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Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises

Note by the Secretariat

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I. Introduction

1. Microfinance has been on the agenda of the Commission since 2009 when the Commission, at its forty-second session, requested the Secretariat to prepare a detailed study including an assessment of the legal and regulatory issues at stake in the field of microfinance. The study was also to include proposals as to the form and nature of a reference document discussing the various elements required to establish a favourable legal framework for microfinance, which the Commission might in future consider preparing with a view to assisting legislators and policymakers around the world.[1]

2. The study, discussed at the forty-third session of the Commission, in 2010, considered the role of microfinance in poverty alleviation and achievement of the Millennium Development Goals by facilitating access to financial services for the poor who were not served by the formal financial system. On the understanding that an appropriate regulatory environment would contribute to the development of the microfinance sector, the Commission agreed that the Secretariat should convene a colloquium, with the possible participation of experts from other organizations working actively in that field, to explore the legal and regulatory issues surrounding microfinance that fell within the mandate of UNCITRAL. The colloquium was to result in an official report outlining the issues at stake and containing recommendations on work that UNCITRAL might usefully undertake in the field.[2]

3. The colloquium, held in January 2011, resulted in a number of findings.[3] Despite some successful initiatives at national level, there was no coherent set of global legal and regulatory measures that could serve as a standard for international best practice. Many States were struggling to find an appropriate regulatory framework to promote financial inclusion (the more recent term for 'microfinance'), and it was suggested that UNCITRAL could make a substantial contribution in this regard. Several issues were identified for future consideration, of which the Commission, at its forty-fourth session, in 2011, chose the following four for further in-depth study by the Secretariat: (i) overcollateralization and the use of collateral with no economic value; (ii) e-money, including its status as savings; whether "issuers" of e-money were engaged in banking and hence what type of regulation they were subject to; and the coverage of such funds by deposit insurance schemes; (iii) provision for fair, rapid, transparent and inexpensive processes for the resolution of disputes arising from microfinance transactions; (iv) facilitating the use of, and ensuring transparency in, secured lending to microenterprises and small and medium-sized enterprises. At that session, the Commission also agreed to include microfinance as an item for its future work.[4]

4. The study by the Secretariat,[5] submitted at the forty-fifth session of the Commission, in 2012, provided a brief summary of the state of the matter in each of the four topics indicated above, as well as key legal and regulatory issues relating thereto, for consideration by the Commission. Following discussion, the

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[1] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17).
[2] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17).
[3] See A/CN.9/727.
[4] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17).
[5] See A/CN.9/756.

Commission unanimously agreed to hold one or more colloquia on microfinance and related matters, as a matter of priority, with a focus on: facilitating simplified business incorporation and registration; access to credit for micro-businesses and small and medium-sized enterprises; dispute resolution applicable to microfinance transactions; and other topics related to creating an enabling legal environment for micro-businesses and small and medium-sized enterprises.[6]

5. This note outlines the key findings of the colloquium organized by the Secretariat in Vienna on 16-18 January 2013. The colloquium was structured around presentations and panel discussions on the following topics: the enabling environment for micro-business and the rule of law; incorporation and registration of micro-borrowers; effective alternative dispute resolution (ADR) mechanisms for micro-entrepreneurs; enabling legal environment for mobile payments; legal issues surrounding access to credit for micro-business, small and medium-sized enterprises (MSMEs); and insolvency and winding up of micro-businesses. Speakers and participants included specialists from governments, international organizations, non-governmental organizations, the private sector and academia from all over the world.

II. An enabling legal environment for micro-business

A. An overview

6. About half of the workforce worldwide is employed in the informal sector, which is said to amount to approximately 10 trillion USD annually (i.e. one third of the world economy).[7] As the Commission for the Legal Empowerment of the Poor put it, members of this workforce "… operate not within the law, but outside it: they enter into informal labour contracts, run unregistered businesses, and often occupy land to which they have no formal rights".[8] Reasons for operating in the informal sector include: tax burden, excessive regulation of the formal sector, deterioration in the quality of public goods (e.g. public infrastructure) and of public administration,[9] and the dynamics of the formal sector. The results, however, do not vary: micro-businesses cannot enforce contracts, get formal bank loans or expand beyond a very small local network.[10] In sum, they have little option "but to trade in the informal economy".[11]

7. Certain factors are critical for micro-business to enter and operate in the formal market. One of the most important is formalization including incorporation, licensing, and other registrations. Starting a legally recognised business, however, can be an extremely burdensome process. Formalities may be extremely costly, they may impose entry requirements (e.g. minimum capital) and compliance with

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[6] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17).

[7] See R. Neuwirth, Stealth of Nations: The Global Rise of the Informal Economy, 2011, page 27.

[8] Report of the Commission on the Legal Empowerment of the Poor, Making the Law Work for Everyone, Volume 1, 2008, page 15.

[9] F. Schneider, A. Buehn, C. E. Montenegro, Shadow Economies All over the World: New Estimates for 162 Countries from 1999 to 2007, World Bank, 2010, page 7.

[10] Report of the Commission on the Legal Empowerment of the Poor, Making the Law Work for Everyone, Volume 1, 2008, page 15.

[11] Ibid., page 39.

cumbersome administrative proceedings (e.g. submission of multiple and different documents for similar purposes). Some of these formalities are holdovers from existing institutions, many of which persist primarily due to pressure groups that can hinder legal reform.[12] These difficulties discourage many viable MSMEs from formalising.

8. Micro borrowers often lack knowledge of their rights and how to protect them.[13] Furthermore, the formal justice system tend to exclude them "because they cannot afford the costs related to lawyers, or paying court fees….court procedures can be slow, and it is not uncommon for courts to have a large backlog of cases".[14] Yet, extrajudicial third-party dispute resolution mechanisms are rarely in place, thus limiting the effectiveness of any microfinance legal framework for client protection. As a result, four billion of the world's population lack access to justice.[15]

9. Currently, 2.7 billion adults worldwide do not have a savings or credit account with a bank or other formal institution: this figure includes households and MSMEs as well. However, an estimated 1.7 billion of these unbanked low income people are said to have access to mobile phones[16] which, together with other new technologies, can enable them to make financial transactions that are accessible and reliable.[17] However, for policy makers at the country level as well as global standard-setting bodies, these new models for delivering banking services to the unbanked present challenges because they implicate new actors and new relationships among actors. Unresolved legal issues surrounding the nature of e-money were already noted in the 2011 UNCITRAL Colloquium on Microfinance, together with their potential to negatively affect low income people.[18]

