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

Note by the Secretariat

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I. Introduction

1. The Commission may wish to recall that the item on rule of law has been on its agenda since its forty-first session, in 2008,¹ 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.² The Commission may further wish to recall that, at its forty-first to fifty-fourth sessions, in 2008 to 2021, respectively, the Commission transmitted comments on its role in promoting the rule of law at the national and international levels, in its annual reports to the General Assembly.³

2. At its fifty-first session, in 2018, 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" and to improve the way the Commission handled that agenda item. The Commission considered the possibility of broadening the discussion of its role in promoting the rule of law at the national and international levels to a discussion of the way its work relates to the 2030 Agenda for Sustainable Development and 17 Sustainable Development Goals, both with regard to the instruments it has developed and with regard to assistance to States in their achievement of the Goals. It was suggested that, in order for the Commission to achieve a more meaningful consideration of that agenda item, the secretariat could prepare a paper outlining the way that the UNCITRAL instruments and texts relate to the Sustainable Development Goals and identifying concrete issues to be discussed by the Commission on that basis.

3. At its seventy-sixth session, the General Assembly again endorsed 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.⁴

4. It further noted the role of the Commission in promoting the rule of law, respective discussions in the Commission at its fifty-fourth session and the comments transmitted by the Commission, pursuant to paragraph 20 of General Assembly resolution 75/141 of 15 December 2020, highlighting the relevance of its current work and of the texts finalized and adopted to the promotion of the rule of law and the implementation of the Sustainable Development Goals.

¹ 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.

² General Assembly resolutions 62/70, para. 3; 63/128, para. 7; 64/116, para. 9; 65/32, para. 10; 66/102, para. 12; 67/97, para. 14; 68/116, para. 14; 69/123, para. 17; 70/118, para. 20; 71/148, para. 22; 72/119, para. 25; 73/207, para. 20; 74/191, para. 20; 75/141, para. 20 and 76/117, para. 20.

³ *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; *ibid.*, *Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 435–441; *ibid.*, *Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 232–233; *ibid.*, *Seventy-fourth Session, Supplement No. 17 (A/74/17)*, paras. 303–308; *ibid.*, *Seventy-fifth Session, Supplement No. 17 (A/75/17)*, para. 25; and *ibid.*, *Seventy-sixth Session, Supplement No. 17 (A/76/17)*, paras. 370–374.

⁴ General Assembly resolution 76/229, para. 21.

5. The Commission may wish to note that the General Assembly, in resolution 76/117 of 17 December 2021, reiterated its invitation to the Commission to comment on its current role in promoting the rule of law. In paragraph 23 of the same resolution, the General Assembly invited Member States to focus their comments during the upcoming Sixth Committee debate on the subtopic “The impacts of the global coronavirus disease (COVID-19) pandemic on the rule of law at the national and international levels”.

6. At its fifty-fourth session, the Commission offered its comments on the topic “The rule of law at the national and international levels”. It highlighted the contribution of its work in the areas of insolvency, micro-, small and medium-sized enterprises, international commercial mediation, and international commercial arbitration. The texts in the areas of insolvency and micro-, small and medium-sized enterprises were expected to assist States in mitigating the effects of the measures required to control the pandemic and their economic recovery efforts, particularly the effects on women, who have borne a disproportionate burden of the economic fallout from the COVID-19 pandemic.⁵

7. Chapter II of this note outlines the relevance of the texts that may be before the Commission for finalization and adoption at its fifty-fifth session, in 2022, to the promotion of the rule of law and the implementation of the Sustainable Development Goals. Chapter III suggests actions by the Commission under this agenda item at its fifty-fifth session.

II. Relevance of texts that are expected to be considered by the Commission at its fifty-fifth session, in 2022, to the promotion of the rule of law and the implementation of the Sustainable Development Goals

8. As the Commission was informed at past sessions,⁶ the UNCITRAL website contains a web page that explains the role of UNCITRAL in the implementation of the Sustainable Development Goals, including its rule-of-law-related target.⁷ The web page focuses on nine Goals most relevant to the work of UNCITRAL: Sustainable Development Goals 1, 4, 5, 8, 9, 10, 12, 16 and 17.

