXIX: 2008	Part two, II, C
A/CN.9/WG.I/WP.56	Volume XXXIX: 2008	Part two, II, D
A/CN.9/WG.I/WP.58	Volume XXXIX: 2008	Part two, II, F
A/CN.9/WG.I/WP.59	Volume XXXIX: 2008	Part two, II, G
A/CN.9/WG.I/WP.61	Volume XL: 2009	Part two, I, B
A/CN.9/WG.I/WP.62	Volume XL: 2009	Part two, I, C
A/CN.9/WG.I/WP.63	Volume XL: 2009	Part two, I, D
A/CN.9/WG.I/WP.64	Volume XL: 2009	Part two, I, E
A/CN.9/WG.I/WP.66 and Add.1–5	Volume XL: 2009	Part two, I, G
A/CN.9/WG.I/WP.68 and Add.1	Volume XL: 2009	Part two, I, I
A/CN.9/WG.I/WP.69 and Add.1–5	Volume XL: 2009	Part two, I, J
A/CN.9/WG.I/WP.71 and Add.1–8	Volume XLI: 2010	Part two, IV, B
A/CN.9/WG.I/WP.73 and Add.1–8	Volume XLI: 2010	Part two, IV, D
A/CN.9/WG.I/WP.75 and Add.1–8	Volume XLII: 2011	Part two, II,B
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	(iv) Micro, Small and Medium-Sized Enterprises (MSMES)	
A/CN.9/WG.I/WP.81	Volume XLV: 2014	Part two, VI, B
A/CN.9/WG.I/WP.82	Volume XLV: 2014	Part two, VI, C
A/CN.9/WG.I/WP.83	Volume XLV: 2014	Part two, VI, D
A/CN.9/WG.I/WP.85	Volume XLVI: 2015	Part two, I, B
A/CN.9/WG.I/WP.86 and Add.1	Volume XLVI: 2015	Part two, I, C
A/CN.9/WG.I/WP.87	Volume XLVI: 2015	Part two, I, D
A/CN.9/WG.I/WP.89	Volume XLVI: 2015	Part two, I, E
A/CN.9/WG.I/WP.90	Volume XLVI: 2015	Part two, I, F
A/CN.9/WG.I/WP.92	Volume XLVII: 2016	Part two, I, B
A/CN.9/WG.I/WP.93 and Add.1–2	Volume XLVII: 2016	Part two, I, C
A/CN.9/WG.I/WP.94	Volume XLVII: 2016	Part two, I, D
A/CN.9/WG.I/WP.96 and Add.1	Volume XLVII: 2016	Part two, I, F
A/CN.9/WG.I/WP.98	Volume XLVIII: 2017	Part two, I, B
A/CN.9/WG.I/WP.99 and Add.1	Volume XLVIII: 2017	Part two, I, C
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A/CN.9/WG.I/WP.104	Volume XLVIII: 2017	Part two, I, H

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	(b) Working Group II	
	(i) International Sale of Goods	
A/CN.9/WG.2/WP.1	Volume I: 1968 1979	Part three, I, A, 2
A/CN.9/WG.2/WP.6	Volume II: 1971	Part two, I, A, 1
A/CN.9/WG.2/WP.8	Volume III: 1972	Part two, I, A, 1
A/CN.9/WG.2/WP.9	Volume III: 1972	Part two, I, A, 2
A/CN.9/WG.2/WP.10	Volume III: 1972	Part two, I, A, 3
A/CN.9/WG.2/WP.11	Volume III: 1972	Part two, I, A, 4
A/CN.9/WG.2/WP.15	Volume IV: 1973	Part two, I, A, 1
A/CN.9/WG.2/WP.16	Volume IV: 1973	Part two, I, A, 2
A/CN.9/WG.2/WP.15/Add.1	Volume V: 1974	Part two, I, 3
A/CN.9/WG.2/WP.17/Add.1	Volume V: 1974	Part two, I, 4
A/CN.9/WG.2/WP.17/Add.2	Volume V: 1974	Part two, I, 4
A/CN.9/WG.2/WP.20	Volume VI: 1975	Part two, I, 4
A/CN.9/WG.2/WP.2 and Add.1–2	Volume VI: 1975	Part two, I, 3
A/CN.9/WG.2/WP.26 and Add.1 and appendix I	Volume VIII: 1977	Part two, I, C
A/CN.9/WG.2/WP.27	Volume IX: 1978	Part two, I, B