10. Most informal businesses have to operate with no more than a limited amount of family capital.[19] With no access to the traditional banking system, they often look to microfinance services when in need of funds. However, increasing commercialization of the sector, intense competition among microfinance institutions (MFIs), and often low levels of literacy — including financial literacy — among borrowers can considerably add to the challenges faced by micro borrowers seeking affordable financing. For instance, micro borrowers may end up paying interest at rates five or six times higher than formal businesses that can access bank services and get more favourable conditions for their loans. Legal reforms that easily, predictably and inexpensively grant micro and small borrowers the status of "legal" persons, would empower them to act as "regular" or "formal" sector borrowers (see para. 7 above). In this regard, it can be noted that an internationally recognized form of business registration would facilitate cross border trade for MSMEs operating in regional markets since it would provide a

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[12] F. Reyes, Latin American Company Law — A New Policy Agenda: Reshaping the Closely-Held Entity Landscape, 2013, page 23.

[13] See A/CN.9/727.

[14] See A/CN.9/756, para. 24.

[15] See Report of the Commission on the Legal Empowerment of the Poor, Making the Law Work for Everyone, Volume 1, 2008, page 13; and A/CN.9/756, para. 24.

[16] See CGAP website: www.cgap.org/topics/mobile-banking.

[17] Ibid.

[18] See A/CN.9/727, paras. 43-44.

[19] Report of the Commission on the Legal Empowerment of the Poor, Making the Law Work for Everyone, Volume 1, 2008, page 53.

recognizable international basis for transactions and avoid problems that can arise because of lack of recognition of the business form. The World Bank has found that economies with modern business registration "grow faster",[20] "promote greater entrepreneurship and productivity",[21] "create jobs",[22] "boost legal certainty"[23] and "attract larger inflows of foreign direct investment".[24] Legal reforms should also enable micro and small borrowers to obtain loans secured not by adding to their personal liability or that of their family or friends but by pledging their own market valued assets.

11. Unsurprisingly, informal businesses often have very short lives:[25] the conditions in which they operate make them particularly vulnerable to market shifts and at more frequent risk of bankruptcy. "They experience small economies of scale, there are higher risks in the establishment process and it is difficult to obtain financing".[26] Nevertheless, effective and ad hoc exit regimes for these businesses are absent in most of the countries with the result that in certain regimes entrepreneurs under financial stress would simply "close the door and walk away", while in others they would face potentially lifelong battles against creditors.[27] Appropriate legal reforms tailored to the needs of MSMEs would allow viable businesses to recover and continue to operate.

12. In order to help micro, small and medium-sized enterprises to adjust to immediate uncertainty, and graduate from a subsistence form of doing business to a growth mode characteristic of the formal sector, an enabling legal environment is thus needed. Such an environment is not limited to microfinance alone; it relates to the life cycle of a business — its establishment, operation and termination — and it also focuses on the supporting institutional legal framework. Nonetheless it is clearly relevant to microfinance since, "as a market-based approach to fighting poverty, microfinance is focused on developing entrepreneurship and expanding self-employment".[28] Furthermore, an enabling legal environment should not be confined only to micro-business. As definitions of micro-business and small enterprise vary substantially by region and from country to country,[29] the same

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[20] World Bank, IFC, Doing Business 2013, Smarter Regulations for Small and Medium-Size Enterprises, page 21.

[21] Ibid.

[22] Ibid., note 16, page 25.

[23] Ibid., page 21.

[24] Ibid., page 14.

[25] Report of the Commission on the Legal Empowerment of the Poor, cited, page 55.

[26] M. Uttamchandani, A. Menezes, The Freedom to Fail: Why Small Business Insolvency Regimes are critical for Emerging Markets, Economist's Outlook, 2010, page 263.

[27] Ibid., page 262.

[28] A/CN.9/727.

[29] "Lack of a clear definition is the main challenge in ensuring SME finance" see CGAP, Financial Access Report 2010, page 37, also including examples of various definitions of SMEs. A definition of SMEs and/or micro-business can be found in the European Union Commission Recommendation of 6 May 2003 (2003/361/EC), in Microenterprise Results Reporting: Methodology and Statistical Annexes FY 2010 19, U.S.AID available at www.usaid.gov/our_work/economic_growth_and_trade/micro/MRR_FY10_Methodology__Statistical_Annexes_82211_Final.pdf or. Different definitions of microcredit also exist, see for instance Basel Committee on Banking Supervision, Microfinance activities and the Core Principles for Effective Banking Supervision, August 2010, pages 34-35.

factors defining an enabling legal environment should pertain to both micro and small/medium-sized businesses.

13. The creation of an enabling legal environment also contributes to reinforcing the rule of law at country level which, as stressed by the General Assembly in its Resolution on the Rule of Law,[30] is conducive to the growth of a fair, stable and predictable system for generating inclusive, sustainable, and equitable development. It is worth noting that most recently the General Assembly, once again "recognizing the important contribution entrepreneurship can make to sustainable development",[31] has encouraged "governments to develop and implement policies … that address the legal, social and regulatory barriers to equal and effective economic participation and promote entrepreneurship". This appeal has also been extended to the international community which has been asked "to support the efforts of countries to promote entrepreneurship and foster the development of small and medium-sized enterprises and microenterprises".[32]

B. Alternative simplified business forms in the context of microfinance

14. The 2012 Eurobarometer on Entrepreneurship informs that a large majority of EU respondents to the Survey "Entrepreneurship in the EU and beyond" are of the opinion that it is difficult to start one's own business due to a lack of available financial support (79 per cent) and due to the complexities of the administrative process (72 per cent).[33] About 67 per cent of the respondents think self-employment is not feasible for them: impressions of the feasibility of self-employment reach as low as 19 per cent in one of the countries surveyed. The results in a selected group of non-EU countries are quite similar: the majority of respondents in eleven of the thirteen countries surveyed affirm that self-employment would not be feasible for them (the two exceptions being Brazil and China). A weak or absent enabling legal environment clearly influences people's perceptions about starting a business.

15. MSMEs need to operate under a recognized business model to attract investment and protect the interests of entrepreneurs. However, "traditional" business models — including incorporated companies and partnerships — present possible barriers to the creation of MSMEs. Such models are often not "fit for purpose" for micro and small businesses as their establishment: (a) is too costly (both in terms of money and time); (b) results in over-regulation (with high compliance costs); and (c) exposes entrepreneurs to significant risks of liability (see also para. 7 above).

