



General Assembly

Distr.: General
25 April 2023

Original: English

United Nations Commission on International Trade Law

Fifty-sixth session

Vienna, 3–21 July, 2023

Exploratory work on the impact of COVID-19 on international trade law

Note by the Secretariat

Contents

	<i>Page</i>
I. Introduction	2
II. Exploratory and preparatory work relating to a draft legal toolkit on COVID-19 and international trade law instruments	2
Annex	
COVID-19 and international trade law instruments: a legal toolkit by the UNCITRAL secretariat	7



I. Introduction

1. At its fifty-third session, the Commission considered a proposal regarding possible future work in connection with measures implemented by States in response to the coronavirus disease (COVID-19) pandemic. It was suggested that the Commission might wish to investigate whether those measures had exposed gaps or obstacles to cross-border trade and investment that could be overcome through efforts put in place by UNCITRAL in harmonizing cross-border rules.¹ After discussion, the Commission requested the Secretariat to explore this proposal further.²
2. At its fifty-fourth session, the Commission requested the Secretariat to continue its exploratory work of the issues identified in the progress report as possible issues falling within the mandate of UNCITRAL and to continue to hold expert meetings and other events with interested stakeholders to further advance the exploratory work.³
3. At its fifty-fifth session, it was noted by the Commission that the impact of the pandemic on international trade law was still significant and that UNCITRAL instruments could support States in developing effective policy and legislative responses and contract parties in developing contractual responses in the event of unforeseen global crises, to minimize disruption to trade, business and investment, as well as in the recovery efforts thereafter. Furthermore, it was said that the exploratory work should ultimately result in an emergency kit that could be useful at the outset of any crisis. An emergency kit would provide information to States, as well as businesses, especially for micro, small and medium-sized enterprises (MSMEs), on the effective use of UNCITRAL instruments in case of a crisis.⁴
4. After discussion, the Commission requested the secretariat to continue its exploratory work on the impact of the COVID-19 pandemic on international trade by holding expert group meetings and other events with interested stakeholders to further advance such work.⁵
5. Accordingly, this note reports on activities undertaken by the UNCITRAL Secretariat to further advance the exploratory work, which resulted in the draft toolkit with the tentative title “COVID-19 and international trade law instruments: a legal toolkit by the UNCITRAL secretariat” (the “toolkit”) in the annex.

II. Exploratory and preparatory work relating to a draft legal toolkit on COVID-19 and international trade law instruments

6. The secretariat focused its exploratory work on the drafting of the toolkit and gathered potential input from different areas and regions, in addition to the stocktaking of relevant developments.⁶ When participating and co-organizing events

¹ See A/CN.9/1039/Rev.1, Submission by the Governments of Armenia, the Russian Federation and Viet Nam.

² *Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17* (A/75/17, part two), para. 89.

³ *Ibid.*, *Seventy-sixth Session, Supplement No 17* (A/76/17), paras. 238–241.

⁴ *Ibid.*, *Seventy-seventh Session, Supplement No. 17* (A/77/17), para. 207.

⁵ *Ibid.*, *Seventy-seventh Session, Supplement No. 17* (A/77/17), para. 208.

⁶ The following information is publicly available on the COVID-19 pandemic related website (<https://uncitral.un.org/en/content/crisis-impact-international-trade-law-covid-19-and-beyond>) and has been used to draft the toolkit: (a) the questionnaire that had been circulated to States to inquire about their experience in terms of COVID-19 measures and identify obstacles to cross-border trade that businesses had encountered and the responses received thereto; (b) online round tables and events in cooperation with interested Governments that have been recorded; and (c) the notes by the Secretariat and submissions by Governments that relate to projects on the impact of COVID-19 pandemic on international trade law: A/CN.9/1080, A/CN.9/1081 and A/CN.9/1119.

the aim was to broadly discuss the pandemic's impact on international trade and analyse if and how UNCITRAL's instruments helped provide for a more robust and uniform legal framework to prepare for future global emergencies (which might again significantly disrupt cross-border trade, with increased transport costs, interrupted and blocked supply chains, scarcity of goods and labour forces, distress in the financial sector and the impossibility of performance of contracts).

7. Similarly, the secretariat took stock of how the UNCITRAL instruments were perceived by other organizations as being helpful in times of global emergencies and reflected those findings in the toolkit.

8. While the impact of the COVID-19 pandemic has continued to receive attention from other international organizations with a linkage to the UNCITRAL mandate, an important focus was on capacity-building activities to raise awareness on existing instruments and training users on how already existing instruments could be utilized to alleviate the negative impact that may be caused by future global crises of a similar nature and scale. This tendency shows that efficient access to information is considered a major pillar, and not necessarily the development of new tools, which underlines the need for the toolkit. Accordingly, the toolkit has been drafted to provide quick and easy access to UNCITRAL instruments.

Events relating to selected UNCITRAL instruments

9. In May 2022, the UNCITRAL secretariat contributed substantially to the Workshop on Modernizing Secured Transactions Legal Regimes in APEC Economies through International Instruments and Effective Dispute Resolution Mechanisms. This workshop focused on designing a strategy to implement secured transaction reform, considering the emergency measures imposed during the COVID-19 pandemic. The UNCITRAL Model Law on Secured Transactions and the United Nations Convention on the Assignment of Receivables were highlighted as legal texts reflecting international best practices and providing a legal framework that steers the loan process away from exclusively land-based collateral. The Practical Guide to the UNCITRAL Model Law was said to coordinate the relevant regulatory rules with a modern secured transactions law. Participants concluded that UNCITRAL instruments promote an enabling environment for a conducive legal and regulatory framework where movable assets can be used as collaterals with adequate credit protection.⁷ This event further considered the use of information technology as a means of circumventing in-person hearings, and that UNCITRAL dispute resolution instruments provided for the necessary flexibility to allow for such virtual hearings. During the pandemic, tribunals were forced to incorporate technology into all stages of dispute resolution (i.e., online hearings, online platforms for dispute resolution, evidence in electronic format, online mediation, etc.).

10. UNCTAD in cooperation with the five United Nations Regional Commissions; United Nations Regional Commission for Africa (ECA), for Europe (ECE), for Latin America and the Caribbean (ECLAC), for Asia and the Pacific (ESCAP) and Western Asia (ESCWA) had provided for training sessions on different topics related to the impact of the COVID-19 pandemic on international trade law, including accompanying training material and supporting policy briefs. For example, in the frame of the component entitled "UN Transport and Trade Connectivity in the Age of the Pandemics" roundtables on resilient supply chains, transport and trade were organized. This training course was designed to understand and assess key issues arising from the pandemic for the different types of closely interconnected contracts. In this context, the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules") and the

⁷ Workshop on Modernizing Secured Transactions Legal Regimes in APEC Economies through International Instruments and Effective Dispute Resolution Mechanisms (September 2022), p. 11
The publication is available at www.apec.org/publications/2022/09/workshop-on-modernizing-secured-transactions-legal-regimes-in-apec-economies-through-international-instruments-and-effective-dispute-resolution-mechanisms.

UN Convention on the Carriage of Goods by Sea (Hamburg, 1978) (the “Hamburg Rules”) were featured as good examples of international standards governing responsibility and liability on international multimodal transport.⁸ In June 2022, the UNCITRAL Secretariat participated in the project closing event themed on transport and trade connectivity in the age of the pandemic.⁹ Governmental officials, policymakers, and stakeholders gathered to share outcomes, lessons learnt, and findings of transport disruptions, transit and trade connectivity caused by the COVID-19 pandemic. The UNCITRAL framework on international mediation and arbitration and the UNCITRAL Model Law on Electronic Transferable Records (MLETR) were featured as legal tools to eliminate obstacles to cross-border trade and transport operations impacted by the COVID-19 pandemic.

11. Additionally, some UNCTAD initiatives focused on other aspects related to UNCITRAL’s mandate. The course on implications of the COVID-19 pandemic for commercial contracts¹⁰ focused on the implications for the performance of international commercial contracts and highlighted the positive role the MLETR could have by facilitating electronic transactions (i.e., electronic bill of lading).¹¹

12. The usefulness and desire fitness for purpose in emergency situations of the MLETR was also emphasized in a webinar organized by the International Civil Aviation Organization on “Air Cargo Digitalization in COVID-19 Times: Perspectives on Legal Frameworks and Solution Implementation” in June 2022.¹²

13. In addition, the Asian Development Bank (ADB) highlighted trade agreements’ role as the main forum for regulating digital services trade issues over time and recommends the adoption of the MLETR, the UNCITRAL Model Law on Electronic Commerce and the UN Convention on the Use of Electronic Communications in International Contracts (2005) to minimize regulatory burdens on e-commerce and establish a business environment conducive to industry.¹³

14. In the intersection of public procurement and digitalization, the European Bank for Reconstruction and Development identified the 2011 UNCITRAL Model Law on Public Procurement as a tool enabling remote working, less printing and paperwork, and generalizing online signature contracts.¹⁴

15. In arbitration, the World Intellectual Property Organization (WIPO) launched a package of support measures to assist member states in addressing the COVID-19 pandemic as part of their sustainable post-COVID-19 pandemic economic recovery

⁸ See ESCAP Training manual on the operational aspect of multimodal transport, available at <https://unctc.org/sites/untc/files/2022-06/Training%20Manual%20on%20Operational%20Aspects%20of%20Multimodal%20Transport.pdf>; UNCTAD Course on Ports and Maritime Supply Chain Resilience, available at <https://resilientmaritimelogistics.unctad.org/training>; Webinar on COVID-19 and maritime transport: disruptions and resilience in Latin America and the Caribbean, available at <https://resilientmaritimelogistics.unctad.org/training/webinar-covid-19-and-maritime-transport-disruptions-and-resilience-latin-america-and>; see also COVID-19, Implications for commercial contracts carriage of goods by sea and related cargo claims, https://unctad.org/system/files/official-document/dtlblinf2021d1_en.pdf.

⁹ Programme of this event is available here https://unctad.org/system/files/information-document/Draft_Agenda-UNDA_closing_event_June_2022_2.pdf.

¹⁰ See <https://unctad.org/meeting/training-course-implications-covid-19-pandemic-commercial-contracts-2>.

¹¹ See also the report, UNCTAD Transport and Trade Facilitation, Series No.20, COVID-19 and International Sales of Goods: Contractual devices for commercial risk allocation and loss prevention, available at <https://unctad.org/publication/covid-19-and-international-sale-goods-contractual-devices-commercial-risk-allocation>.

¹² See document by the secretariat A/CN.9/1138, para. 24.