A/CN.9/WG.2/WP.28	Volume IX: 1978	Part two, I, B
	(ii) International Contract Practices	
A/CN.9/WG.II/WP.33 and Add.1	Volume XII: 1981	Part two, I, B, 1 and 2
A/CN.9/WG.II/WP.35	Volume XIII: 1982	Part two, III, B
A/CN.9/WG.II/WP.37	Volume XIV: 1983	Part two, III, B, 1
A/CN.9/WG.II/WP.38	Volume XIV: 1983	Part two, III, B, 2
A/CN.9/WG.II/WP.40	Volume XIV: 1983	Part two, III, D, 1
A/CN.9/WG.II/WP.41	Volume XIV: 1983	Part two, III, D, 2
A/CN.9/WG.II/WP.42	Volume XIV: 1983	Part two, III, D, 3
A/CN.9/WG.II/WP.44	Volume XV: 1984	Part two, II, A, 2(a)
A/CN.9/WG.II/WP.45	Volume XV: 1984	Part two, II, A, 2(b)
A/CN.9/WG.II/WP.46	Volume XV: 1984	Part two, II, A, 2(c)
A/CN.9/WG.II/WP.48	Volume XV: 1984	Part two, II, B, 3(a)
A/CN.9/WG.II/WP.49	Volume XV: 1984	Part two, II, B, 3(b)
A/CN.9/WG.II/WP.50	Volume XV: 1984	Part two, II, B, 3(c)
A/CN.9/WG.II/WP.52 and Add.1	Volume XVI: 1985	Part two, IV, B, 1
A/CN.9/WG.II/WP.53	Volume XVI: 1985	Part two, IV, B, 3
A/CN.9/WG.II/WP.55	Volume XVII: 1986	Part two, III, B, 1
A/CN.9/WG.II/WP.56	Volume XVII: 1986	Part two, III, B, 2
A/CN.9/WG.II/WP.58	Volume XVIII: 1987	Part two, III, B
A/CN.9/WG.II/WP.60	Volume XIX: 1988	Part two, II, B

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A/CN.9/WG.II/WP.62	Volume XX: 1989	Part two, IV, B, 1
A/CN.9/WG.II/WP.63	Volume XX: 1989	Part two, IV, B, 2
A/CN.9/WG.II/WP.65	Volume XXI: 1990	Part two, IV, B
A/CN.9/WG.II/WP.67	Volume XXII: 1991	Part two, III, B, 1
A/CN.9/WG.II/WP.68	Volume XXII: 1991	Part two, III, B, 2
A/CN.9/WG.II/WP.70	Volume XXII: 1991	Part two, III, D, 1
A/CN.9/WG.II/WP.71	Volume XXII: 1991	Part two, III, D, 2
A/CN.9/WG.II/WP.73 and Add.1	Volume XXIII: 1992	Part two, IV, B
A/CN.9/WG.II/WP.76 and Add.1	Volume XXIV: 1993	Part two, II, B, 1
A/CN.9/WG.II/WP.77	Volume XXIV: 1993	Part two, II, B, 2
A/CN.9/WG.II/WP.80	Volume XXV: 1994	Part two, II, B
A/CN.9/WG.II/WP.83	Volume XXVI: 1995	Part two, I, B
A/CN.9/WG.II/WP.87	Volume XXVIII: 1997	Part two, II, B
A/CN.9/WG.II/WP.89	Volume XXVIII: 1997	Part two, II, D, 1
A/CN.9/WG.II/WP.90	Volume XXVIII: 1997	Part two, II, D, 2
A/CN.9/WG.II/WP.91	Volume XXVIII: 1997	Part two, II, D, 3
A/CN.9/WG.II/WP.93	Volume XXIX: 1998	Part two, I, B
A/CN.9/WG.II/WP.96	Volume XXIX: 1998	Part two, I, D
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A/CN.9/WG.II/WP.100	Volume XXX: 1999	Part two, I, D
A/CN.9/WG.II/WP.102	Volume XXX: 1999	Part two, I, F
A/CN.9/WG.II/WP.104	Volume XXXI: 2000	Part two, I, B
A/CN.9/WG.II/WP.105	Volume XXXI: 2000	Part two, I, C
A/CN.9/WG.II/WP.106	Volume XXXI: 2000	Part two, I, D
	(iii) Arbitration and Conciliation/Dispute Settlement	
A/CN.9/WG.II/WP.108 and Add.1	Volume XXXI: 2000	Part two, IV, B