9. As indicated in paragraphs 2, 3 and 4 above, the relationship between UNCITRAL instruments and the implementation of the Sustainable Development Goals, was highlighted by the Commission, by the General Assembly and by the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels.

10. At its fifty-fifth session, in 2022, the Commission is expected to have before it for finalization and adoption a number of texts that further demonstrate that interrelationship as explained below.

A. Draft model law on identity management and trust services

Relevance to Sustainable Development Goals 1, 9, 10 and 16.

11. At its fifty-fifth session, in 2022, the Commission will have before it for consideration and adoption a draft model law on identity management and trust services. The draft model law provides a legislative framework for the use of

⁵ *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17 (A/76/17)*, paras. 370–374.

⁶ *Ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, paras. 254 and 309; *Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 193; *Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 193; and *Seventy-fourth Session, Supplement No. 17 (A/74/17)*, para. 267.

⁷ <https://uncitral.un.org/en/about/sdg>.

electronic identity and of trust services and for their cross-border recognition. It builds upon and complements existing UNCITRAL texts on electronic commerce, in particular their provisions dealing with electronic signatures.

12. Trust is a fundamental element of trade. Trust is particularly important online given that electronic means allow long distance transactions without prior personal interaction. Identity management aims to provide sufficient assurance of the online identification of physical and legal persons. Trust services aim to provide sufficient assurance of the quality of data, such as origin, integrity and point in time of transmission. The draft model law identifies the legal requirements to achieve that level of assurance. In doing so, it sets a legislative standard not only for the use of electronic transactions and documents, but more generally for data exchanges. Thus, the draft model law effectively enables dataflows at the national and international levels and may be considered a building block of digital trade.

13. Identity management is directly relevant for the achievement of SDG Target 16.9, on providing legal identity for all, as online identity is an integral part of personal identity. Identity management is also instrumental in achieving several other SDGs. For instance, with respect to access to finance, identity management may be used to satisfy know-your-customer (KYC) requirements for banking and to maintain efficient credit and land registries, which are activities relevant to implementing SDG Target 1.4 on ensuring that all have access, among others, to new technology and financial services. Efficient identity management through KYC may also assist in reducing the costs of remittance transfers and of illicit financial flows, which is respectively the aim of SDG Targets 10c and 16.4. Trust services are relevant for all activities relating to innovation as new technologies such as artificial intelligence are fuelled by input of reliable large data sets. Thus, trust services are relevant, among others, for the pursuit of SDG Target 9.b, on supporting technology development, research and innovation in developing countries.

B. Draft convention on the international effects of judicial sales of ships

Relevance to Sustainable Development Goal 16.

14. At its fifty-fifth session, the Commission will have before it a draft convention on the international effects of judicial sales of ships. The Convention establishes harmonized rules governing the legal effect of judicial sales with a particular focus on foreign sales, complementing previous international efforts to harmonize the rules governing the arrest of ships.

15. The Convention provides legal certainty as to the title that the purchaser at a judicial sale acquires in the ship as it navigates internationally. In so doing, it is expected to maximize the price that ships are able to attract in a judicial sale and thus the proceeds that are made available for distribution among creditors. The Convention regime is conditioned on certain minimum standards being met for notifying both registered and unregistered creditors of the sale, thus affording them the opportunity to pursue their claims against the proceeds.

16. The Convention is expected to contribute to the implementation of Sustainable Development Goal 16 (Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels), in particular target 16.3 (Promote the rule of law at the national and international levels and ensure equal access to justice for all) and target 16.6 (Effective, transparent and accountable institutions).

C. Draft recommendations to assist mediation centres and other interested bodies with regard to mediation under the UNCITRAL Mediation Rules (2021)

Relevance to Sustainable Development Goals 5, 16.