¹³ See Unlocking the potential of digital services trade in Asia and the Pacific (November 2022), pp. 148–174, available at www.adb.org/sites/default/files/publication/842321/digital-services-trade-asia-pacific.pdf.

¹⁴ Alexei Zverev and Eliza Niewiadomska, “How can e-procurement serve public-private partnership projects, including concessions?”, *Law in Transition Journal*, (October 2022), p. 31, available at www.ebrd.com/news/publications/newsletters/law-in-transition-2022.html.

efforts.¹⁵ Both the United Nations Convention on International Settlement of Agreements Resulting from Mediation (the Singapore Convention on Mediation) and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) were highlighted as crucial instruments to ensure cross-border enforceability of settlement agreements and arbitral awards.

Events focusing on the toolkit

The 2022 UNCITRAL Latin American and Caribbean Days

16. From October to December 2022, in the context of the 2022 UNCITRAL Latin American and Caribbean Days (LAC Days),¹⁶ the secretariat supported discussions focusing on how UNCITRAL instruments could be useful in preparing micro, and small enterprises for a crisis such as the COVID-19 pandemic. This stocktaking exercise was done across 17 countries in parallel.

17. The UNCITRAL collection on instruments for MSMEs and existing instruments on insolvency, secured transactions, arbitration and mediation, as well as on e-commerce, were identified as particularly relevant for a crisis situation, including the recovery thereof. Generally, it was highlighted that awareness-raising and educational activities like the UNCITRAL Days were needed so that MSME entrepreneurs could utilize the existing UNCITRAL instruments better. Furthermore, the UNCITRAL instruments were commended for creating an enabling legal framework for paperless trade and digital government. Additionally, speakers underscored that (i) mediation was a useful dispute resolution tool in the LAC region and that (ii) the UNCITRAL framework captured well the diversity of practices and was therefore well suited to be used in very diverse situations as it provided the necessary space for a mediation to unfold, including in the times of the pandemic, with its severe restrictions. The main obstacle to mediation was not the lack of a framework. However, due to a lack of sufficiently developed capacity, a culture conducive to mediation was still missing. It was widely felt that an emergency toolkit should cover those instruments that various parties and stakeholders could refer to, including contractual and explanatory texts.

APEC Economic Committee Policy Dialogue

18. From 23 to 24 February 2023 the UNCITRAL Secretariat presented preliminary findings of the COVID-19 Stocktaking Project at the Asia-Pacific Economic Cooperation (APEC)¹⁷ Economic Committee Policy Dialogue on the “Impact of International Health Crisis on Legal Infrastructure for Trade and Implications for Structural Reform” and co-chaired the Policy Dialogue with Viet Nam. The Policy Dialogue, which was held on the occasion of the APEC First Senior Officials’ Meeting and Related Meetings (SOM1), aimed to devise an emergency kit for economies and public and private stakeholders in the event of a future health crisis that could similarly impact supply chains and trade flows. This Dialogue was endorsed by members of the APEC Economic Committee and sponsored by many countries and jurisdictions. In addition, 19 APEC economies as well as the World Economic Forum and the World Bank discussed lessons learned and best legislative practices on digitalization and insolvency. The UNCITRAL Secretariat presented the texts on

¹⁵ The WIPOs COVID-19 related services and support is available at www.wipo.int/covid-19/en/ Publication WIPO ADR Options for Life Sciences Dispute Management and Resolution, paras 8–9 available at www.wipo.int/amc/en/center/specific-sectors/lifesciences/.

¹⁶ UNCITRAL LAC Days activities are open to a broader range of participants, including members of the academia, students, researchers, private and public legal practitioners, policymakers, legislators, judiciary members and entrepreneurs. The 2022 UNCITRAL LAC Days Final Report with further details on the events is available as a non-official document on the webpage of the 56th Commission Session.

¹⁷ By way of background, regionally, the Asia-Pacific Economic Cooperation (APEC) worked extensively on the COVID-19 impact on trade, see for instance APEC Policy Support Unit, Policy Brief No. 45, May 2022 – Lessons from the COVID-19 Pandemic: A Renewed Agenda for the Free Trade Area of Asia Pacific, available at <https://research.apec.org/ftaap/>.

e-commerce and public procurement as modelled resources for emergency public procurement (vaccines) and digitalization. Some countries and jurisdictions shared initiatives and reforms on digitalization of the economy and insolvency. The World Economic Forum encouraged economies to take advantage of the digital economy and build interoperable regulatory frameworks based on the relevant UNCITRAL instruments. The World Bank highlighted important structural reforms on insolvency in the context of vulnerabilities, including high debt and liquidity pressures and the usefulness of UNCITRAL insolvency instruments to address such issues.¹⁸

Stocktaking during other technical activity events and future work by UNCITRAL

19. Additionally, in many events undertaken by the secretariat to promote its instruments, COVID-19 pandemic related impact on trade was not explicitly on the agenda but has been part of the discussions and as such has been considered when drafting the emergency kit.¹⁹

20. Similarly, the draft toolkit highlights the need for users to continue monitoring UNCITRAL's work. Indeed, various UNCITRAL Working Groups might further contribute useful instruments to respond to emergency situations. For instance: (i) Working Group I formulated a draft guide on access to credit for MSMEs ([A/CN.9/1156](#)), which should also apply in times of crisis and which is on the agenda for the current session of the Commission for adoption; (ii) Working Group IV commenced at its 65th session in April 2023 work on automation in contracting; and (iii) Working Group VI has started working on negotiable multimodal transport documents.²⁰

21. The preparatory work conducted by the Commission and the numerous references to various UNCITRAL instruments in the preceding paragraphs highlight the importance of UNCITRAL instruments in international trade. The draft toolkit is therefore the culmination of the Commission's work in the form of a suite of legal solutions that States can refer to in building an enabling and robust legal framework to minimize or prevent the negative impacts of future global crises or emergencies or international trade.

22. Cognisant that different States are at different stages of harmonizing their legal frameworks, the draft toolkit has been structured with a thematic approach, i.e.: digitalization and e-commerce, public procurement, MSMEs, insolvency and dispute resolution, thereby accommodating States that are at different stages of adopting or harmonizing their legal frameworks with UNCITRAL instruments. The draft toolkit also provides States and contract parties with a series of recommendations in its conclusion. The full text of the draft toolkit can be found in the subsequent annex and discussions on the draft toolkit are expected to continue at future events.

23. Indeed, the Commission may wish to note that an event entitled "The impact of international health crisis on legal infrastructure for trade" will be organized in June 2023 by Armenia, preparing for the discussions on the draft toolkit at the Commission by presenting the main components of the draft emergency kit for economies and public and private stakeholders in the event of a future health crisis that could similarly impact supply chains and trade flows.

¹⁸ Information is available on the webpage of APEC under meeting document database www.apec.org/.

¹⁹ For instance at the UNCITRAL Academy in Singapore, the flexibility of mediation to respond to restrictions imposed by public health measures, was highlighted and discussed, see the unofficial report of the UNCITRAL Academy, as posted on the Commission website.

²⁰ UNCTAD, reviewing developments in maritime transport since 1968, highlighted in its 2022 review that the existing framework on multimodal transport was complicated and not straightforward and expressly welcomed work by UNCITRAL's Working Group 6, see the UNCTAD Review of Maritime Transport 2022: Navigating stormy waters, available at https://unctad.org/system/files/official-document/rmt2022_en.pdf, pp. 164–165.

Annex

COVID-19 and international trade law instruments: a legal toolkit by the UNCITRAL secretariat

Introduction

1. The coronavirus disease (COVID-19) pandemic has made a significant impact on States and contract parties. At the State level, the COVID-19 pandemic has inflicted severe stress on the society and economy: across the world, numerous States had to impose unprecedented health measures to contain the spread of the COVID-19 pandemic on its population, which in turn severely affected the economy and, in several instances, brought business activities – sometimes entire industries – to a standstill. The repercussions of the COVID-19 pandemic can still be felt today, more than three years after the COVID-19 disease was first publicly announced.
2. There are three main dimensions that the COVID-19 pandemic has impacted the society and economy – social distancing and isolation domestically and the world at large, supply chain disruptions and the sudden increased difficulty in traditional trade processes. Businesses were abruptly confronted with dissonance in their usual trade activities as a result of the measures implemented by States; in some cases, the haphazard and non-uniform implementation of COVID-19 measures and the lack of a robust legal framework made the disruption on the economy caused by the COVID-19 pandemic more acute.
3. The combination of these dimensions resulted in severe and long-lasting consequences on societies and economies. Social distancing of persons led to a tremendous shift in how work and business is being carried out due to lockdown measures preventing businesses from operating out of their physical workspaces. States, institutions and businesses scrambled to ensure that operations could be done as remotely as possible; in industries where remote work was impossible, businesses suffered a catastrophic loss of earnings overnight and some were pushed to the brink of insolvency. As States closed their borders, supply chains were significantly disrupted and an increased difficulty in trade processes arose overnight. This gross uncertainty and sudden disruption in business operations arising from the COVID-19 pandemic culminated in the suspension or breach of contracts on an unprecedented scale.
4. At its fifty-fifth session in 2022, UNCITRAL noted that the impact of the pandemic on international trade law was still significant and that UNCITRAL instruments could support States in developing effective policy and legislative responses and contractual parties in developing contractual responses in the event of unforeseen global crises, to minimize disruption to trade, business and investment, as well as in the recovery efforts thereafter. With that in mind, UNCITRAL endorsed the proposal by its secretariat to examine which UNCITRAL texts could be useful to assist Micro, small and mid-sized enterprises (MSMEs) in a crisis and how UNCITRAL instruments could be utilized to facilitate digital commerce and paperless trade, and thereby reduce trade disruptions and bottlenecks in the event of a future global crisis. Such work should ultimately result in an emergency kit that could be useful at the outset of any crisis and that would provide information to States, as well as businesses, especially MSMEs, on the effective use of UNCITRAL instruments in case of a crisis.²¹
5. This draft toolkit prepared by UNCITRAL (“UNCITRAL toolkit”) is a suite of solutions that would allow States to understand and apply UNCITRAL instruments to develop a more robust and uniform legal framework, which in turn will better prepare States for future global emergencies. UNCITRAL’s work on this toolkit has been

²¹ *Official Records of the General Assembly, Seventy-seventh, Supplement No. 17 (A/77/17, part two), para. 207.*

supported by institutions such as the Asia-Pacific Economic Cooperation (APEC), which has been active in promoting numerous topics such as digital economy, trade facilitation and emergency preparedness as a result of the COVID-19 pandemic. One of APEC's key objectives is to create policies to enable its member economies to recover from the impact of the COVID-19 pandemic and better prepare its member economies in the event of a similar type of emergency. In February 2023, APEC held a policy dialogue on the impact of international health crises on legal infrastructure for trade and implications for structural reform, whereby the key objective of this dialogue was to facilitate the creation of a legal toolkit for future emergencies that can be used by States and contract parties. This UNCITRAL Toolkit is thus also designed to be used or referred to by institutions such as APEC.