A/CN.9/WG.II/WP.110	Volume XXXII: 2001	Part two, III, B
A/CN.9/WG.II/WP.111	Volume XXXII: 2001	Part two, III, C
A/CN.9/WG.II/WP.113 and Add.1	Volume XXXII: 2001	Part two, III, E
A/CN.9/WG.II/WP.115	Volume XXXIII: 2002	Part two, I, B
A/CN.9/WG.II/WP.116	Volume XXXIII: 2002	Part two, I, C
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A/CN.9/WG.II/WP.119	Volume XXXIII: 2002	Part two, I, F
A/CN.9/WG.II/WP.121	Volume XXXIV: 2003	Part two, III, B
A/CN.9/WG.II/WP.123	Volume XXXIV: 2003	Part two, III, D
A/CN.9/WG.II/WP.125	Volume XXXV: 2004	Part two, II, B
A/CN.9/WG.II/WP.127	Volume XXXV: 2004	Part two, II, D
A/CN.9/WG.II/WP.128	Volume XXXV: 2004	Part two, II, E

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A/CN.9/WG.II/WP.129	Volume XXXV: 2004	Part two, II, F
A/CN.9/WG.II/WP.131	Volume XXXVI: 2005	Part two, III, B
A/CN.9/WG.II/WP.132	Volume XXXVI: 2005	Part two, III, C
A/CN.9/WG.II/WP.134	Volume XXXVI: 2005	Part two, III, E
A/CN.9/WG.II/WP.136	Volume XXXVII: 2006	Part two, II, B
A/CN.9/WG.II/WP.137 and Add.1	Volume XXXVII: 2006	Part two, II, C
A/CN.9/WG.II/WP.138	Volume XXXVII: 2006	Part two, II, D
A/CN.9/WG.II/WP.139	Volume XXXVII: 2006	Part two, II, F
A/CN.9/WG.II/WP.141	Volume XXXVII: 2006	Part two, II, G
A/CN.9/WG.II/WP.145 and Add.1	Volume XXXVIII: 2007	Part two, III, D
A/CN.9/WG.II/WP.147 and Add.1	Volume XXXIX: 2008	Part two, III, B
A/CN.9/WG.II/WP.149	Volume XXXIX: 2008	Part two, III, D
A/CN.9/WG.II/WP.151 and Add.1	Volume XL: 2009	Part two, II, B
A/CN.9/WG.II/WP.152	Volume XL: 2009	Part two, II, C
A/CN.9/WG.II/WP.154	Volume XL: 2009	Part two, II, E
A/CN.9/WG.II/WP.154/Add.1	Volume XLI: 2010	Part two, I, B
A/CN.9/WG.II/WP.157 and Add.1–2	Volume XLI: 2010	Part two, I, D
A/CN.9/WG.II/WP.159 and Add.1–4	Volume XLII: 2011	Part two, I, B
A/CN.9/WG.II/WP.160 and Add.1	Volume XLII: 2011	Part two, I, C
A/CN.9/WG.II/WP.162 and Add.1	Volume XLII: 2011	Part two, I, E
A/CN.9/WG.II/WP.163	Volume XLII: 2011	Part two, I, F
A/CN.9/WG.II/WP.164	Volume XLII: 2011	Part two, I, G
A/CN.9/WG.II/WP.166 and Add.1	Volume XLIII: 2012	Part two, I, B
A/CN.9/WG.II/WP.167	Volume XLIII: 2012	Part two, I, C
A/CN.9/WG.II/WP.169 and Add.1	Volume XLIII: 2012	Part two, I, E
A/CN.9/WG.II/WP.170 and Add.1	Volume XLIII: 2012	Part two, I, F
A/CN.9/WG.II/WP.172	Volume XLIV: 2013	Part two, I, B
A/CN.9/WG.II/WP.173	Volume XLIV: 2013	Part two, I, C
A/CN.9/WG.II/WP.174	Volume XLIV: 2013	Part two, I, D
A/CN.9/WG.II/WP.176 and Add.1	Volume XLIV: 2013	Part two, I, F
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A/CN.9/WG.II/WP.181	Volume XLV: 2014	Part two, I, D
A/CN.9/WG.II/WP.183	Volume XLVI: 2015	Part two, II, B
A/CN.9/WG.II/WP.184	Volume XLVI: 2015	Part two, II, C