16. As a response to this need for new forms of limited liability organizations, new corporate forms ("uncorporations"), including hybrid business forms, are being developed to facilitate the establishment and operation of micro and small and medium-sized businesses. In India, for instance, the Limited Liability Partnership

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[30] See A/RES/67/97.

[31] See A/RES/67/202.

[32] Ibid.

[33] 2012 Flash Eurobarometer on Entrepreneurship, http://ec.europa.eu/enterprise/policies/sme/facts-figuresanalysis/eurobarometer/index_en.htm, page 13.

(LLP) blends features of an incorporated company (in providing limited liability) with a partnership (for taxation and financing purposes). Establishment of an LLP can be done quickly, using a web portal, and involves very low cost. In Colombia, a major legal reform effort in the past 15 years has led to the development of a hybrid business form prioritizing flexibility, contractual freedom and limited liability: the so called *sociedad por acciones simplificada* (SAS). An SAS can be formed by one or more shareholders and can be incorporated via a relatively simple private or electronic document at minimal cost. The Simplified Stock Corporation Act (2008) relies on a system of ex post regulation in the form of enforceable standards during operation (as opposed to ex-ante regulation which creates rules to be met during establishment) to target abusive behaviour, thus lowering costs for establishing micro-businesses. In fact, compliance with strict requirements to set up a business, e.g. minimum legal capital or public deeds of incorporation, affects all entrepreneurs. On the other hand, when standards that are enforceable ex post are used (e.g. abus de droit or equal treatment rules, that leave discretion for adjudicators to determine ex post whether violations have occurred), there is a cost only for those entrepreneurs who breach the standards. However, this approach requires effective judicial infrastructure to oversee and enforce ex-post standards. Since the SAS legislation was enacted in 2008 about 181,742 SASes (the data refers to November 2012) have been set-up, most of which, it is estimated, were pre-existing informal businesses. The SAS account for over 95 per cent of market share and, according to 2009-2010 data, they have enabled a growth in formalization of business entities of over 25 per cent.

17. The legislation developed by the government of Colombia was inspired by France's legislation, among others. Specialized corporate structures in France enable entrepreneurs to effectively separate personal assets from company assets, through either the form of the structure itself, e.g. EURL (*entreprise unipersonnelle à responsabilité limitée*, a single person limited company), EIRL (*entreprise individuelle à responsabilité limitée*, limited liability individual entrepreneur), or through a declaration of assets as being non-sizeable. Such approaches can provide flexibility for entrepreneurs as well as better information for potential creditors. In Germany, the legislator chose not to create a new legal structure, but to instead facilitate entry by significantly reducing the start-up capital requirements (1 EUR instead of 25,000 EUR) and to reduce other costs of establishment by providing a sample protocol as well as low notary and registration fees. In the 12 months following the legislative reform (1 November 2008-1 November 2009) 19,563 companies were registered; as at January 2013, that number had risen to 76,377. In another example, the Angolan experience of facilitating micro-businesses through the creation of the Entrepreneur Unique Office has stressed the need to: (a) simplify the process of incorporation; (b) speed up the granting of permits to operate businesses; and (c) reduce incorporation fees. In Brazil the difficulty in achieving a better corporate regime for smaller firms, despite various waves of reform, has prompted a reflection on the assistance international standards in this field (now lacking) could have provided to challenge the status quo.

18. It is to be noted that most of these reforms are relatively recent (within the last decade) and that many jurisdictions still struggle to find an appropriate regulatory solution. Common threads to facilitate participation by micro-businesses include the need to provide for flexible, simplified and low-cost corporate structures,

accompanied by clear guidance and supported by streamlined and effective administrative and judicial infrastructure.

C. Effective dispute resolution mechanisms for micro-entrepreneurs and small and medium-sized enterprises

19. Dispute resolution has been identified as one of the elements defining the strength of a country's institutional framework for microfinance (another key element being transparent pricing regulation).[34] However, as a recent study has highlighted, dispute resolution mechanisms often lack accessibility and effectiveness, which suggests a need for new solutions to encourage the appropriate design of such mechanisms for microfinance.[35]

20. In the meantime, the microfinance industry has been mainly relying on self-regulation which, on its own, is not enough to provide efficient client protection. Although "financial institutions are the first line of defence when it comes to resolving disputes",[36] it has been noted that only a small number of countries require financial institutions to implement procedures for resolving customer complaints, set limits for timeliness of response, and ensure accessibility.[37] This corroborates the view that claims are likely to be better solved through self-regulatory channels if efficient external systems for solving disputes are also accessible to clients.

21. Depending on the country's situation, such systems could include simplified court procedures, expedited commercial mediation and arbitration, or financial ombudsman offices. They could also include more than one mechanism, since these are not "mutually exclusive".[38]

22. States' replies to the microfinance questionnaire circulated in 2011 by the Secretariat upon request of the Commission[39] indicate that in some cases small claims tribunals have been set up, as in Israel, the Philippines and states in the United States. Other countries have established ombudsman services or specialized institutions for the resolution of disputes resulting from financial claims. However, not all of these systems (whether ombudsman, arbitration or otherwise) can render binding decisions. Some systems rely more on voluntary compliance by the party at fault: for instance in Italy, where, if a financial institution does not comply with the decision of the *arbitro bancario finaziario*,[40] a notice of non-fulfilment is made public.

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[34] Economist Intelligence Unit, Global microscope on the microfinance business environment 2012, page 23.

[35] Ibid.

[36] See CGAP, Financial Access Report 2010, page 31.

[37] Ibid.

[38] Ibid.

[39] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), cited, para. 246.

[40] The title can be roughly translated as "financial banking arbitrator". The functions, however, cannot be compared to those of arbitrators in arbitration proceedings.