6. This UNCITRAL Toolkit is structured in three parts – Part I discusses the responses by States during the COVID-19 pandemic and the consequences of their respective responses; Part II analyses how UNCITRAL instruments can be used as a suite of legal solutions to minimize or prevent the impact of the consequences of future global crises; lastly, Part III provides recommendations for States and contract parties. The UNCITRAL Toolkit thus hopes to help States by providing them with a useful guide on how they can strengthen and harmonize their legal frameworks and contract parties by providing them with possible mechanisms that they can incorporate in their contracts to prevent or minimize future trade disruptions.

PART I: Consequences of the COVID-19 Pandemic and Responses by States during the COVID-19 Pandemic

Consequences of the COVID-19 pandemic to international trade

7. The COVID-19 pandemic had wide ranging consequences and severely impacted governments, businesses and private individuals alike. From a societal level, the social distancing and lockdown measures implemented by numerous States in a bid to contain the spread of the virus had multiple impacts on the way work is done and how businesses are conducted. While each State had its own definition of how lockdowns, and quarantine measures operate and varying degrees of the strictness of such measures, these measures have generally included a restriction on people's movement beyond their residences unless an exception to leave the premises applies. Besides restricting the movement of people, States also imposed a mandatory closure of physical stores that resulted in these businesses being unable to operate and conduct any revenue-generating activity.

8. These measures severely have altered and eventually revolutionized the way businesses operated and how work is being done. Remote working, i.e., the relaxation of the requirement to be physically present at the business premises, became the default method of working as businesses were unable to have their employees to be present at their premises. This accelerated the need for digitalization in the private sector, as businesses required employees to have the relevant infrastructure at their homes to allow for remote working. The use of electronic documents, electronic identities and electronic authentication became even more critical as logistics became an issue due to the lockdown measures or closure of delivery services. In addition, the lockdown and quarantine measures meant that businesses that could sell their goods and services via e-commerce or online were compelled to do so, or otherwise risked having ongoing overheads but no revenue. MSMEs – in particular businesses where it would be virtually impossible to sell goods and services online (e.g., gastronomy, hospitality, tourism) – were most at risk as they struggled to operate their businesses or may not have enough capital to invest in digital infrastructure to permit online operations.

9. MSMEs additionally face more challenges as they are at a higher risk of becoming insolvent due to problems caused by supply chain disruptions, materializing of business risks or inability to make payments on debts due. In many cases, the fates of the owners of such MSMEs are tied to the fortunes of their businesses (e.g., through the taking of personal guarantees with banks or credit

institutions to finance their business operations), which means that such persons face personal bankruptcy in addition to insolvency. In States whereby MSMEs form the bulk of businesses or employers, the failure of these businesses can significantly impact the livelihoods of a large segment of society.

10. Insolvency not only applies to MSMEs, but also to large or global enterprises. With the sudden imposition of numerous measures to prevent trade operations, businesses that were already on the brink of insolvency or were operating with a tight margin quickly became susceptible to statutory insolvency proceedings against them as creditors, who themselves may have a credit crunch due to the impact of States' measures to contain the spread of the COVID-19 pandemic, can commence insolvency proceedings against debtors once the threshold for an insolvency application is met. In certain industries, such as retail (which rely on brick-and-mortar stores for revenue), or hospitality and tourism, the overnight standstill in business operations while still being legally obliged to pay for employees' wages, rent and ongoing business overheads meant that such businesses could readily be insolvent. The dire consequences thus cannot be greater emphasized.

11. On a broader scale of things, the COVID-19 pandemic and States' measures to contain the spread of the COVID-19 pandemic had severe implications for global trade as a whole. Over the years, globalisation and a liberal international trade regime had allowed for the development of cross-border supply chains, where different parts are sourced from across the world. As States restricted travelling cross-border and enacted laws and regulations that negatively impacted normal business operations for the purposes of curbing the spread of the COVID-19 disease, supply chains were severely disrupted as contract parties were unable to fulfil their contractual obligations either vertically or horizontally on the supply chain. The delay by one supplier could easily lead to a further breach of contracts down the chain as parties struggled to fulfil their contractual obligations.

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

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

13. To reduce the negative consequences caused by the COVID-19 pandemic, numerous measures were undertaken by States to alleviate the situation faced by businesses. These measures can be broadly categorized in the following ways: measures to enable businesses to operate as normally as possible remotely, measures to prevent the negative consequences resulting from insolvency, measures to help MSMEs, and measures to help contract parties reduce disputes as much as possible.

14. A general questionnaire was sent to States to seek for their responses to the COVID-19 pandemic. Several of the responses from the States shed light on how international trade law may have an implication on their responses. A review of these responses show that some States have undertaken common measures to handle the COVID-19 pandemic, of which a summary of the key common measures can be found below:

Summary of Responses by States on Measures Undertaken for the COVID-19 Pandemic²²

<i>Measure</i>	<i>Description</i>	<i>Examples</i>
Digitalization of trade: Acceptance of electronic processes in lieu of physical processes	Remote/virtual/online participation in meetings (as required by law or by applicable rules) is accepted in lieu of physical presence	<ul style="list-style-type: none"> • <u>Austria</u>: participation in civil procedural hearings or insolvency hearings with modern technology • <u>Indonesia</u>: supporting the electronic holding and reporting of shareholders meetings for public companies • <u>Italy</u>: remote participation in court hearings • <u>Malta</u>: holding of annual general meeting virtually • <u>Russian Federation</u>: general shareholder meetings could be held online without determining their particular venue • <u>Singapore</u>: allowing companies and other organizations to hold meetings by electronic means • <u>Sweden</u>: participation of general meetings of company shareholders without physical presence – generally allowing voting by mail, general meetings to be held digitally and allowing general meetings to be held only by mail • <u>Switzerland</u>: An exemption from the obligation to appear in person during the COVID-19 pandemic was provided for in the Ordinance on Certification Services in the Field of Electronic Signatures and Other Applications of Digital Certificates
Functional equivalence of electronic documents to physical documents		<ul style="list-style-type: none"> • <u>Argentina</u>: temporary authorization to exceptionally accept documents of origin in electronic form for accreditation and to determine the origin of imported goods. Presentation of original format to customs not required, due to the COVID-19 pandemic • <u>Japan</u>: clarification on the interpretation of electronic contracting services
Enabling electronic signatures and electronic authentication		<ul style="list-style-type: none"> • <u>Austria</u>: extension of the electronic notarial act to all transactions and processes that require the involvement of a notary • <u>United States</u>: US Internal Revenue Service allowed the use of digital signatures (including scanned/photographed images of signatures) for certain IRS forms that must be filed manually
Public procurement	Amendment of procedures	<ul style="list-style-type: none"> • <u>Czechia</u>: issued recommendations for shorter tender procedure • <u>Italy</u>: simplifying procedures relating to public contracts
Assistance to MSMEs	Tax breaks and exemptions	<ul style="list-style-type: none"> • <u>Argentina</u>: Temporary waiving of export duties (60 days) for MSMEs • <u>Indonesia</u>: tax exemptions up to 50% reduction for selected businesses determined by the government until December 2020 • <u>Kyrgyzstan</u>: allowing taxpayers to submit applications for deferred or instalment payments for the amount of tax arrears as a result of force majeure without having to submit documents on a bank guarantee for a period of no more than 1 year • <u>Russian Federation</u>: 6 months deferral for payment of all taxes (excluding VAT) to selected industries

²² The responses by States have been made publicly online on the UNCITRAL website.

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

<i>Measure</i>	<i>Description</i>	<i>Examples</i>
	Direct financial assistance / subsidies	<ul style="list-style-type: none"> • <u>Armenia</u>: one-time assistance in the amount of 10% of the turnover of goods, services provided in Q1 of 2020, but not more than twice the minimum wage • <u>Slovakia</u>: subsidy to cover fixed costs if an entrepreneur in the segment of culture and creative industries recorded a decrease in turnover of at least 30% in March-December 2020 compared to the same period in 2019 • <u>Sweden</u>: compensation scheme for undertakings faced with turnover losses due to COVID-19
	Loans	<ul style="list-style-type: none"> • <u>Angola</u>: made available credit lines to finance (1) the purchases of family producer cooperatives and small and medium sized agribusinesses; and (2) micro-finance societies, field schools and community credit banks • <u>Armenia</u>: provision of loans to companies depending on the sector that they are operating in • <u>Italy</u>: general moratorium on loans granted to MSMEs, e.g. suspension of the payment of mortgage instalments and on maintaining credit lines or other forms of bank financing • <u>Jordan</u>: initiating financial programs with caps on interest rates; obtaining of loanable funds to finance working capital and operating expenses • <u>Russian Federation</u>: provision of low interest loans to SMEs • <u>Thailand</u>: offering of soft loans in total of 20,000 million baht to financial institutions at 0.01% rate p.a. and allows those institutions to provide loans to MSMEs • <u>United States</u>: provided US Small Business Administration with \$7 billion in disaster assistance loans to offer to small businesses
	Deferral of the repayment of loans provided	<ul style="list-style-type: none"> • <u>Jordan</u>: allowing banks to postpone the instalments due of outstanding credit facilities granted to their customers • <u>Slovakia</u>: Banks and branches of foreign banks are required to defer payments for up to nine months at the request of the borrower. Other (non-bank) lending companies must do so for a period of three months, with the possibility for the borrower to extend this deferral for another three months
Modified insolvency regimes to reduce or suspend negative effects of the COVID-19 pandemic	<p>Simplified insolvency regimes</p> <p>Amendment of insolvency laws and procedures</p>	<ul style="list-style-type: none"> • <u>Singapore</u>: introduction of the Simplified Insolvency Program to allow for low-cost, faster and more efficient debt restructuring and winding up proceedings • <u>Armenia</u>: temporary increase from AMD 1.000.000 to AMD 2.000.000 before a debtor will be declared bankrupt • <u>Austria</u>: extension for filing deadlines by debtors and suspension of filing for insolvency by creditors • <u>Czechia</u>: suspension of debtor's / creditor's duty to file for insolvency; prolongation of deadlines for debtors' applications • <u>India</u>: increasing of threshold of default and temporary suspension of initiation of the corporate insolvency resolution process for a period of six months (later extended for a further three months) • <u>Israel</u>: freezing of collection proceedings and enforcement bureaus were only allowed to carry out limited collection operations in exceptional cases