A/CN.9/WG.II/WP.186	Volume XLVI: 2015	Part two, II, E
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A/CN.9/WG.II/WP.191	Volume XLVII: 2016	Part two, II, C
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A/CN.9/WG.II/WP.194	Volume XLVII: 2016	Part two, II, G
A/CN.9/WG.II/WP.195	Volume XLVII: 2016	Part two, II, H
A/CN.9/WG.II/WP.196 and Add.1	Volume XLVII: 2016	Part two, II, I
A/CN.9/WG.II/WP.198	Volume XLVIII: 2017	Part two, II, B
A/CN.9/WG.II/WP.200 and Add.1	Volume XLVIII: 2017	Part two, II, D
	(c) Working Group III	
	(i) International Legislation on Shipping	
A/CN.9/WG.III/WP.6	Volume IV: 1973	Part two, IV, 2
A/CN.9/WG.III/WP.7	Volume IV: 1973	Part two, IV, 3
A/CN.9/WG.III/WP.11	Volume V: 1974	Part two, III, 3
	(ii) Transport Law	
A/CN.9/WG.III/WP.21 and Add.1	Volume XXXIII: 2002	Part two, VI, B
A/CN.9/WG.III/WP.23	Volume XXXIV: 2003	Part two, IV, B
A/CN.9/WG.III/WP.25	Volume XXXIV: 2003	Part two, IV, D
A/CN.9/WG.III/WP.26	Volume XXXIV: 2003	Part two, IV, E
A/CN.9/WG.III/WP.27	Volume XXXIV: 2003	Part two, IV, F
A/CN.9/WG.III/WP.28	Volume XXXIV: 2003	Part two, IV, G
A/CN.9/WG.III/WP.29	Volume XXXIV: 2003	Part two, IV, H
A/CN.9/WG.III/WP.30	Volume XXXIV: 2003	Part two, IV, I
A/CN.9/WG.III/WP.28/Add.1	Volume XXXV: 2004	Part two, III, B
A/CN.9/WG.III/WP.32	Volume XXXV: 2004	Part two, III, C
A/CN.9/WG.III/WP.33	Volume XXXV: 2004	Part two, III, D
A/CN.9/WG.III/WP.34	Volume XXXV: 2004	Part two, III, E
A/CN.9/WG.III/WP.36	Volume XXXV: 2004	Part two, III, G
A/CN.9/WG.III/WP.37	Volume XXXV: 2004	Part two, III, H
A/CN.9/WG.III/WP.39	Volume XXXVI: 2005	Part two, IV, B
A/CN.9/WG.III/WP.40	Volume XXXVI: 2005	Part two, IV, C
A/CN.9/WG.III/WP.41	Volume XXXVI: 2005	Part two, IV, D
A/CN.9/WG.III/WP.42	Volume XXXVI: 2005	Part two, IV, E
A/CN.9/WG.III/WP.44	Volume XXXVI: 2005	Part two, IV, G
A/CN.9/WG.III/WP.45	Volume XXXVI: 2005	Part two, IV, H
A/CN.9/WG.III/WP.46	Volume XXXVI: 2005	Part two, IV, I
A/CN.9/WG.III/WP.47	Volume XXXVI: 2005	Part two, IV, J
A/CN.9/WG.III/WP.49	Volume XXXVII: 2006	Part two, IV, B
A/CN.9/WG.III/WP.50/Rev.1	Volume XXXVII: 2006	Part two, IV, C
A/CN.9/WG.III/WP.51	Volume XXXVII: 2006	Part two, IV, D
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A/CN.9/WG.III/WP.53	Volume XXXVII: 2006	Part two, IV, F
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A/CN.9/WG.III/WP.55	Volume XXXVII: 2006	Part two, IV, H
A/CN.9/WG.III/WP.56	Volume XXXVII: 2006	Part two, IV, I
A/CN.9/WG.III/WP.57	Volume XXXVII: 2006	Part two, IV, J
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A/CN.9/WG.III/WP.62	Volume XXXVII: 2006	Part two, IV, O
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