23. Trinidad and Tobago, one of the few low-income countries with a financial ombudsman, has an Ombudsman Office based on a voluntary scheme.[41] The Office not only provides mediation services free of charge to aggrieved bank (and insurance) clients (individuals and small business), but it also promotes financial literacy among potential clients, using various formal and informal channels. However satisfactory, the experience of the Office prompts consideration of the importance of enshrining such regimes in law so that significant areas of complaint are not left outside the jurisdiction of the Ombudsman (due to a lack of "buy-in" by financial services providers participating in the scheme). For instance, the terms of reference of the Office do not include complaints in relation to general interest rate policies or pricing of products or services. Furthermore, "giving statutory backing to the Ombudsman scheme [would] also facilitate the introduction of appropriate sanctions for non-compliance".[42]

24. In general, legislation on ADR mechanisms addressing the needs of MSMEs doesn't seem to be widespread. Only recently, for instance, new legislation on arbitration has been passed in Colombia,[43] which establishes that arbitration centres must offer free arbitration proceedings for low-value cases (up to USD 13,000 approximately). These are intended to be short proceedings in which the parties do not require representation by a lawyer. The Ministry of Justice will issue regulations to set the minimum number of free arbitration proceedings to be offered annually by arbitration centres. The new law also makes it possible to use online mechanisms at any stage of the arbitration proceedings and for any purpose, thus reducing administrative cost. As a further development of this law (since it is based on its provisions), Colombia is in the process of issuing a regulation on on-line dispute resolution that aims at resolving low value disputes including those involving micro and small business. Prior to this recent legislation on arbitration, the Chamber of Commerce of Bogotá supported the development of arbitration for MSMEs, offering free proceedings in those disputes where one of the parties was an MSME. The Chamber's arbitration rules also provide for a sole arbitrator proceeding with a decision to be rendered within one month (the term can be extended for an additional month). It is estimated that in the last four years approximately 300 MSMEs have benefitted from this service.[44] Still in Colombia, the Banco Caja Social in the last decade initiated a pilot conciliation process to recover non-performing small loans from clients, in addition to the bank's established use of collection houses and litigation. After the completion of the pilot, the bank found that the conciliation mechanism had produced a significantly higher outcome in the recovery of small amount loans than the other two methods, i.e. the use of collection houses and litigation in court.[45]

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[41] Ibid.

[42] Office of the Financial Services Ombudsman, Annual Report 2011, Trinidad and Tobago, page 8.

[43] Law 1563/2012, 12 July 2012, available at: www.cancilleria.gov.co/sites/default/files/Normograma/docs/ley_1563_2012.htm.

[44] See Portafolio.co, Nueva Ley de Arbitraje, 10 October 2012 available at: www.portafolio.co/opinion/nueva-ley-arbitraje.

[45] A. Alvarez, The private sector approach to commercial ADR: commercial ADR mechanisms in Colombia, 2010, available at www.wbginvestmentclimate.org/uploads/Private%20Sector%20Approach%20to%20Commercial%20ADR_%20the%20case%20of%20Colombia%20.pdf.

25. Other countries have perceived the need for legislation (or regulation) on ADR mechanisms applicable to microfinance. In Nigeria, for example, "microfinance banks in Lagos state have been calling for a special court to try loan default cases, to which the Central Bank of Nigeria agreed in 2011. The court has not yet been established, although the Central Bank is currently backing two bills that have direct ties to improving dispute resolution: the Financial Ombudsman Bill, which would help to resolve financial disputes more quickly, and the Alternative Dispute Resolution (ADR) Bill, which would promote and regulate ADR in Nigeria".[46]

26. Alternative dispute resolution mechanisms may also be of significant assistance in resolving disputes other than the most common complaints in microfinance. The International Financial Corporation has noted that "when ADR structures are efficient, they may be the most effective way to recover secured assets ..."[47] and this could be applicable in the context of secured lending to microborrowers. The Model Inter-American Law on Secured Transactions, prepared by the Organisation of American States (OAS), explicitly provides for ADR mechanisms to be utilized to resolve all kinds of disputes, including those relating to enforcement (see Article 68). Colombia is in the process of modernizing its legislative framework on secured transactions and the draft law includes a provision on ADR, based on the OAS Model Law.

27. The above examples indicate that an efficient dispute resolution framework for microfinance users would require "laws and regulations governing relations between service providers and users and [ensuring] fairness, transparency and recourse rights".[48] Such a system would promote accessibility both through recourse mechanisms under financial institutions' internal procedures, and dispute resolution through a third-party ADR mechanism. Facilitating access to redress mechanisms also implies the possibility for complainants to lodge a claim in their own language, at little or no cost, and to have easy-to-reach points of access to the system.[49] An efficient legal regime for microfinance would ensure enforceability of outcomes reached in mediation, arbitration proceedings or via an ombudsman. Finally, such a system would promote "financial literacy and capability by helping users of financial services to acquire the necessary knowledge and skills to manage their finances".[50]

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[46] Economist Intelligence Unit, Global microscope on the microfinance business environment 2012, page 59.

[47] IFC, Secured Transactions Systems and Collateral Registries, January 2010, page 54, available at www.wbginvestmentclimate.org/uploads/SecuredTransactionsSystems.pdf.

[48] O. P. Ardic, J. A. Ibrahim, N. Mylenko, Consumer Protection Laws and Regulations in Deposit and Loan Services: A Cross-Country Analysis with a New Data Set, The World Bank, Consultative Group to Assist the Poor, January 2011, page 2.

[49] See also CGAP, A Guide to Regulation and Supervision of Microfinance, Consensus Guidelines October 2012, page 59.

[50] O. P. Ardic, J. A. Ibrahim, N. Mylenko, Consumer Protection Laws and Regulations in Deposit and Loan Services: A Cross-Country Analysis with a New Data Set, The World Bank, Consultative Group to Assist the Poor, January 2011, page 2.

D. An enabling legal environment for mobile payments

28. Branchless banking[51] (of which mobile payments are a subset) has been identified as an effective means of achieving financial inclusion by facilitating access to financial services that is both convenient and affordable. Given the high levels of penetration of mobile phone access in many countries around the globe (for instance in Pakistan there are 110 million cell phone users but only 15 million bank account users; and 400,000 telecom agents as against only 12,700 bank branches), technology is an effective means of providing such access. Benefits of branchless banking, whether through mobile phones or other arrangements, include: improved access for people in remote areas; reduced transaction costs; improved efficiency for customers and service providers; and fewer losses of funds (as a result of a reduction in the number of cash transactions).

29. There are thought to be some 50 mobile payments models currently in existence, with a wide range of regulatory frameworks and practices in place. In Kenya, for instance, the Safaricom experience uses a blend of existing and amended laws, and the creation of new laws, to provide an appropriate regulatory framework. Guiding principles of the country legislative framework include efficiency and accessibility (encouraging client access to financial services, reducing barriers to entry for new entrants), client protection (responsibility for which should lie with the provider, and include accessible and efficient procedures and channels for resolution of client queries or complaints), technological neutrality (in which the regulatory framework provides for electronic retail transfers irrespective of the underlying technology used).