Measure	Description	Examples
Legislation impacting contractual relations	Relief from legal and enforcement action for individuals and businesses that are unable to perform contractual obligations	<ul style="list-style-type: none"> • <u>Italy</u>: general freezing of bankruptcy filings with certain exceptions • <u>Kyrgyzstan</u>: suspension of the initiation of bankruptcy process by state bodies in relation to business entities that have signs of insolvency due to circumstances related to the spread of COVID-19 • <u>Malta</u>: suspension of the right of creditors to file for insolvency and a stay of procedure for those cases filed after 16 March 2020. Moratorium of 4 months which may be extended to 12 months to provide companies with “breathing space” • <u>Russian Federation</u>: bankruptcy freeze for certain legal entities and individual entrepreneurs doing business in the industries the most affected by the pandemic and strategic and systemic organizations • <u>Singapore</u>: temporarily increasing the monetary threshold for bankruptcy and corporate insolvency and lengthening the statutory period to respond to demands from creditors • <u>Switzerland</u>: temporary suspension of enforcement procedures and extension of the debt-restructuring moratorium from 4 to 8 months • <u>United States</u>: increased debt limit under the Small Business Reorganization Act of 2019 from \$2.7 million to \$7.5 million for small businesses that choose to restructure under Chapter 11 of the Bankruptcy Code
Limitation of interest		<ul style="list-style-type: none"> • <u>Italy</u>: general obligation to renegotiate contracts based on the principle of “good faith in the execution of the contract”, which can take into account also the changed circumstances originally unknown to the parties • <u>Singapore</u>: relief from contractual obligations for certain contracts, e.g. construction contract or supply contract • <u>Türkiye</u>: COVID-19 was evaluated within the scope of the “force majeure” article in contracts, and additional time was given to enterprises to complete their work under their responsibilities • <u>Austria</u>: limitation of interest on arrears and on the exclusion of contractual penalties • <u>Czechia</u>: limitation of late payments of monetary debts to statutory default interest
Suspension of limitation of periods / extension of procedural periods and deadlines		<ul style="list-style-type: none"> • <u>Italy</u>: temporary suspension of procedural time limits • <u>Lebanon</u>: legal, judicial and contractual deadlines have been suspended

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

PART II: UNCITRAL instruments and how it can help in times of global emergencies

16. UNCITRAL instruments can apply in numerous ways to assist States and contract parties during global emergencies, depending on the existing legal

framework that the State has and the degree of its adoption of UNCITRAL instruments. The degree of adoption can be determined based on two factors; (i) the number of UNCITRAL instruments adopted and; (ii) whether any modifications have been made in the adoption of said UNCITRAL instrument:

Degree of adoption			
←		→	
States have adopted the UNCITRAL instruments fully without modifications	States have adopted some UNCITRAL instruments and/or may make modifications or reservations	States did not formally announce that they have adopted the UNCITRAL instrument, but State legislation is identical / almost similar to the UNCITRAL instrument	States have not adopted UNCITRAL instruments

17. The extent to which a State will be able to benefit from UNCITRAL instruments in the times of global crises or emergencies will depend on the degree of implementation of the relevant UNCITRAL instruments. Nonetheless, States that have adopted only certain parts of the relevant UNCITRAL legislative instruments, or none of them, are still able to benefit from guidance and advice provided in instruments of a contractual nature adopted by UNCITRAL, or the recommendations formulated in the legislative guides it has published. States may use the various model provisions and legislative guides adopted by UNCITRAL to shape their policies.

18. Contract parties that operate in States that have not adopted the UNCITRAL instruments or only a part thereof are still able to benefit from some UNCITRAL instruments, such as the arbitration and mediation rules in dispute resolution.

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

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

Digital economy and the prevention of immediate international trade disruption

20. The adoption of UNCITRAL instruments may prevent immediate trade disruption due to lockdowns and mandatory closures by providing the legal framework for government agencies and the private sector to operate digitally or remotely. As seen in Part I, the adoption of remote operations measures was initiated by States to ensure business operations continue as much as possible. The UNCITRAL instruments on e-commerce law have provided the international community with a legislative framework to facilitate the use of electronic means to engage in commercial activities between States. The first UNCITRAL Standard on e-commerce law, the UNCITRAL Model Law on Electronic Commerce (1996) (MLEC),²³ remains the most widely enacted Standard which establishes rules for the equal treatment of electronic and paper-based information, as well as the legal recognition of electronic transactions and processes, based on the fundamental principles of non-discrimination against the use of electronic means, functional equivalence and technology neutrality.

21. Continued developments in e-commerce law proved to be essential in ensuring the functioning of a digital economy within a State as the COVID-19 pandemic forced numerous States to order various degrees of measures to prevent the spread of the COVID-19 disease and the overburdening of the healthcare system. Since the adoption of the MLEC in 1996, legislation based on or influenced by the MLEC has been adopted in 80 states and a total of 160 jurisdictions as of March 2022. The adoption by States of the MLEC, together with other UNCITRAL e-commerce instruments such as the UNCITRAL Model Law on Electronic Signatures (2001)

²³ UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996) (United Nations publication, 1999).

(MLES),²⁴ the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (ECC)²⁵ and the MLETR²⁶ enables the functioning of a digital economy.

22. Digitalization efforts supported by UNCITRAL e-commerce instruments are crucial not only to States but also to contract parties in order to prevent immediate trade disruption. As States adopt the UNCITRAL e-commerce instruments, contract parties can rely on these instruments for a smooth functioning of trade in the digital sphere. For instance, article 1(1) of the ECC provides that the provisions of the ECC shall apply to electronic communications in connection with the formation or performance of a contract, resulting in a broad application to contracts. Contract parties can thus rely on electronic communications in the formation and performance of a contract, which is important in a crisis whereby regular post may be disrupted, as seen by multiple instances of delivery services having delayed operations due to COVID-19 outbreaks at dispatch centres or logistics centres.

23. The importance of an enabling legal framework for digital transactions was already noted by UNCITRAL in the early months of COVID-19. In 2020, the Commission held a panel series on “UNCITRAL Texts and COVID-19 Response and Recovery”, whereby topics such as “Identification and Authentication in the Digital Economy” and “Digital Economy and Trade Finance” were discussed.²⁷ These discussions focussed on how the COVID-19 pandemic accelerated the need to transition to online trade and how UNCITRAL instruments, such as the MLETR, can play the role of a legal enabler of paperless trade. Reference was made to the work that eventually led to the adoption of the UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services (2022)²⁸ (MLIT) to establish trust in transactions conducted remotely. The COVID-19 pandemic has highlighted the need for modernizing the law of electronic payments, particularly for financial inclusion and in developing economies. Adopting UNCITRAL e-commerce instruments can thus help to harmonize the legal framework on digital transactions, which will help promote the use and acceptance of digital transactions amongst States and contract parties.

Enabling electronic signatures and electronic authentication

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

²⁴ UNCITRAL Model Law on Electronic Signatures with Guide to Enactment (2001) (United Nations publication, 2002).

²⁵ United Nations Convention on the Use of Electronic Communications in International Contracts 2898 UNTS 3 (opened for signature 23 November 2005, entered into force 1 March 2013).

²⁶ UNCITRAL Model Law on Electronic Transferable Records (United Nations publication, 2018).

²⁷ UNCITRAL, Virtual Panel Series: UNCITRAL Texts and COVID-19 Response and Recovery – 8 to 9 and 13 to 16 July 2020, available at <https://uncitral.un.org/en/COVID-19-panels>.

²⁸ UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlit_advance_copy.pdf.

effectively address the legal treatment of electronic signatures and give certainty to their status.²⁹

25. The increased use of electronic authentication techniques as substitutes for handwritten signatures and other traditional authentication procedures suggested the need for a specific legal framework to reduce uncertainty as to the legal effect that may result from the use of electronic means. In response to such needs, the MLES builds on the fundamental principle underlying article 7 of the MLEC with respect to the fulfilment of the signature function in an electronic environment by following a technology-neutral approach, which avoids favouring the use of any specific technology or process. This means, in practice, that legislation based on this Model Law may recognize both digital signatures based on cryptography (such as public key infrastructure – PKI) and electronic signatures using other technologies.³⁰ That flexibility is particularly important to ensure that the law accommodates both current and future technologies supporting electronic signatures.

26. Finally, in July 2022, UNCITRAL adopted the MLIT.³¹ The MLIT provides a set of model legislative provisions that legally enable the use of identity management services for online identification of physical and legal persons as well as the use of trust services to provide assurances as to the quality of data in electronic form. With more States and contract parties moving towards the digitalization of operations, trust in digital identity becomes even more important as an increasing amount of data exchanges are made.³² The MLIT is thus a welcome addition in strengthening the legal framework for a digital economy, which has shown to be critical for the functioning of trade and services during the COVID-19 pandemic, and possibly for future emergencies.

Digitalization of the dispute resolution industry and online dispute resolution

27. While States can benefit from the MLES and recent MLIT, further work is required in the dispute resolution industry as there remains issues on the acceptance of electronic signature and electronic awards. In the case of online dispute resolution, the UNCITRAL Technical Notes on Online Dispute Resolution (ODR) (2016)³³ provide guidance on how online dispute resolution can assist contract parties in resolving their disputes in a fair, transparent and efficient manner. The implementation of a robust ODR system will bolster the creation of a comprehensive digital economy and provide reassurance for businesses and consumers that disputes arising from online transactions can be resolved quickly and efficiently.³⁴

Paperless trade environment with electronic transferable records

28. The COVID-19 pandemic has disrupted shipping activities and consequently affected supply chains worldwide; in an UNCTAD report,³⁵ the physical shipment of goods has impacted the availability of documents accompanying these goods, such as

²⁹ UNCITRAL Model Law on Electronic Signatures (United Nations publication, 2001), available at https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_signatures.

³⁰ Ibid.

³¹ UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services (United Nations publication, 2022), available at <https://uncitral.un.org/en/mlit>.

³² See also the UNCTAD Digital Economy Report 2021, which recognizes increasing amount of cross-border data flows. *Digital Economy Report 2021: Cross-border data flows and development: For whom the data flow* (United Nations publication, 2021).

³³ UNCITRAL Technical Notes on Online Dispute Resolution (United Nations publication, 2017).

³⁴ Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17 (A/77/17), para. 222 The Commission continues to take part in the Inclusive Global Legal Innovation Platform on Online Dispute Resolution (iGlip); see also the APEC collaborative framework for Online Dispute Resolution of Cross-Border Business to Business Disputes (ODR Framework) which is modelled after the UNCITRAL ODR text, see for further information www.apec.org/SELI/Overview.