17. The draft recommendations to assist mediation centres and other interested bodies with regard to mediation under the UNCITRAL Mediation Rules (2021) aim to assist mediation centres and other interested bodies with mediation under the UNCITRAL Mediation Rules (2021) (“Rules”), including how to adjust the Rules for use in the institutional context. With the recommendations adopted, UNCITRAL will have developed a comprehensive mediation framework for all stakeholders. States will be able to design an enabling mediation framework with the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the “Singapore Convention on Mediation”) and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 including its Guide to enactment and use. Mediation institutions will be able to adopt the UNCITRAL Mediation Rules as their institutional rules according to the recommendations. Disputing parties will have a set of contractual rules and an explanatory text for use in solving their disputes.

18. Upon adoption of the Singapore Convention on Mediation, the General Assembly recognized the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations. Non-adversarial settlement methods, in particular mediation, are considered swifter and less expensive than adversarial dispute settlement, benefiting commercial enterprises, promoting long-term and cross-border commercial transactions, and offering States possible cost savings in the administration of justice, thus increasing access to justice. These methods may be particularly suitable for micro-, small, and medium-sized enterprises (MSMEs), which may not have the financial resources or the time to pursue solutions through adversarial dispute settlement. The ability to access to a flexible, cost and time-efficient method of dispute resolution as a means of overcoming the consequences of the crisis and allowing parties to find solutions to their conflicts will be especially important in the post-pandemic recovery phase.

19. The text will complement the UNCITRAL Mediation Framework and is expected to contribute to the implementation of Sustainable Development Goal 16 (Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels), in particular target 16.3 (Promote the rule of law at the national and international levels and ensure equal access to justice for all) and target 16.6 (Effective, transparent and accountable institutions). In light of the fact that women are predominately involved in MSMEs, the comprehensive UNCITRAL Mediation Framework, to which the recommendations are an element, contributes also to Sustainable Development Goal 5 (Achieve gender equality and empower all women and girls, in particular target 5a (Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws)).

III. Suggestions for consideration of the rule of law agenda item at the Commission's fifty-fifth session, in 2022

A. UNCITRAL work relevant to upcoming Sixth Committee debates on "The impacts of the global coronavirus disease (COVID-19) pandemic on the rule of law at the national and international levels"

20. The Commission may wish to take note of the General Assembly resolutions referred to in chapter II above. In formulating and transmitting its comments to the General Assembly in response to the invitation contained in paragraph 23 of General Assembly resolution 76/117, the Commission may wish to bear in mind that the upcoming debates of the Sixth Committee under the rule of law agenda item will focus on the subtopic "The impacts of the global coronavirus disease (COVID-19) pandemic on the rule of law at the national and international levels".

21. The Commission may wish to recall its consideration of issues relevant to that sub-topic at its sessions in 2020⁸ and 2021.⁹ At its fifty-third session in 2020, the Commission requested the secretariat to organize a series of virtual panels to consider the important role the tools that UNCITRAL has developed can play in their COVID-19 response and recovery efforts.¹⁰ At its fifty-fourth session in 2021, the Commission hosted a series of events to support States in commercial law reform and to highlight the importance of resilience in that framework to facilitate COVID-19 economic recovery.¹¹

22. The Commission may also wish to note its request to the secretariat to conduct exploratory work to identify and address gaps or obstacles in the international commercial law framework that have been exposed by the COVID-19 pandemic.¹² At the request of the Commission, the secretariat circulated a questionnaire asking States to share their best practices and experiences in responding to the impact of COVID-19 on international trade.¹³ The results of the responses are summarized in A/CN.9/1080. The secretariat also held webinars on 30 March 2021 on "Digitalization of International Trade", 8 May 2021 on a simplified insolvency regime for micro- and small enterprises and a webinar on 18 June 2021 on COVID-19 measures implemented by States. This exploratory work has led to a more comprehensive understanding of the impact of COVID-19 has had on cross-border trade and the legal framework for cross-border trade, while providing detailed information about the legal responses implemented by many States to address the impact of COVID-19 on cross-border trade.