30. A new "e-money" law was recently issued in Peru,[52] under which e-money is defined as a monetary value stored in an electronic device, widely accepted as a means of payment, can be converted back to cash, and is not considered a deposit. The new law seeks to ensure security, transparency and reliability for clients as well as foster competition and innovation among businesses. For that purpose, it allows the provision of e-money based services only to entities supervised by the Superintendencia de Banca, Seguros y AFP — financial intermediaries already in the market and new firms that can enter the market as specialized e-money issuers. The new law is complemented by a comprehensive legal framework already in place at the time the law was passed that addresses inter alia payment systems, anti-money laundering, integral and operational risk regulation, internal audit and retail agents' regulation. The most important purpose of the law is to boost financial inclusion; thus, it is expected that the regulations accompanying the law, to be issued by the Superintendencia de Banca, Seguros y AFPs, will define a simplified e-money "account", similar to the concept of basic deposit accounts already existing in Peruvian legislation. That is, a low-risk product with minimal pre-requisites for contracting, i.e. a valid Peruvian national identification document, in order to open

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[51] Branchless banking generally refers to the delivery of financial services outside conventional bank branches, using agents or other third-party intermediaries as the principal interface with customers, and relying on technologies (POS terminals and mobile phones) to transmit the transaction details.

[52] Law nr. 29985 was approved by the Congress on 12 December 2012 and published on 17 January 2013.

the account at a retail agent. Such accounts have balance and transaction limits, per month and per day.

31. In Sri Lanka, the Mobile Payment Guidelines[53] promote safety and effectiveness of mobile payment services and enhance user confidence. The Guidelines require the licensed service provider to adhere to all applicable laws, including the Electronic Transactions Act No. 19 of 2006. The Act includes features to recognise mobile transactions as legally valid electronic transactions, thus facilitating the transition to this form of business. The Act is largely influenced by UNCITRAL texts (including the UNCITRAL Model Law on Electronic Commerce, 1996, and the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005).

32. Notwithstanding the wide range of regulatory frameworks and practices, of which the above are just a few examples, there appears to be increasing convergence on a number of principles that are crucial in developing mobile payments legislation, including: use of agents by banks and non-bank e-money issuers; regulation of e-money issuers; protection of the "float" (i.e., the public's funds held in the form of e-money by the e-money issuer) of non-bank e-money issuers;[54] and financial client protection, to name just a few. Emerging concerns include interoperability as between branchless banking schemes; competition and fair access to payment systems and communications infrastructure; and security of data.

33. An enabling legal environment for mobile payments should thus create conditions to address these issues, while promoting innovation, fostering fluid market entry and exit by diverse players, and facilitating sustainable market development. The legal environment needs to be dynamic, adapting and evolving as the market enters different stages. The initial focus would be on facilitating innovation by removing barriers to entry and ensuring a level playing field, providing equal legal standards for diverse players engaging in the same activity. As innovations are implemented the enabling environment would turn to mitigating operational risk and enhancing client protection. As consolidation sets in, prudential regulation and addressing systemic risks becomes more relevant. A mature market needs to remain competitive and efficient to deliver productivity gains.

34. A number of components can be identified for building an enabling environment for mobile payments, including precise definitions of key concepts such as "deposit", "payment" and "electronic money" which would provide clarity and uniformity in interpretation. Coordination between regulatory agencies would be important to ensure a coherent regulatory environment including the development of technological risk regulation and mitigation strategies prior to electronic money services becoming available. Further, development of a competitive market structure would foster innovation, remove barriers to entry and lower costs. New prudentially supervised entities should be created to manage the e-money: such capital structure entities should ideally allow all types of service providers to enter the market. Client protection should not be downplayed: allocation of the burden of loss concerning mobile payments should be borne by the

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[53] Mobile Payment Guidelines No. 1 and 2 of 2011 issued pursuant to Regulations under Payment and Settlement Systems Act No. 28 of 2005.

[54] See CGAP, A Guide to Regulation and Supervision of Microfinance, Consensus Guidelines, October 2012, page 77.

service provider: countries where mobile financial services are offered directly by telecom agents may thus consider issuing separate regulations for establishing the responsibilities of their agents.

35. The legal environment for mobile payments should also take into account that such payments are at the intersection of two established areas of international law: namely electronic transactions and international payments. Existing UNCITRAL instruments, including the Convention on the Use of Electronic Communications in International Contracts, the Model Law on Electronic Commerce, and the Model Law on International Credit Transfers, provide the necessary building blocks for developments in mobile payments. As UNCITRAL develops further guidance relevant to the topic, coordinated guidance with other standard setting bodies relevant to branchless banking should be considered.

E. Legal issues of access to credit for micro-business, small and medium-sized enterprises

36. Businesses worldwide identify access to credit as one of the main obstacles they face. This holds particularly true for MSMEs. "Good credit information systems and strong collateral laws help overcome this obstacle".[55] In the case of microfinance and micro-business, provisions addressing transparency in loan terms, overcollateralization and abusive collection practices also have a role to play. It is important to clarify that transparency in lending is not an issue of prudential regulation (which has to do with the safety and soundness of deposit-taking and systemic risk regulation in the macro-economy). Rather it is a concept relating to clients' rights and their protection, and as such it is relevant for commercial law.

37. There is considerable evidence that many MFIs price their products in a non-transparent manner, obscuring the true price of loans and confusing clients through techniques such as "flat" interest and complex fee structures. A "downward spiral" process draws responsible MFIs into these practices in order to compete, because transparent prices look more expensive than non-transparent prices, even though the underlying product is the same. An absence of "truth-in-lending" legislation in many countries has allowed this situation to perpetuate, resulting in non-transparent, non-competitive and dysfunctional markets in which lack of price competition allows some institutions to generate high profits from the poorest in society. Truth-in-lending makes use of APR (annual percentage rates) or EIR (effective interest rates) to compare the true cost of various types of loans. The APR and EIR are standardized annualized rates, presenting the actual cost of the loan to the borrower. To be most accurate for the client, they should include not only interest but also all other compulsory fees (e.g. training fees, insurance, and security deposit), allowing the borrower to make an informed decision.