³⁵ UNCTAD, *COVID-19 and International Sale of Goods: Contractual Devices for Commercial Risk Allocation and Loss Prevention*, Transport and Trade Facilitation Series 20 (United Nations publication, 2023).

negotiable bills of ladings.³⁶ Negotiable bill of ladings and other transferable documents, which are commonly used in transport and logistics in international trade, if made available in electronic form, may be greatly beneficial for facilitating electronic commerce by, for example, improving speed and security of transmission, permitting the reuse of data and automating certain transactions through “smart contracts”. The MLETR is specifically designed to enable the functional equivalence of electronic transferable records to their physical counterparts, by removing discrimination between physical and electronic form and promoting technology neutrality in the acceptance of electronic transferable records.

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

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

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

32. The MLETR is promoted as a key legislative tool for the facilitation of paperless trade by the International Chamber of Commerce (ICC). The ICC has launched the ICC Digital Standards Initiative, which has the goal of harmonizing the digital trade environment.³⁷ The ICC Digital Standards Initiative has specifically listed the MLETR as the enabler to trade digitisation for States, and thus promotes the widespread adoption of the MLETR. It has provided a dedicated webpage on the MLETR, a case for adoption, and growing evidence base for legislative reform.³⁸ Furthermore, the ICC Digital Standards Initiative has published a “Standards Toolkit for Cross-border Paperless Trade”, and lists the MLETR as a master reference that

³⁶ Ibid., p. 28.

³⁷ ICC, *The ICC Digital Standards Initiative*, available at www.dsi.iccwbo.org/.

³⁸ ICC, *Policymakers*, available at www.dsi.iccwbo.org/policymakers.

helps supply chain actors integrate in the ecosystem.³⁹ The ICC's work and push of the MLETR highlights the MLETR as a key pillar in the functioning of an digital economy for international trade.

33. In addition, the MLETR also encompasses the inclusion of dynamic information, including contract automation, also known as "smart contracts", i.e., scripts that allow for automatic conclusion or performance of a contract when specific conditions are reached. These specific conditions may be fulfilled by referencing the smart contract to metadata, e.g. geolocation tags, which is also permitted and recognized under the article 6 MLETR. One such example is the automatic transfer of possession of the electronic transferable record and triggering of transfer of money when the ship's GPS attains certain coordinates (i.e. the ship has reached the port successfully). Legal recognition of contract automation, which is a topic currently dealt with by UNCITRAL Working Group IV provide contract parties with alternative forms of contracting during a crisis.

34. The functioning of a digital economy is a key step for States to function in situations whereby there is severe trade disruption. The COVID-19 pandemic has pushed numerous States to legislate measures to prevent the spread of the pandemic and these measures were often put into place within a very short period. Key institutions of the States, such as administrative units, national banks, etc., had to either suspend their services or reduce their opening hours, causing delays in international trade and finance. Adopting the Commission's e-commerce texts can be effective in preventing disruption in international trade and finance by first ensuring that States can operate in the digital economy by allowing the recognition of electronic documents as functionally equivalent to their paper-based equivalents and the recognition of electronic identities and signatures to allow processing of international trade and customs without needing paper documents, if possible.

Swift reaction by public authorities in public procurement matters

35. The UNCITRAL Model Law on Public Procurement (2011)⁴⁰ (Model Law on Public Procurement or MLPP) provides a framework for States to develop a procurement system that will both achieve value for money and avoid abuse. The MLPP allows government purchasers to take advantage of modern commercial techniques, such as e-procurement and framework agreements, to allow it to maximize value for money in procurement. It contains procedures to allow for standard procurement, urgent or emergency procurement, simple and low-value procurement, and large and complex projects (in which, and where appropriate, the government can interact with potential suppliers and contractors to obtain the best solution to its needs). All procedures are subject to rigorous transparency mechanisms, requirements to promote competition and objectivity. All decisions and actions taken in the procurement process can be challenged by potential suppliers.

36. Countries that have passed legislation enabling electronic procurement, as the MLPP does, were able to avoid numerous difficulties arising from the disruption due to the closure of the authorities' offices during the COVID-19 pandemic. The MLPP provides for procurement by means of an electronic reverse auction or involving an electronic reverse auction at article 31. This, combined with the enactment of the UNCITRAL instruments on electronic commerce as elaborated earlier in this UNCITRAL toolkit, allows public procurements to continue digitally.

37. In the case of a global emergency, there may be a need for emergency procurement processes in order to swiftly address the impact caused by the event. This is provided for in the Model Law on Public Procurement as well, which has provisions for cases where there is an urgent need for the subject matter of the procurement due to a catastrophic event, i.e., an emergency procurement.

³⁹ ICC, *Standards Toolkit for Cross-border Paperless Trade*, available at <https://iccwbo.org/news-publications/policies-reports/standards-toolkit-for-cross-border-paperless-trade/#anchor-download>.

⁴⁰ UNCITRAL *Model Law on Public Procurement* (United Nations publication, 2014).

Article 30(4)–(5) stipulates the processes for an emergency procurement, where there is an urgent need for the subject matter of the procurement. This may include procurement for equipment to prevent the spread of infectious diseases, or even for the provision of vaccines to roll-out to the population as soon as possible.

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

38. According to the World Bank, MSMEs account for “the majority of businesses worldwide and are important contributors to job creation and global economic development”.⁴¹ MSMEs are particularly vulnerable to economic downturns, as they typically operate with tight cashflows and lack financial reserves to face business outages. It is thus not surprising that the COVID-19 pandemic has had a significant negative impact on MSMEs – UNCTAD has likewise reported in its publication “[T]he COVID-19 Pandemic Impact on Micro, Small and Medium Sized Enterprises” that “many MSMEs have already ceased trading, and many more are either on the cusp of closure or remain highly vulnerable.”⁴² As seen in Part I, States have enacted specific measures to support MSMEs to enable them to tide through the turbulent times. UNCITRAL instruments can further support States in providing MSMEs with more legal certainty in areas such as financing and also help to reduce the negative impacts that arise in the event that MSMEs are insolvent.

Secured transactions and financing to benefit MSMEs

39. The UNCITRAL Model Law on Secured Transactions (2016)⁴³ (Model Law on Secured Transactions or MLSS) aims to provide a transparent, comprehensive and rational legislative framework of secured financing, which thus expects to have a beneficial impact on the availability and the cost of credit, in particular to MSMEs in developing countries. For instance, article 10 provides rules where proceeds in the form of money or funds credited to a bank account are commingled with other assets of the same kind, which is a situation that MSMEs may face as MSMEs may have intermingled personal assets with the business. Article 4 further provides that a person must exercise their rights (including enforcement) in a “commercially reasonable manner”. Article 1(5) provides an express priority of laws for the protection of parties to transactions made for personal, family or household purposes.

No requirement for surrender of goods for secured transactions

40. The MLSS also provides a regime where the debtor is not required to surrender their goods, making this more efficient than court proceedings, as court proceedings could lead to delays and problems.⁴⁴ This is particularly useful in cases if the encumbered assets are perishable or declining rapidly in value.⁴⁵ In order for the secured creditor to take possession of the encumbered assets, there are three conditions that need to be satisfied: (1) the debtor needs to consent in writing; (2) the secured creditor needs to notify the debtor (and any other person in possession of the assets) in advance that the debtor is in default and that the creditor intends to take possession – for perishable assets or assets that might decline rapidly in value, this condition is waived; and (3) the secured creditor can only take possession over the encumbered assets if the person in possession of the encumbered assets does not object when the secured creditor attempts to take possession.

⁴¹ World Bank, *Small and Medium Enterprises (SMEs) Finance: Improving SMEs' access to finance and finding innovative solutions to unlock sources of capital*, available at www.worldbank.org/en/topic/smefinance.

⁴² The COVID-19 pandemic impact on micro, small and medium sized enterprises: *Market access challenges and competition policy* (United Nations publication, 2022), p. 1.

⁴³ UNCITRAL Model Law on Secured Transactions (United Nations publication, 2019).

⁴⁴ UNCITRAL Practice Guide to the Model Law on Secured Transactions (United Nations publication, 2020), p. 79.

⁴⁵ Ibid.

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

Access to credit with the Model Law on Secured Transactions

42. Credit lines are critical for MSMEs during global emergencies such as the COVID-19 pandemic. The purpose of the MLSS is helping States in developing a modern secured transactions law dealing with security rights in movable assets. The MLSS is designed to increase the availability of credit at more affordable rates by providing an effective and efficient secured transactions law, this helps to improve access to credit and lower the cost of credit to MSMEs.⁴⁶ The model law is based on the assumption that, to the extent that a secured creditor is entitled to rely on the value of the encumbered asset for the payment of the secured obligation, the risk of non-payment is reduced and this is likely to have a beneficial impact on the availability and the cost of credit.⁴⁷

43. For instance, article 6 has the purpose of stating the requirements for the creation of a security right, as well as the form and the minimum content of a security agreement, so as to enable parties to obtain a security right in a simple and efficient manner.⁴⁸ Furthermore, under paragraph 4, where the secured creditor is in possession of the encumbered asset, an oral security agreement with the grantor is sufficient for a security right to be created. This is because the fact that the secured creditor is in possession of the encumbered asset is itself evidence that the grantor may not have unencumbered ownership.⁴⁹

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

44. The Model Law adopts the policy that maximizing flexibility in enforcement is likely to increase the efficiency of the enforcement process.⁵⁰ Article 72 of the MLSS provides that after default, the grantor and the secured creditor are entitled to exercise: (a) any right under the provisions of this chapter of the model law; and any other right provided in the security agreement or any other law, except to the extent it is inconsistent with the provisions of this Model Law on Secured Transactions. Furthermore, article 73 of the MLSS provides that the secured creditor may exercise its post-default rights by application to [a court or other authority to be specified by the enacting State] or without such an application. By allowing secured creditors to exercise their post-default rights either through the court process or extra-judicially, the flexibility to avoid formal enforcement processes where possible helps to increase the availability and reduce the cost of credit. This is especially beneficial for MSMEs, where access to cheaper credit can be an important lifeline to a business impacted by a global emergency.

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

45. The UNCITRAL Legislative Guide on Key Principles of a Business Registry (2019)⁵¹ provides a reference tool for policymakers, registrars and experts involved in business registries reform on the features of an effective and efficient business registry and the minimum necessary requirements for a business to register. The legislative guide is based on the view that businesses of all sizes, and in particular

⁴⁶ UNCITRAL Model Law on Secured Transactions: Guide to Enactment (United Nations publication, 2017), p. 4.

⁴⁷ Ibid.