23. The Commission may wish to note in its comments to the General Assembly that the sub-topic is relevant to the Commission's work in all its subject areas, but particularly relevant to texts in the areas of electronic commerce, micro-, small, and medium-sized enterprises, insolvency, international sale of goods, public-private partnerships and public procurement, mediation, arbitration and secured transactions.

⁸ *Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17 (A/75/17, part one)* paras. 107–117.

⁹ *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17 (A/76/17)* paras. 238–241.

¹⁰ <https://uncitral.un.org/en/COVID-19-panels>.

¹¹ <https://uncitral.un.org/en/content/side-events-54th-commission-session>.

¹² *Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17 (A/75/17, part two)*, para. 89.

¹³ *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17 (A/76/17)* para. 239.

24. The Commission may wish to highlight the positive role played by the following UNCITRAL texts during the COVID-19 pandemic:

(a) In the area of electronic commerce, the importance of the UNCITRAL Model Law on Electronic Transferable Records has been noted for its role in supporting supply chains, especially for micro-, small and medium-sized enterprises (MSMEs), that have been particularly negatively affected by liquidity shortages and difficulties in accessing credit;

(b) In the area of MSMEs and insolvency, both the UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises (MSEs) and the UNCITRAL Legislative Recommendations on Limited Liability Enterprises help mitigate the effects of the measures required to control the COVID-19 pandemic. Many businesses, especially MSMEs, have become insolvent or are expected to become insolvent due to the COVID-19 crisis. The UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises (MSEs) provides micro- and small enterprises with a simplified, equitable, fast, flexible and cost-efficient manner of resolving insolvency issues and can help deserving MSEs restart entrepreneurial activities, thereby preserving jobs and other positive economic activity. The UNCITRAL Legislative Recommendations on Limited Liability Enterprises provides a legal form that allows entrepreneurs to protect personal assets if their businesses become distressed or insolvent;

(c) In the area of international sale of goods, the United Nations Convention on Contracts for the International Sale of Goods (CISG) has 94 States Parties, including almost all major industrialized countries. Relevant to the COVID-19 pandemic, Article 79 of the CISG provides an exemption from liability if a party can prove its failure to perform obligations was due to an impediment beyond their control and that they could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences;

(d) In the area of public-private partnerships and public procurement, the COVID-19 pandemic has affected public-private partnership contracts in force and it was a necessity to have an adaptation mechanism between the contracting authority and the private partner to address cost increases in the provision of public services or unexpected financial changes. The mechanism for contract adaptation provided in the UNCITRAL Model Legislative Provisions on Public-Private Partnerships is relevant to that context;

(e) In the area of mediation, the UNCITRAL Mediation Framework provides a whole suite of texts that support mediation from its initiation through the enforcement of the settlement agreement through the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018). This framework may be particularly suitable for micro-, small, and medium-sized enterprises (MSMEs), which may not have the financial resources or the time to pursue solutions through adversarial dispute settlement and will thus increase access to justice. Especially in the post pandemic recovery phase, flexible, cost and time efficient methods of dispute resolution will be particularly important to overcome the consequences of the crisis and allow parties to find solutions to their conflicts;

(f) In the area of arbitration, the COVID-19 pandemic has required arbitral institutions to take measures to respond to the crisis, ranging from measures to ensure the safe operation of the institutions to measures aimed at the effective administration of arbitral proceedings. During the COVID-19 pandemic the number of expedited arbitration proceedings increased and there was an increased use of digitisation and technology in arbitration proceedings. These trends are expected to continue in the post-pandemic environment. The UNCITRAL texts on dispute resolution are flexible enough to accommodate these changes. The recently adopted UNCITRAL Expedited Arbitration Rules are particularly appropriate for low-value cases that are not overly complex and may assist with the post-pandemic recovery by providing a mechanism to solve disputes more quickly, particularly those involving micro-, small and

medium-sized enterprises, which are largely family-owned or owned by women, while also ensuring greater access to justice;

(g) In the area of secured transactions, legislative reforms based on UNCITRAL texts on secured transactions could have a positive impact on access to credit for micro-, small and medium-sized enterprises by facilitating the use of a wide range of movable assets (including receivables) as collateral.