38. Transparent pricing data from fifty-nine MFIs in the Philippines demonstrates the existence of a "price curve" in microfinance. The smallest loan sizes have the highest prices, because of the correlation with the higher operating cost to the MFI of servicing these loans. This price curve needs to be considered when addressing

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[55] World Bank, IFC, Doing Business 2013, Smarter Regulations for Small and Medium-Size Enterprises, page 22.

the effectiveness of regulated price caps[56] in microfinance — a common feature of microfinance regulatory environments (for example in India, Colombia and the West Africa Economic and Monetary Union region). An unintended consequence of such caps is that they can lead to a reduction in the supply of smaller loans (those typically aimed at the most financially excluded in society) as these loans cannot be sustainably delivered without charging higher prices, whereas larger micro-loans can have prices under the cap and still be profitable for lenders. Therefore, the frequently advocated introduction of interest caps can, in the absence of transparency in pricing, be ineffective. Overall, a non-transparent pricing regime introduces serious market imperfections and confusion, affecting consumers, MFIs, investors and regulators alike.

39. Transparency is thus crucial, and self-regulation in this realm has not proven sufficient to protect clients, notwithstanding efforts launched by the industry, such as the global "Smart" Campaign (which includes, but is not exclusively about, transparency).[57] While self-regulation signals a commitment to responsible finance and is an important step for pricing transparency to function effectively, it includes no legal enforcement mechanism, relying rather on market forces to distinguish among MFIs. Furthermore, self-regulation is voluntary, while transparency works best when consistent, i.e. when clients can compare a product across all lenders and receive the same information, ideally in the same format. Truth-in-lending legislation in the United States, the Philippines and Cambodia demonstrates this point clearly: laws in these countries set up pricing disclosure regimes, mostly through the use of APR or EIR of the requirement that prices be calculated via the declining interest rate method, offering protection to borrowers against pricing abuse.

40. Transparent pricing is therefore an essential element in creating an enabling environment for micro-business: although important for any loan agreement, transparency issues are of most concern to unsophisticated borrowers who cannot afford counsel. The following can be suggested as essential when building transparency into an enabling legal environment: (a) standard pricing formulas (with appropriate disclosure standards); (b) standard repayment schedules; (c) enforcement of sanctions to ensure implementation of disclosure requirements; and (d) education of clients and MFIs about disclosure requirements as well as relevant communication mechanisms.

41. As mentioned above, credit reporting and the legal rights of borrowers and lenders in secured transactions are among the measures that better facilitate access to credit and make its allocation more efficient; and they work best when implemented together. Information-sharing through credit reporting systems or bureaus (though not the only risk assessment tool)[58] helps lenders assess the creditworthiness of clients, reduces processing time for loans and leads to lower

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[56] A "price cap" is more inclusive than an "interest rate cap". It may include other costs, such as processing fees, and sometimes the cost of other services that are bundled with the loan, such as insurance, see for instance mfTransparency.org at www.mftransparency.org/zambias-new-price-cap-good-intentions-with-unintended-consequences/.

[57] The Smart Campaign is a global effort to promote client protection in the microfinance industry. The Campaign is based on a set of principles that assist MFIs in delivering financial services respectful of clients' rights. See www.smartcampaign.org/.

[58] World Bank, IFC, Doing Business 2013 Smarter Regulations for Small and Medium-Size Enterprises, page 72.

default rates, thereby facilitating access to credit, particularly for small firms. For instance, one study noted that in countries where credit bureaus exist only 27 per cent of small and medium-sized enterprises (SMEs) report high financing constraints, against 49 per cent in countries without credit bureaus. Similarly 40 per cent of SMEs are able to obtain a bank loan in countries with credit bureaus, as opposed to 28 per cent in countries without. As noted at the 2011 UNCITRAL Colloquium on Microfinance, therefore, adequate legislation is needed to support the development of, and proper regulation of credit bureaus, which play an important role in providing accurate financial information to lenders to help reduce imprudent lending, thus limiting losses and leading to cheaper credit for all.[59]

42. The report "Selected legal issues impacting microfinance", prepared by the Secretariat in 2012, notes that while microfinance does not necessarily involve secured lending, when it does "fragile borrowers … may be utilizing essential household items to secure loans for micro trade as well as consumption purposes".[60] Although there are MFIs that do not require collateral, for example Fundoz Mikro in Poland and Grameen Bank in Bangladesh, there is an increasing trend to make use of collateral, as a complementary product to traditional unsecured methods such as group lending. Since the valuation of collateral in microloans is generally difficult, due to the type of assets used, overcollateralization is almost a standard practice in this market and much more prevalent than in secured loans for bigger businesses. The extent of overcollateralization also depends on a country's legal framework and the efficiency of courts in expeditiously enforcing payment of debts. Evidence suggests that microlenders take collateral simply because the legal system allows them to do so at a reasonable cost. This corroborates the view that it is difficult to define secured microlending as true asset-based lending since some of the features of asset-based lending, such as determining advances on the basis of the collateral value, are missing.

43. As with secured lending to non-micro businesses, however, a secured micro-lending model should be based on the borrower's ability to generate income (and thus repay the debt) rather than on the collateral, which is secondary and to which recourse is had only in the case of default. Therefore, an enabling legal environment for MSMEs, while being guided by the secured transactions regime as set out in the UNCITRAL Legislative Guide on Secured Transactions, could consider certain adaptations to target the particular needs of microborrowers (for example, limited enforceability or exemption of certain assets from enforcement, alternative enforcement mechanisms, e.g. ADR) and to facilitate registration and thus transparency of microloans (for example, through reduction of or exemption from registry fees).

F. A legal framework for insolvency and winding up processes of MSMEs

44. Insolvency regimes are fundamental to a sound investment climate and help promote commerce and economic growth.[61] An important factor is that they

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[59] A/CN.9/727, para. 32.

[60] A/CN.9/756, para. 3.

[61] World Bank, IFC, Doing business 2013, Smarter Regulations for Small and Medium-Size Enterprises page 72.

enhance the willingness of creditors to lend,[62] which is particularly relevant for MSMEs. According to the 2012 INSOL Africa Roundtable, there are still countries where banks will not lend to MSMEs because of the risk of non-recovery and lack of confidence in the court system.[63] As previously mentioned (see para. 11), MSMEs are particularly vulnerable since "they bear an excessive burden of risk…[and] the global financial crisis has exacerbated this problem, creating a scarcity of working capital for SMEs, a decline in equity finance, increased rates of rejected applications for finance, higher interest rate spreads, larger collateral requirements and an increase in insolvency".[64] Commercial insolvency regimes, however, are typically too complex and expensive for MSMEs and consumer insolvency regimes, from which MSMEs could benefit, may not exist or take insufficient account of the commercial nature of the debt. Moreover, the informal mechanisms (described in the UNCITRAL Legislative Guide on Insolvency as voluntary restructuring negotiations) widely used for the resolution of corporate insolvency in a number of developed countries, as well as expedited procedures (also addressed in the Legislative Guide) may not be widely available elsewhere. This is particularly relevant in developing countries, where the economy is often largely based on the informal sector: when informal entrepreneurs find themselves in a situation of financial distress, with no access to funds to overcome it, they become insolvent. A lack of appropriate legal regimes and mechanisms or outdated or inefficient legal regimes dealing with insolvency prevent viable small businesses from surviving or being revived, as there is no means by which to find a satisfactory settlement with creditors. Given their characteristics, MSMEs thus need alternative insolvency regimes that are expedited, streamlined and cost-efficient, and which should facilitate "exit and re-entry of the entrepreneurs" in the market.