⁴⁸ Ibid., p. 31.

⁴⁹ Ibid., p. 33.

⁵⁰ Ibid., p. 129.

⁵¹ UNCITRAL Legislative Guide on Key Principles of a Business Registry (United Nations publication, 2019).

MSMEs, benefit from streamlined and simplified registration procedures as they reduce the registration burden, and often the cost, for the business. Its key purpose is for MSMEs operating in the informal economy to move into the formal economy, and in times of crises, such MSMEs can thereby benefit from the support by States or appointed institutions.

46. Efficient business registries allow public and easy access to business information, which facilitates the search for potential business partners, clients or sources of finance and reduces risk when entering into business partnerships. Registries efficiently performing their functions also play an important role in a cross-border context as they make access to business information by users from foreign States as simple and fast as possible. This legislative guide then aims to address all aspects of establishing and operating an efficient business registry.

47. As described in the legislative guide, there are different approaches in organizing and operating a business registry, although the State is normally involved either directly as the overseeing authority or the registry is subject to the administrative oversight of the judiciary.⁵² The business registry may also be a centralized body that contains key information of operating, dormant or liquidated businesses. Such a business registry may be relevant in preventing trade disruption as key information needed by finance institutions or administrative units by the State for processing of financial loans or grants can be obtained or verified at the business registry, thereby reducing the administrative hurdles businesses need to face in times of a crisis.

48. Digitalization of the business registry, e.g. providing electronic versions of the certificate of incorporation, company register, annual reports or other key data of a business, and being able to obtain such information readily online may also support business which may need to obtain such information swiftly.

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

49. Various measures introduced by States to contain the spread of COVID-19 have significantly affected the operations and cash flow of businesses, in particular MSMEs, and as seen in Part I, States have introduced measures such as moratoriums for insolvency filings or other measures to prevent businesses from becoming insolvent. The intention is to allow businesses to continue to operate as long as possible and to tide through the hardship caused by the COVID-19 pandemic. However, in the event that businesses are not able to survive the economic fallout caused by the COVID-19 pandemic, insolvency then becomes unavoidable. The development of a robust insolvency framework is therefore critical to ensure that both debtors and creditors reach a swift resolution to the insolvency proceedings, as this helps to minimize the negative impacts from insolvency. The UNCITRAL Legislative Guide on Insolvency provides States with guidance on a possible legal framework that they can consider adopting for MSMEs.

Insolvency and MSMEs

Simplified insolvency proceedings for micro and small enterprises

50. Where insolvency cannot be avoided, a simplified insolvency regime may help entrepreneurs and creditors reach a resolution swiftly. As seen in Part I, such a regime has been adopted by certain States during the COVID-19 pandemic to ease the negative impacts of insolvency. The UNCITRAL instruments do also advocate for a simplified insolvency regime in certain cases. Part five of the UNCITRAL Legislative Guide on Insolvency Law,⁵³ which suggests for a simplified insolvency regime with the key objectives of ensuring flexible, low-cost, expeditious proceedings easily

⁵² Ibid., para. 39.

⁵³ UNCITRAL Legislative Guide on Insolvency Law: Part five: Insolvency law for micro- and small enterprises (United Nations publication, 2022).

accessible to MSMEs, while promoting a fresh start for the MSME debtor and protecting persons affected by the simplified insolvency proceedings.⁵⁴ The main features of such a simplified insolvency regime are default procedures and treatment, short time periods and reduced formalities. This involves short time periods for all procedural steps, including narrow grounds for the extension of proceedings and a specified maximum number of permitted extensions.⁵⁵

51. The UNCITRAL Legislative Recommendations on Insolvency Law for Micro- and Small Enterprises (2021)⁵⁶ further describes and elaborates how such a simplified insolvency regime should apply. Some recommendations that can be beneficial to MSEs and all MSMEs include, amongst others:

Recommendation 12 – short time periods: The insolvency law providing for a simplified insolvency regime should specify short time periods for all procedural steps in simplified insolvency proceedings, narrow grounds for their extension and the maximum number, if any, of permitted extensions

Recommendation 14 – Debtor-in-possession as the default approach: in simplified reorganization proceedings, the debtor remains in control of its assets and the day-to-day operation of its business with appropriate supervision and assistance of the competent authority.

52. In 2021, the World Bank, together with UNCITRAL, released a newly updated document entitled “Principles for Effective Insolvency and Creditor/Debtor Regimes”.⁵⁷ This document, which takes into account the COVID-19 pandemic and global recession, aims to help policymakers improve the existing insolvency systems for MSMEs.⁵⁸ It highlights 9 sub-principles for a simplified insolvency regime with the overarching policy being that the insolvency framework should provide for minimal procedures to ensure straightforward, closed, low cost and expeditious processes for both debtors and creditors.⁵⁹ In addition to a formal simplified insolvency regime, States may consider the introduction of pre-insolvency activities, such as the development of policies and processes to incentivize debtors to address the situation early through informal restructuring, counselling, assistance to debtors, training or awareness. This may mean building a legal framework to define the ambit of what constitutes as pre-insolvency and the obligations of MSME debtors when they fall within the scope of pre-insolvency, so that they are required to seek timely assistance and incentivized to prevent formal insolvency from happening.

Personal guarantees

53. It is not uncommon for business owners of MSMEs to have taken personal guarantees in order to finance their businesses, thereby intertwining their private financial situations with their businesses. In the event of an insolvency, such business owners become personally liable and may be bankrupted by the creditor as well. The UNCITRAL Legislative Guide on Insolvency Law, Part V: Insolvency Law for MSEs provides the following recommendation for personal guarantees:

Recommendation 88 – Where the insolvency law providing for a simplified insolvency regime specifies that conditions may be attached to the MSE debtor's discharge, those conditions should be kept to a minimum and clearly set forth in the insolvency law.

⁵⁴ Ibid., para. 271.

⁵⁵ Ibid., para. 282.

⁵⁶ UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/part_5_en.pdf.

⁵⁷ World Bank, *Principles for Effective Insolvency and Creditor and Debtor Regimes (English)*, available at <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/391341619072648570/principles-for-effective-insolvency-and-creditor-and-debtor-regimes>.

⁵⁸ Ibid., ii.

⁵⁹ Ibid., p. 30.

54. It is noted in the legislative guide that “for individual entrepreneurs who manage their own businesses or who become insolvent because of giving personal guarantees, some of those restrictions and conditions may have serious consequences, effectively prohibiting them from being involved in future business.”⁶⁰ Where the insolvency law provides that conditions may be attached to discharge, the UNCITRAL Legislative Guide on Insolvency Law, Part V: Insolvency Law for MSEs recommends that those conditions should be kept to a minimum in order to facilitate the fresh start. It also recommends that those conditions should be clearly set forth in the insolvency law.⁶¹ With a global emergency, it is highly likely that such businesses and owners will be subject to insolvency and bankruptcy. Insolvency regimes that enable a quick and fresh start for such businesses and business owners after a global emergency will help such MSME owners restart their lives again.

Cross-border insolvencies

55. As businesses operate across borders, it is common for creditors and debtors to come from different legal regimes. In an emergency such as the COVID-19 pandemic, a business facing financial distress due to the unforeseen circumstances may quickly result in its inability to make timely payments to its local or foreign creditors, thereby causing a domino effect on the market. The UNCITRAL Model Law on Cross-Border Insolvency (1997) with Guide to Enactment and Interpretation (2013)⁶² is designed to assist States to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency.⁶³ This model law has identified four elements identified as key to the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation.⁶⁴ These four elements aim to allow creditors to participate in another State’s insolvency regime, establish simplified procedures recognition of qualifying foreign proceedings in order to avoid time-consuming legalisation or other processes, availability of relief considered necessary for the orderly and fair conduct of insolvency proceedings and empowering courts to communicate directly with their foreign counterparts.

Digitalization of insolvency proceedings

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

57. If States were to consider a simplified insolvency regime, digitalizing such insolvency procedures will be further beneficial to both debtors and creditors. Processes, such as permitting digital communications and the submission of evidence through digital means, reduces the time needed for formal notices and documents to be sent by post as parties involved can retrieve such information almost instantaneously online. This also reduces time and financial burdens on parties in having to ensure that the documents are sent out by post in time to meet the procedural

⁶⁰ Ibid., para 341.

⁶¹ Ibid.

⁶² UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (United Nations publication, 2014).

⁶³ See UNCITRAL Model Law on Cross-Border Insolvency (United Nations publication, 1997), available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.

⁶⁴ Ibid.

datelines. Discussions on harnessing electronic tools in simplified insolvency regimes have been raised at academic conferences as well.⁶⁵ States may consider developing this insolvency framework in tandem with the development of a legal framework for a digital economy as well, i.e. the adoption of UNCITRAL e-commerce instruments.

Recognition and enforcement of insolvency-related judgments

58. On the same vein as the insolvency instruments described in the previous paragraphs, the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment (2018)⁶⁶ will assist creditors, debtors and claimants in finalizing their claims, especially in a situation where the insolvency in question involves the division of assets across numerous jurisdictions. Quick enforcement of insolvency related judgments can reduce capital or assets being locked up and unable to be used due to enforcement proceedings.

Establishing a robust regime when there is supply chain disruption and contractual breaches

Dispute resolution due to breach of contract or trading terms

59. In times of crisis, contractual obligations may be breached, or contracts may be terminated. A robust dispute resolution and enforcement mechanism by States will allow ease of enforceability of an arbitral award or mediation settlement agreement from one State to another State, which may thus reduce the disruption of international trade through the quick recognition and enforcement of settlements. UNCITRAL has developed frameworks for alternative dispute resolution mechanisms, such as for arbitration and mediation, that States can utilize.

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

UNCITRAL framework for arbitration

61. UNCITRAL has developed a robust framework for international commercial arbitration in the past few decades. The framework includes two conventions,⁶⁷ a model law, several explanatory texts and contractual texts, and numerous additional frameworks. The interaction of the UNCITRAL instruments and resources provide States and parties with a strong framework to rely on should the need for arbitration amongst States and parties arise.

62. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)⁶⁸ is the foundation of the international arbitration system, offering common legislative standards for the recognition of arbitration

⁶⁵ See Singapore Management University, *3rd SMU-Cambridge Roundtable on Corporate Insolvency Law: Conference Report*, available at <https://ccla.smu.edu.sg/sites/cebla.smu.edu.sg/files/Final%20Report.%20SMU-3CL%20Cambridge%20Roundtable.pdf>.

⁶⁶ UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment (United Nations publication, 2019).