25. The Commission may wish to highlight the launch of its first e-learning course “Introduction to the United Nations Commission on International Trade Law” developed in partnership with the International Training Centre of the International Labour organization (available at <https://ecampus.itsilo.org/course/view.php?id=1637>). In addition to providing users an introduction to legal harmonization and promoting international trade and UNCITRAL’s methods of work, it also outlines how UNCITRAL texts contribute to the achievement of the Sustainable Development Goals.

B. Expected contribution of UNCITRAL’s programme to the promotion of the rule of law and achievement of the Sustainable Development Goals

26. Considering the developments highlighted in this note, the Commission may wish to consider ways of closer aligning its work programme with the Sustainable Development Goals, taking into account that the Goals are time-bound (until 2030). The Commission may wish to consider whether criteria that it uses for assessing feasibility and desirability of undertaking work on a new topic, such as the promotion of international trade law, legal feasibility, economic need and relevance to specific needs of developing countries, already encompasses the expected relevance and impact of such work on the achievement of the Sustainable Development Goals.¹⁴

27. In addition, the Commission may wish to continue highlighting in its texts and decisions adopting or approving the texts, their relevance to and impact on sustainable development. In the light of the expected finalization and adoption of texts in the areas of electronic commerce, judicial sale of ships and mediation at its fifty-fifth session, the Commission may wish to highlight in its decisions on those texts their expected input to the implementation of the Sustainable Development Goals (see paras. 11–19 above). The Commission may also wish to consider and specify the expected contribution of its ongoing work on access to credit for MSMEs, early dismissal and preliminary determination in arbitration, investor-State dispute settlement (ISDS) reform, civil asset tracing in insolvency proceedings, and applicable law in insolvency proceedings to the achievement of the Sustainable Development Goals.

28. As an example of the link between the Commission’s work programme, the SDGs and the Rule of Law, the Commission has recently approved a stocktaking project to compile, analyse and share relevant information with regard to developments in dispute resolution in digital economy. There has been a significant increase in the use of technology for resolving disputes through alternative dispute resolution, which was further accelerated by the pandemic. A wide range of technology is being employed to provide innovative dispute resolution services widening the reach to those that had limited access. Despite these benefits, the potential negative impacts of technology on the integrity of the process need to be examined. Efforts should be made to ensure the principle of due process and fairness. Another aspect deserving attention is the so-called digital divide, that not all parties have access to the same level of technology. The use of technology also comes at a cost, which may be burdensome for small and medium-sized enterprises, and it requires a level of understanding, which some individuals might not possess.

¹⁴ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 294 and 295.

Accordingly, the benefits that technology can bring would need to be weighed against such gaps to guarantee that technology can enhance access to justice for all. The outcome of the stocktaking project scheduled initially for a two-year period would not only assist the Commission in considering future work to be conducted in the area of dispute resolution but also provide the international community with concrete information on how technology can be utilized to improve dispute resolution and access to justice for all.

29. The Commission may wish to request States, the secretariat, organizations and institutions to continue their efforts towards increasing awareness of the role of UNCITRAL standards and activities for the promotion of the rule of law at the national and international levels and the implementation of the Sustainable Development Goals. Such opportunities might in particular arise in conjunction with the High-Level Political Forum on Sustainable Development “Building back better from the coronavirus disease (COVID-19) while advancing the full implementation of the 2030 Agenda for Sustainable Development” (New York, 5–7, 11–15 July 2022), which will review Sustainable Development Goals 4 on quality education, 5 on gender equality, 14 on life below water, 15 on life on land, and 17 on partnerships for the Goals and will consider the impacts of the COVID-19 pandemic across the Sustainable Development Goals.