45. An insolvency regime covering MSMEs should draw both from the regimes regulating the insolvency of corporations and those regulating insolvency of natural persons. Both have features that meet the needs of MSMEs: the corporate regime focuses on asset maximization and preservation of the company; insolvency of natural persons focuses on discharge or providing a fresh start to support and promote entrepreneurial activity. An insolvency system covering MSMEs should combine these characteristics: it should aim to maximize assets and preserve the company on one hand, and provide for discharge and a fresh start for the entrepreneurs involved on the other. The goal would be to distinguish the effects of insolvency on the enterprise from those on the individuals behind the enterprise. Continuity is possible for an incorporated entity, but more difficult for an individual operating without the protection of incorporation. A balance between the interests of the different stakeholders is required, and punitive approaches should be avoided. An insolvency regime covering MSMEs should also be adaptable to the social and economic features of each jurisdiction and it should consider the definition of small and medium-sized enterprise provided in that jurisdiction.

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[62] M. Uttamchandani, A. Menezes, The Freedom to Fail: Why Small Business Insolvency Regimes are Critical for Emerging Markets, Economist's Outlook, 2010, page 264.

[63] A. Idigbe, O. Kalu, Best practice and tailored reforms in African insolvency: lessons from INSOL, December 2012, footnote 6.

[64] M. Uttamchandani, A. Menezes, The Freedom to Fail: Why Small Business Insolvency Regimes are Critical for Emerging Markets, Economist's Outlook, 2010, pages 263-264.

46. The example of OHADA can be provided. OHADA is modernizing its Uniform Act on Insolvency. The draft submitted by the Permanent Secretariat to OHADA member states (which are reviewing it and so the final version might eventually differ) makes the insolvency framework, inter alia, more adaptable to the needs of MSMEs. The new regime would provide simplified procedures for reorganization and liquidation of MSMEs both in the pre-insolvency phase and when the MSME debtor is insolvent. Broadly speaking, the ad hoc regime for MSMEs would provide shorter time-frames, lighter evidentiary requirements, fewer procedural steps, and permit fewer appeals (or none at all). However, courts would have the discretion to refuse to apply the simplified procedure and could decide to use the "standard" framework. Reforms are taking place in some Indian states as well.[65] Those states have amended the Provincial Insolvency Act from 1920, focusing on removing criminal punishments and reducing stigma; and introducing less cumbersome procedural requirements. The Reserve Bank of India has promoted a Debt Restructuring Scheme for viable SMEs, which is worked out and implemented within 90 days from the date of receipt of request for restructuring from the borrower. Furthermore, the establishment of specialized debt recovery tribunals has expedited the resolution of claims, increasing the probability of repayment by 28 per cent and reducing interest rates on loans by 1 to 2 percentage points.[66]

47. In Colombia, a recent law[67] has established an insolvency system for natural persons that introduces hybrid proceedings and simplified procedures, removes criminal liability for the insolvent debtor and promotes discharge: discharge is also applicable to merchants. However, apart from discharge, merchants remain subject to the corporate insolvency regime, which makes no differentiation as to size or type of the enterprise's operation and is essentially designed to address problems of large enterprises, thus bringing with it high direct costs, complex requirements and procedures, and sophisticated mechanisms for creditors' participation.

48. An efficient framework to address the insolvency of MSMEs cannot be based on amended legislation alone, however. Like all insolvency systems, institutional and administrative arrangements for making the system work must also be developed or strengthened to ensure the effectiveness and efficiency of the insolvency resolution mechanisms developed. Resolving disputes, for instance, is particularly relevant and should not be limited to the court-based system: alternative dispute resolution regimes, including arbitration and mediation, could also be made available. Other elements to consider include insolvency representatives, the administrative structure of the regime, strong credit information systems (through credit bureaus, for instance), and capacity-building for key players involved in the insolvency proceedings (e.g. judges).[68]

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[65] Some of the states include Andhra Pradesh, Tamil Nadu, Goa and Uttar Pradesh.

[66] World Bank, IFC, Doing business 2013, Smarter Regulations for Small and Medium-Size Enterprises page 22.

[67] Ley 1564 de 2012, 12 July 2012, available at: www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=48425.

[68] See also M. Uttamchandani, A. Menezes, The Freedom to Fail: Why Small Business Insolvency Regimes are Critical for Emerging Markets, Economist's Outlook, 2010, pages 267-268.

III. The way forward

49. Micro, small and medium-sized enterprises, which are often established informally without carefully considering and clarifying their business structure, continue to suffer the detrimental effects of sub-optimal legal rules in many respects. These firms usually lack the organization and resources necessary to lobby for the required legislative overhaul. On the other hand, the informal sector perpetuates non-compliance with the law, increasing risks for loss of tax revenue, corruption, and a poor environment for investment. It will not naturally evolve into a formal sector, which allows businesses to grow, obtain credit on normal terms, increase employment and contribute to the tax base. Excessive regulation, too many laws and too many outdated laws, will discourage transition of business to the formal sector. An improved legal infrastructure for MSMEs is needed which should rest on a global policy vision and not just isolated devices. Simply adapting traditional system laws to MSMEs will not work. Experience has shown that transposing laws from other, more highly-developed, jurisdictions is similarly unhelpful, since law needs to fit the culture and circumstances of the country. It will thus be important to prepare principles that are global in nature and can be tailored by countries according to their needs. UNCITRAL has proven to be well-placed as a forum for developing such general principles and legislation that is acceptable by a wide range of countries with different legal traditions. Therefore, the Commission could play a leading role in helping to create a level playing field by promoting best practices and sharing knowledge with countries seeking guidance in this area.

