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## Technical assistance to law reform

### Note by the Secretariat

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## I. Introduction

At its forty-third session, in 2010, the Commission requested the Secretariat to consider ways of better integrating its technical cooperation and assistance activities into activities conducted on the ground by the United Nations in particular through the United Nations Development Programme or other country offices of the United Nations.<sup>1</sup> The present note is submitted pursuant to that request. It contains a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms. The Secretariat suggests that the Commission should finalize, approve and transmit the guidance note to the General Assembly for endorsement with the request to the Secretary-General to circulate it across the United Nations system.

## II. Draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms

### **“Guidance note on strengthening United Nations support to States to implement sound commercial law reforms**

#### A. About this Guidance Note

1. This Guidance Note provides the guiding principles and framework for strengthening United Nations support to States, upon their request, to implement sound commercial law reforms on the basis of internationally accepted standards. It is framed within the United Nations mandate to promote higher standards of living, full employment, and conditions of economic and social progress and development, as well as solutions of international economic, social and related problems.<sup>2</sup> It is a contribution to the implementation of the international development agenda and General Assembly resolutions calling for: (a) enhanced technical assistance and capacity-building in the commercial law field; (b) better integration of the work in that field in the broader agenda of the United Nations; (c) greater coordination and coherence among the United Nations entities and with donors and recipients; (d) greater evaluation of the effectiveness of such activities; (e) measures to improve the effectiveness of capacity-building activities; and (f) placement of national perspectives at the centre of United Nations assistance programmes.

2. This Guidance Note is relevant to all United Nations departments, offices, funds, agencies and programmes as well as other donors that deal with: (a) mobilizing finance for sustainable development; (b) reducing or removing legal obstacles to the flow of international trade and achieving international and/or regional economic integration; (c) private sector development; (d) justice sector reforms; (e) increasing resilience of economy to economic crisis; (f) good governance, including public procurement reforms and e-governance; (g) empowerment of the poor; (h) preventing and combatting through education economic crimes

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<sup>1</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 336.

<sup>2</sup> The Charter of the United Nations, article 55 (a) and (b).

(e.g. commercial fraud, forgery and falsification); (i) addressing root causes of conflicts triggered by economic factors; (j) addressing post-conflict economic recovery problems; (k) addressing specific problems with access to international trade by landlocked countries; and (l) domestic implementation of international obligations in the area of international commercial law and areas related thereto.

## **B. Guiding Principles**

### **1. The United Nations work in the field of international commercial law should be an integral part of the broader agenda of the United Nations**

1. The establishment of sound rules furthering commercial relations is an important factor in economic development. This is because commercial decisions are taken not in isolation but in the context of all relevant factors, including the applicable legal framework.

2. The modern and harmonized international commercial law framework is the basis for rule-based commercial relations and an indispensable part of international trade. In reducing or removing legal obstacles to the flow of international trade, especially those affecting developing countries, it also contributes significantly to universal economic cooperation among all States on a basis of equality, equity, common interest and respect for the rule of law, to the elimination of discrimination in international trade and, thereby, to peace, stability and the well-being of all peoples. The implementation and effective use of such framework are also essential for advancing good governance, sustained economic development and the eradication of poverty and hunger. They can thus produce the positive multifaceted impact on all three pillars upon which the United Nations is built: peace and security, human rights and development.

3. For these reasons, the United Nations work in the field of international commercial law should be better integrated at the headquarters and country levels in United Nations operations, be they in development, conflict-prevention, post-conflict-reconstruction or other context.

### **2. The need for assistance with domestic commercial law reforms should be regularly assessed**

1. The adequate local capacity to enact, enforce, implement, apply and interpret the sound commercial law framework should be in place for the expected benefits of rule-based commercial relations and international trade to accrue. Often States need international assistance with building the required local capacity to enact necessary rules and adequately enforce, implement, apply and interpret them. The United Nations system should be equipped to provide necessary assistance when requested to do so.

2. The legal framework should provide for the recognition, protection and enforcement of property rights and legal relationships. It should also provide for legal certainty and predictability in order to enable parties to commercial transactions to take commercially reasonable decisions. It should also be readily available, easily understood and allow for its uniform interpretation and application. Harmonization of the local legal framework regulating commercial relations with

internationally accepted commercial law standards should be promoted in this context since such harmonization facilitates fulfilling these basic requirements in the local legal framework.

3. Legal certainty, credibility and predictability depend not only on the stability and quality of the applicable law but also on the ways legal relationships (e.g. contracts) are respected and enforced. There should be swift and effective mechanisms to hold those violating the legal framework accountable. Mechanisms for adjudicating disputes and enforcing binding commitments in the context of trade and investment must operate on the basis of internationally recognized human rights and should be easily accessible, affordable, efficient and effective. Arbitration and alternative dispute resolution mechanisms (jointly referred to in this Guidance Note as ADR) should also be available as an option to seek adjudication of commercial disputes in a neutral forum, and the court system should aim to be equipped with means to efficiently and effectively support ADR.

**3. Commercial law reforms should be holistic and coordinated as appropriate with other relevant initiatives**

1. Laws and regulations governing commercial relations and the accompanying institutional framework are not purely technical matters. They embody particular policy preferences. They can produce political and social impact, in addition to the obvious, economic impact. Ill-conceived policies, rules, procedures and practices applicable to commercial relations may trigger short- and long-term negative consequences.