⁶⁷ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 330 UNTS 3 (opened for signature 10 June 1958, entered into force 7 June 1959), which predicated the establishment of UNCITRAL, has been a foundational component of UNCITRAL work on international arbitration; and United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 3208 UNTS (opened for signature 10 December 2014, entered into force 18 October 2017).

⁶⁸ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 330 UNTS 3 (opened for signature 10 June 1958, entered into force 7 June 1959).

agreements and court recognition and enforcement of foreign and non-domestic arbitral awards, and has been adopted by 172 parties that come from various legal systems. The New York Convention has been described as the “most successful treaty in private international law”.⁶⁹ Arbitration has been recognized as an important dispute resolution mechanism for international trade disputes and arbitration institutes have also implemented new technologies to ensure the smooth running of arbitration hearings despite the COVID-19 pandemic.⁷⁰

63. Another important instrument is the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006⁷¹ (Model Law on International Commercial Arbitration) which is designed to assist States in modernizing their arbitration laws. It covers all stages of the arbitral process from the arbitration agreement (including its conclusion by electronic communication), the composition and jurisdiction of the arbitral tribunal as well as the extent of court intervention through the recognition and enforcement of arbitral awards, while allowing parties to adapt the proceedings to their needs. Indeed, the Model Law has many provisions that are default provisions, from which parties may deviate, so as to provide parties with the necessary flexibility, for instance to agree on the use of electronic means of communication. The Model Law has been widely adopted, to date in 119 jurisdictions and reflects a worldwide consensus on arbitral practices.

UNCITRAL Arbitration Rules for contract parties

64. The UNCITRAL Arbitration Rules⁷² provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award. However, the Rules provide for a complete procedural framework to avoid procedural lacunae and still leave much flexibility to the parties to “agree otherwise”, for instance on the use of electronic communication.

65. To enable contract parties to quickly rely on the UNCITRAL Arbitration Rules, an Annex has been provided in the 2021 version of the UNCITRAL Arbitration Rules which sets out a model arbitration clause for contracts.⁷³ The Annex also includes a waiver statement that contract parties may consider including.

66. Additionally, UNCITRAL developed explanatory texts, such as the UNCITRAL Notes on Organizing Arbitral Proceedings (2016),⁷⁴ providing practitioners with an annotated list on matters relevant to the organization of arbitral proceedings.

Arbitration as the preferred choice of dispute resolution mechanism

67. The use of international arbitration during the COVID-19 pandemic has also been noted by industry observers, as certain industries adopt arbitration as its preferred choice of dispute resolution mechanism. For instance, in the life sciences sector, there is a trend of international arbitration being used due to its private and confidential nature, multiple jurisdictions involved, complexity of claims (e.g. global supply chain disruptions, earn-out clauses from merger and acquisitions transactions,

⁶⁹ New York Arbitration Convention, *In Brief*, available at www.newyorkconvention.org/in+brief#:~:text=The%20Convention%20on%20the%20Recognition,by%20more%20than%20160%20nations.

⁷⁰ See Shanghai International Economic and Trade Arbitration Commission (SHIAC), *International commercial arbitration in the time of covid-19* (Global Arbitration Review, 2021).

⁷¹ UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 (United Nations publication, 2008).

⁷² UNCITRAL Arbitration Rules, UNCITRAL Expedited Arbitration Rules, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (United Nations publication, 2021).

⁷³ Ibid., p. 30.

⁷⁴ UNCITRAL Notes on Organizing Arbitral Proceedings (United Nations publication, 2016).

and investor-state claims) and the generally better flexibility within arbitration rules and proceedings to accommodate more efficient procedures (unlike in the case of litigation before national courts) in the event of a global emergency.⁷⁵

Expedited Arbitration Proceedings under the UNCITRAL Expedited Arbitration Rules

68. The UNCITRAL Arbitration Rules provide clarity and certainty for the contract parties involved since its first version has been issued in 1976. They have recently been updated in 2021 and this version now incorporates the UNCITRAL Expedited Arbitration Rules.⁷⁶ This set of rules has been used for the settlement of a broad range of disputes, including disputes between private commercial parties, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions which thus shows the versatility and applicability of the UNCITRAL Arbitration Rules. Contract parties may incorporate into their contracts clauses providing for the application of the UNCITRAL Arbitration Rules, using the model clauses provided for in their Annex.⁷⁷

69. Furthermore, UNCITRAL has also published Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules (as revised in 2010),⁷⁸ which assists arbitral institutions and other interested bodies that envisage using the UNCITRAL Arbitration Rules either as (1) a model for institutions drafting their own arbitration rules, (2) institutions that have offered to administer disputes under the UNCITRAL Arbitration Rules or to render administrative services in ad hoc arbitrations under the UNCITRAL Arbitration Rules, or (3) institutions (or a person) that may be requested to act as appointing authority, as provided for under the UNCITRAL Arbitration Rules. A list of arbitration centres which have served in the aforementioned capacities has been made available by UNCITRAL.⁷⁹

Remote hearings in arbitration

70. The UNCITRAL instruments do permit for remote hearings, even if they are not explicitly stated. This has been clarified in the UNCITRAL Expedited Arbitration Rules, whereby the explanatory note for article 3 states that article 3(3) “emphasizes the discretion provided to the arbitral tribunal to make use of a wide range of technological means to conduct the proceeding, including when communicating with the parties and when holding consultations and hearings.”⁸⁰ Furthermore, the explanatory note states that “[T]he inclusion of such a rule in the Expedited Rules does not imply that the use of technological means is available to arbitral tribunals only in expedited arbitration”, and further states that parties should be given “an opportunity to express their views on the use of such technological means and consider the overall circumstances of the case, including whether such technological means are at the disposal of the parties”. Nonetheless, the availability of virtual hearings provides contract parties with the possibility of continuing its arbitration proceedings without physical obstacles.

71. It is interesting to note that in March 2022, the International Council for Commercial Arbitration published the general report with the conclusions of an

⁷⁵ See Tanya Landon & Dorothee Schramm, *2020 International Arbitration Overview: Demand for Dispute Settlement Up, Despite COVID-19 Struggles*, available at www.pharmtech.com/view/trends-in-international-arbitration-the-fallout-from-covid-19.

⁷⁶ UNCITRAL Arbitration Rules, UNCITRAL Expedited Arbitration Rules, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (United Nations publication, 2021).

⁷⁷ Ibid., p. 38.

⁷⁸ Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules (as revised in 2010) (United Nations publication, 2013).

⁷⁹ UNCITRAL, Arbitration Centres, available at <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration/centres>.

⁸⁰ Ibid., p. 51.

investigation whether contract parties have a right to physical hearing in international arbitration (“Does a Right to a Physical Hearing Exist in International Arbitration?”).⁸¹ In this report, the authors scrutinized the laws of individual jurisdictions, including those that have adopted the Model Law on International Commercial Arbitration, and whether there were any repercussions on the enforceability of the arbitral award if a remote hearing was held. In essence, the report concluded that “no jurisdiction expressly recognizes a right to a physical hearing in international arbitration, and only a handful recognizes such a right by inference and, even then, it is typically circumscribed.”⁸² Where enforceability is concerned, the authors concluded that the risk of an award being set aside because of an arbitral tribunal’s decision to use a remote hearing is very low, and there has been no reported case where an award was vacated solely on the grounds of a remote hearing.⁸³ The findings of this report may reassure contract parties who decide to proceed with remote hearings.

Move towards the acceptance of electronic signatures and electronic awards

72. Although the UNCITRAL instruments do allow for remote hearings, work remains to be done on issues such as electronic signatures and awards for international arbitration. The Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention⁸⁴ recommends that, considering the wide use of electronic commerce and taking into account international legal instruments such as the Model Law on International Commercial Arbitration, the MLEC, the MLES and the ECC, article II, paragraph 2, of the New York Convention, be applied recognizing that the circumstances described therein are not exhaustive, and recommends also that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement. These are however recommendations and are not necessarily adopted by States who have already adopted the New York Convention; furthermore, although the ECC explicitly refers to the New York Convention⁸⁵ and while the application of the ECC to arbitral agreements is undisputed, its application to arbitral awards is not.

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

74. In addition, article 34(2) and (4) of the UNCITRAL Arbitration Rules require awards to be made in writing and signed by the arbitrators. Considering the strong move towards digitalization of the economy and the growing acceptance of electronic signatures in lieu of wet-ink signatures, the formal need for a wet-ink signature on an arbitral award only serves as an additional hurdle for parties, especially in the case of a global emergency. However, due to the lack of harmonisation of the acceptance of electronic signatures, the signing of an arbitral award using an electronic signature may risk it being unenforceable, depending on the State’s regulations governing

⁸¹ ICCA Projects, *Does a Right to a Physical Hearing Exist in International Arbitration?*, available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Right-to-a-Physical-Hearing-General-Report.pdf.

⁸² Ibid., p. 39.

⁸³ Ibid.

⁸⁴ Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its Thirty-Ninth Session.

⁸⁵ United Nations Convention on the Use of Electronic Communications in International Contracts 2898 UNTS 3 (opened for signature 23 November 2005, entered into force 1 March 2013), p. 29.

electronic signatures.⁸⁶ In light of the growing push for remote processes, there should be a bolder move towards the acceptance of electronic awards and electronic signatures in arbitration.⁸⁷

UNCITRAL framework for mediation

75. UNCITRAL has also developed a framework for international commercial mediation to complement the extensive work that has been done in laying down a framework on international commercial arbitration. In addition to the enforcement of arbitral awards, the enforcement of international settlement agreements resulting from mediation is also relevant. The United Nations Convention on International Settlement Agreements Resulting from Mediation (the “Singapore Convention on Mediation”)⁸⁸ establishes a harmonized legal framework for the right to invoke settlement agreements as well as for their enforcement. The Convention is an instrument for the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving trade disputes.

76. Being a binding international instrument, the Singapore Convention on Mediation is expected to bring certainty and stability to the international framework on mediation. It has also been highlighted at the inaugural UNCITRAL Academy at the Singapore Convention Week 2021 “as an important step in promoting international trade as (...) the [Singapore] Convention provides an effective avenue for parties to enforce mediated settlement agreements for cross-border disputes, as well as the benefits of mediation, which can help businesses settle disputes quickly, amicably and cost-effectively.”⁸⁹ This becomes especially relevant in times of crisis.