50. There was broad consensus among participants at the Colloquium recommending that a Working Group be established to address the legal aspects necessary for the creation of an enabling legal environment for MSMEs. It was stressed that work in establishing such an environment would be consistent with the Commission's primary mandate to promote coordination and cooperation in the field of international trade, including regional cross-border trade. This was consistent also with the findings of the 2011 UNCITRAL Colloquium that microfinance had become a globally recognized form of cross border finance, that it kept growing world-wide, that legal, regulatory and market gaps kept the sector from operating as well as it should and that this had created a role for international legal standard-setting.[69] Noting that cross-border recognition of these new and varied legislative issues and emerging structures was needed for MSMEs operating in regional markets in order to provide a recognizable international basis for transactions and avoid problems that can arise because of a lack of business recognition,[70] participants further suggested that a flexible tool, such as a legislative guide or a model law according to the topics, would contribute to harmonizing efforts in this sector and provide momentum for reforms which would further encourage micro-business participation in the economy. At the same time, it was pointed out that consideration could be given to addressing certain of the subject

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[69] A/CN.9/727, paras. 6-7.

[70] In this respect, contract law differs significantly from other fields of law, such as company law, where businesses are bound by the forms of legal entity created by the legislator, and the diversity of national forms of legal entity does indeed cause problems for SMEs. See, International Chamber of Commerce, ICC Position on the European Commission proposal for a regulation on a Common European Sales Law, July 2012, page 2, available at ICC Position on the European Commission proposal for a regulation on a Common European Sales Law.

matters of the Colloquium in the context of relevant existing Working Groups, so as to make best use of Secretariat resources.

51. Whether handled in a single Working Group or allocated to various Working Groups, the guidance provided by the Commission should, nevertheless, be developed in a strongly coordinated fashion, so to result in a coherent and homogeneous framework addressing the business cycle of MSMEs. The starting point could be guidance that allows for simplified business start-up and operation procedures. In this regard, attention would be drawn to simplified corporate structures with easy establishment and minimal formalities, limited liability, flexible management and capitalisation structure, plus ample freedom to contract. Considering the current absence of any internationally recognized standards or direction for countries wishing to adopt effective new forms, such a legal framework would significantly contribute to the formalization of thousands of enterprises that would otherwise remain in the informal sphere.[71]

52. The Commission may then wish to focus on difficulties faced by MSMEs in accessing redress mechanisms, in particular court-based mechanisms. The Commission may thus wish to consider whether it would be appropriate to undertake preparation of notes[72] on how a system of dispute resolution in the field of microfinance should be organized. Such notes could be designed for use by legislators and administrators in considering whether a country has established a system that effectively serves the needs of MSMEs. Furthermore, given the exponential increase in Internet usage around the world (and the corresponding ability to resolve disputes online), consideration could be given to the feasibility of using online dispute resolution (ODR) methods for microfinance-related disputes. ODR systems have the potential to reach the low income people residing in rural areas: in Africa, Internet usage increased by nearly 3000 per cent over the last 10 years, in the Middle East by nearly 2,250 per cent, in Latin America by over 1,200 per cent (for instance Brazil ranks fifth, Mexico twelfth and Colombia eighteenth in the world in number of individuals connected to the internet), and in Asia by nearly 800 per cent. Globally, Internet usage has increased by 528 per cent over the last decade: approximately one third of the world's population is now connected to the Internet. That number is expected to increase to 47 per cent by 2016.[73] The Commission might thus consider whether the legal standards currently under consideration in UNCITRAL's Working Group III, dealing with low-value cross-border e-commerce disputes, could be adapted to a microfinance context.

53. Electronic transfers (including mobile payments) offer MSMEs operating in the informal sector the opportunity to have effective access to financial services. UNCITRAL's existing instruments on e-commerce and international credit transfers can accommodate mobile payment systems, as recognized at the Colloquium (see para. 35 above). In order to broaden their scope, however, it was suggested that

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[71] F. Reyes, Latin American Company Law — A New Policy Agenda: Reshaping the Closely-Held Entity Landscape, 2013, page ii.

[72] For instance, in the past the Commission prepared notes to assist arbitration practitioners during the course of arbitral proceedings, see UNCITRAL Notes on Organizing Arbitral Proceedings (1996).

[73] See Internet World Stats: Usage and Population Statistics, available at www.internetworldstats.com/stats.htm.

UNCITRAL should monitor market developments with a view to broadening the scope of these legal instruments, being careful to avoid duplication with other standard-setting bodies working in the field. The development by the Commission of a document summarizing the recommendations of relevant bodies would provide a reference guide for countries designing laws in this area, as well as the recompilation of best practices gathered from the successful experiences of countries that have set an enabling legal environment for mobile financial services and transactions, and would like to share laterally to other peer countries their experiences. The provision of a clear definition of key concepts such as deposit, payment and electronic money, as well as guidance on apportioning of the risks between providers and clients, would be of particular importance.

54. An enabling legal environment promoting access to credit for MSMEs would address commercial law matters arising in the context of secured and unsecured credit agreements. Guidance from the Commission, based on best practices, could deal with transparency in lending and enforcement in all kinds of lending transactions. The benefits of applying the recommendations of the UNCITRAL Legislative Guide on Secured Transactions to MSMEs should be the basis for discussion. Additional issues for guidance could include: (i) use of possessory and non-possessory security interests; (ii) assets in which security rights may not be created or are unenforceable (e.g. employment benefits and household items); (iii) exemption of microfinance secured transactions from any registration or searching fee; (iv) acquisition finance (e.g. financial leasing); (v) unfair collection and enforcement practices; (vi) asset valuation and over-collateralization; (vii) the importance of group guarantees; and (viii) the importance of credit bureaus.

55. Finally, the Commission may wish to address the insolvency of MSMEs with the objective to ensure fast-track procedures and business rescue options so as to develop adequate and workable alternatives to formal insolvency processes in line with both the key characteristics of an effective insolvency system and the needs of MSMEs.[74] Guidance could focus, inter alia, on matters such as use of informal procedures; commencement of proceedings, including expedited proceedings; applicable remedies, e.g. reorganization or liquidation; treatment of assets; and the administrative structure of the insolvency regime. Guidelines already developed by international organizations, such as UNCITRAL's Legislative Guide on Insolvency Law (2004) and INSOL's Statement of Principles for a Global Approach to Multi-Creditor Workouts, can serve as building blocks for this work.

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[74] A. Idigbe, O. Kalu, Best practice and tailored reforms in African insolvency: lessons from INSOL, December 2012, page 2.