77. In addition, the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation with Guide to Enactment and Use (2018) (amending the Model Law on International Commercial Conciliation, 2002)⁹⁰ (Model Law on International Commercial Mediation), which is not only an alternative to the Singapore Convention, but may also be used by States as a framework for domestic mediation. This provides States with the option of harmonizing their national laws with UNCITRAL instruments and to allow itself time to gain experience in introducing and conducting mediation before proceeding with a convention. The Model Law contains a comprehensive set of rules in respect of the whole mediation process dealing with the commencement of mediation proceedings (article 5), number and appointment of mediators (article 6), conduct of mediation (article 7), communication between mediator and parties (article 8), disclosure of information (article 9), confidentiality (article 10), admissibility of evidence in other proceedings (article 11), termination of mediation proceedings (article 12) and mediator acting as arbitrator (article 13). It further provides rules on international settlement agreements that States can consider adopting.

78. UNCITRAL has also continuously supported the development and discussion of the Singapore Convention, which has added to the strengthening of the UNCITRAL framework on international commercial mediation. Since 2019, an annual Singapore Convention Week is held, which features a series of legal and dispute resolution-

⁸⁶ See Felipe Volio Soley, *Signing the Arbitration Award in Wet Ink: Resistance to Technological Change or A Reasonable Precaution?*, available at <https://arbitrationblog.kluwerarbitration.com/2020/11/06/signing-the-arbitral-award-in-wet-ink-resistance-to-technological-change-or-a-reasonable-precaution/>.

⁸⁷ Exploratory work is ongoing in the field of dispute resolution in the digital economy – see *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17 (A/77/17)*, para. 222.

⁸⁸ United Nations Convention on International Settlement Agreements Resulting from Mediation (opened for signature 20 December 2018, entered into force 2020).

⁸⁹ Ministry of Law, Singapore, *Singapore Convention Week Concludes*, available at www.mlaw.gov.sg/news/press-releases/2021-09-15-singapore-convention-week-2021-concludes.

⁹⁰ *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation with Guide to Enactment and Use* (2018) (United Nations publication, 2022).

related events across an entire week. There is also a UNCITRAL Academy held during the Singapore Convention Week, which is organized by the Ministry of Law, Singapore and UNCITRAL, and comprises a conference and workshops. More recently, the Singapore Convention Week 2022 was held from 30 August to 1 September 2022.

79. The mediation framework that UNCITRAL has developed is also available for contract parties to use. Contract parties may use the UNCITRAL Mediation Rules (2021)⁹¹ when conducting their mediation and the UNCITRAL Mediation Rules (2021) set out the process concerning the commencement of mediation (article 2), number and appointment of mediators (article 3), conduct of mediation (article 4), communication between the parties and the mediator (article 5), confidentiality (article 6), introduction of evidence in other proceedings (article 7), settlement agreement (article 8) and termination of mediation (article 9).

Remote mediation processes

80. Similar to the UNCITRAL Arbitration Rules, the UNCITRAL Mediation Rules do permit contract parties to use technological means to conduct the mediation process. Article 4 of the UNCITRAL Mediation Rules explicitly provides that “in conducting the mediation, the mediator may, in consultation with the parties and taking into account the circumstances of the dispute, utilize any technological means as he or she considers appropriate, including to communicate with parties and to hold meetings remotely.”⁹² This will enable contract parties prevented from cross-border traveling or holding physical meetings due to a global crisis to be able to continue the mediation proceedings with as minimal disruption as possible.

Model mediation clauses

81. Likewise, the UNCITRAL Mediation Rules offer model mediation clauses that contract parties can readily incorporate into their contracts. The Annex of the UNCITRAL Mediation Rules provides for a multi-tiered clause, whereby parties can refer to a case that has not been settled during mediation after an agreed amount of days have elapsed to arbitration under the UNCITRAL Arbitration Rules. The Annex also provides for a model declaration of disclosure and model statement of availability that contract parties can consider.

82. Furthermore, they may refer to the UNCITRAL Notes on Mediation (2021),⁹³ which describe matters relevant to mediation to help better understand mediation. UNCITRAL has also made available Recommendations to assist mediation centres and other interested bodies with regard to mediation under the UNCITRAL Mediation Rules (2021).⁹⁴ A list of mediation centres that have adopted the UNCITRAL instruments on mediation will be made available by UNCITRAL, similar to the list of arbitral centres in relation to the UNCITRAL Arbitration Rules.

The CISG and the prevention of disputes arising from supply chain impacts

83. The disruption to supply chains caused by COVID-19 outbreaks at factories, warehouses, logistics companies and lockdown or quarantine measures introduced by various States had a tremendous impact on the shipment of goods from supply actors – this impact was acutely felt across the world. UNCITRAL instruments may be used to prevent disputes arising from supply chain impacts. In general, the United Nations

⁹¹ UNCITRAL Mediation Rules (2021) (United Nations publication, 2022).

⁹² Ibid., p. 3.

⁹³ UNCITRAL Notes on Mediation (2021) (United Nations publication, 2021).

⁹⁴ Recommendations to assist mediation centres and other interested bodies with regard to mediation under the UNCITRAL Mediation Rules (2021), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mediation_rules_recommendations.pdf.

Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)⁹⁵ provides harmonized rules on the sale of goods across borders in regular trade situations. In the event of a global emergency, the CISG does provide for a framework to address the uncertainty arising from novel situations created by domestic or international crisis and emergencies situations and government measures taken in response.

Force majeure

84. Force majeure has been widely invoked by contract parties as an excuse for the non-performance of contract obligations during COVID-19. In the event that contract parties do not explicitly or implicitly agree on a force majeure clause and the matter concerns an international sale of goods falling within the CISG scope of application, they may find a default solution in article 79 of the CISG, which addresses force majeure. article 79(1) provides that “a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.” Article 79 suspends the parties liability for non-performance or partial performance of their obligations while the impediment persists. The parties may complement the provision of article 79 with contractual provisions based article 6.2.3 of the UNIDROIT Principles of International Commercial Contracts 2016⁹⁶ and on the ICC Force Majeure and Hardship Clause,⁹⁷ if they so wish. Under those additional provisions, the parties may agree to renegotiate the contract in case certain impediments should arise. Another relevant provision is article 71 CISG, which allows one party to suspend the performance of its obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations and certain other conditions are met.

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

Rotterdam Rules

86. As for the transportation of goods, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (Rotterdam Rules)⁹⁸ permits the use and effect of electronic transport records. Article 9 sets out the procedures for the use of negotiable electronic transport records while article 10 provides that a negotiable transport document can be replaced by a negotiable electronic transport document if the procedures set out in article 10(1) are fulfilled. The legal recognition and convertibility of a paper transport document to that of an electronic transport document bolsters the establishment and functioning of a digital economy, which, as set out earlier in this toolkit, is a key element in reducing trade disruption in times of crisis.

⁹⁵ United Nations Convention on Contracts for the International Sale of Goods 1489 UNTS 3 (opened for signature 11 April 1980, entered into force 1 January 1988).

⁹⁶ UNIDROIT Principles of International Commercial Contracts (2016).

⁹⁷ See ICC, *ICC Force Majeure and Hardship Clauses*, available at <https://iccwbo.org/news-publications/icc-rules-guidelines/icc-force-majeure-and-hardship-clauses/>.

⁹⁸ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (opened for signature 11 December 2008, not yet in force).

PART III: Recommendations for States and contract parties

Promotion of the Adoption of UNCITRAL instruments for global emergencies

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

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

Digital economy

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

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

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

Trade terms and supply chains

90. With more than 90 parties having adopted the CISG, the CISG has been the cornerstone in harmonizing the law on the sale of goods internationally. As the CISG celebrated its 40 years in 2020, its relevance bears even more importance and meaning during a global crisis as supply chains become severely disrupted due to unexpected measures. The Rotterdam Rules may also provide some relief in reducing supply chain disruption caused by the transportation of goods.

Having robust credit and insolvency systems in place:

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

- UNCITRAL Model Law on Cross-Border Insolvency (1997) with Guide to Enactment and Interpretation (2013)
- UNCITRAL Model Law on Secured Transactions (2016)
- UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises (2021)

Resolution of trade disputes due to trade disruptions:

92. A harmonized framework for the enforcement of arbitral awards and international settlement agreements is crucial in the resolution of trade disputes. This becomes even more relevant in a global crisis where trade disputes may increase sharply, and efficient resolution of such disputes is necessary to reduce backlog of

cases. The following UNCITRAL instruments are useful in harmonizing States' dispute resolution mechanisms, in particular where enforcement is concerned:

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

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

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

94. Every State has its own strategy and approach, and more importantly, is at different stages of growth and development. There is also finite number of resources that a State has when adopting new standards, i.e. the adoption of an UNCITRAL instrument necessitates significant work in determining how the relevant UNCITRAL instrument interacts with existing local legislation (if applicable), whether an UNCITRAL Model Law should be adopted in its entirety or only specific articles, sufficient public consultations with key stakeholders that may be impacted by the adoption of said UNCITRAL instruments and finally the adoption and implementing thereof.

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

The future of trade and UNCITRAL instruments and how it may help States and contract parties in future global emergencies

96. The COVID-19 pandemic has shown that a single event can cause significant trade disruptions in the global economy, as some States continue to grapple with the economic impact from the measures taken to contain the spread of the COVID-19 pandemic while other States seek to kickstart the recovery of their economies. One of the key lessons of the COVID-19 pandemic is the importance of a functioning digital economy whereby all possible stakeholders, i.e. States and contract parties, can continue to operate or provide the necessary services and goods with minimal disruption as much as possible.

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

98. Furthermore as discussed in earlier other UNCITRAL instruments can also help prevent trade disruption in a global emergency, such as the CISG, which intends to harmonize trading terms to minimize supply chain disruptions. The UNCITRAL instruments also support the access to credit, promote efficiency in insolvency proceedings and facilitate dispute resolution. It should however be noted that many discussions on these UNCITRAL instruments make reference to the digital economy, e.g. how dispute resolution mechanisms and procedures could be digitalized as well. The COVID-19 pandemic has thrust such discussions into the spotlight, as debates on the legal implications of the adoption of online arbitration hearings and issuing of digital arbitral awards become practically relevant. The reduced costs (from a time and monetary perspective) of having arbitrations on a digital level put further weight on the importance of the UNCITRAL instruments on e-commerce and its interaction with other UNCITRAL instruments. In essence, UNCITRAL instruments are designed to be complementary with each other, and all of these instruments are designed with the broader picture of enabling international trade in mind.

Recommendations

States

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

100. States that have not adopted the UNCITRAL instruments yet may nevertheless consider UNCITRAL model laws, technical notes, guidance notes and other resources, which may (1) provide at least a source of substantive inspiration for a legislative framework that they may wish to introduce if they are not ready to adopt a convention or a model law in its entirety; (2) offer information on how other States have implemented certain legal frameworks, e.g. in the field of e-commerce or insolvency, which can subsequently serve as a reference standard for consideration.

Contract Parties

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