2. Commercial law reforms should therefore involve close consultations and coordination among all relevant stakeholders. In particular, the close link between policymaking and law-making and institutional reforms needs to be ensured. The results of coordination and cooperation achieved at the country level must be preserved at the headquarters level and vice versa.

**4. Local capacity to effectively implement sound commercial law reforms should be continuously built**

1. Commercial law constantly evolves in response to new business practices and global challenges. This necessitates building local capacity to engage in relevant commercial law reforms that keep pace with international developments in finance and commerce. There should be sufficient local expertise capable of drawing on readily available international standards, tools and expertise for carrying out commercial law reforms at the country level. There should also be sufficient local expertise capable of coordinating the position of a State in regional and international rule-formulating bodies in order to avoid conflicting rules and interpretations appearing in those bodies.

2. Good laws regulating commerce may be enacted at the local level but their economic impact may be limited when there is no local capacity to properly implement and enforce them. Commercial law reform is therefore a continuous process that does not end with the enactment of the law. It presupposes a number of supplementing measures, such as developing the required capacity to operate and administer the applicable legal framework, monitor its implementation and impact and react promptly and appropriately to any shortcomings.

3. Positive results achieved at the legislative and implementation stages can also be undermined through conflicting interpretations of laws and conflicting enforcement results. Achieving transparent, consistent and predictable outcomes in jurisprudence on commercial law matters in compliance with the relevant international obligations of States<sup>3</sup> is important for rule-based commercial relations. Judges, arbitrators, law professors and other legal practitioners play the primary roles in this regard. Their capacity to interpret international commercial law standards promoting uniformity in their application and the observance of good faith in international trade should be a continuous concern.

**5. UNCITRAL is the core legal body in the United Nations system in the field of international commercial law and as such should be relied upon in strengthening United Nations support to States to implement sound commercial law reforms**

1. UNCITRAL is the only global and neutral international law-making body entrusted with legislating on commercial law matters on behalf of the entire international community. Not only States and relevant intergovernmental organizations but also professional associations and other non-governmental organizations participate in the UNCITRAL legislative process. This contributes to the transparency and inclusiveness of the standard-making process and ensures scrutiny of legislative proposals by representatives of various economic and social interests, different legal traditions and societies at different levels of development. The possible disconnect between Government delegates and business world representatives is therefore minimized and adopted texts ideally reflect the optimal balance between the many competing interests. These facts together with consensus building ensure a type of legislative due process that gives legitimacy to UNCITRAL standards as internationally accepted ones, rather than the product of any given system or country.

2. UNCITRAL standards represent what the international community considers at a given time to be the best international practices for regulating certain commercial transactions. They equip States with models and guidance to support sound commercial law reforms at lower costs. Reliance on such standards enhances the quality of enacted legislation in the long run and builds confidence of the private sector, including foreign investors, in ease of doing business in a country that adheres to them. Most standards are adaptable to local circumstances and needs of commercial parties.<sup>4</sup>

3. In addition to internationally accepted commercial law standards, UNCITRAL provides such readily-available technical assistance, capacity-building and other tools as CLOUT,<sup>5</sup> digests of case law,<sup>6</sup> databases related to the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,

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<sup>3</sup> E.g. the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), article 7. United Nations, *Treaty Series*, vol. 1489, No. 25567. Also available at [www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html) (accessed May 2013).

<sup>4</sup> For the up-to-date list of the UNCITRAL standards, see [www.uncitral.org/uncitral/en/uncitral\\_texts.html](http://www.uncitral.org/uncitral/en/uncitral_texts.html).

<sup>5</sup> [www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html).

<sup>6</sup> [www.uncitral.org/uncitral/en/case\\_law/digests.html](http://www.uncitral.org/uncitral/en/case_law/digests.html).

done at New York, on 10 June 1958<sup>7</sup> (the New York Convention),<sup>8</sup> and other databases and publications,<sup>9</sup> that aim to facilitate the understanding and use of those standards and to disseminate information about modern legal developments, including case law, in the international commercial law field. Those tools are in particular indispensable in training judges, arbitrators, law professors and other legal practitioners on commercial law matters and to the legal empowerment of people in general.

4. The areas covered by UNCITRAL work are: (a) contracts (international sale of goods, international transport of goods, electronic commerce); (b) international commercial and investment dispute settlement (arbitration, conciliation, online dispute resolution (ODR) and transparency in investor-State dispute resolution); (c) public procurement and privately financed infrastructure projects; (d) international payments; (e) insolvency law; (f) security interests; (g) commercial fraud; and (h) enabling legal environment for micro-, small- and medium-sized enterprises.<sup>10</sup>

## C. Operational framework

1. The need to identify local requirements for commercial law reforms should be recognized in United Nations operations in the appropriate context, such as in peacebuilding and development assistance frameworks. To effectively address any identified local requirements for commercial law reforms, awareness about United Nations existing standards, tools and expertise related to regulation of commercial relations and recourse to them should be substantially increased across the United Nations system. An annex to this Guidance Note may serve as a checklist of indicators relevant in the assessment of the state of commercial law framework in a particular country.

### 1. Legal framework

2. States may request technical assistance and capacity-building with their commercial law reform efforts, in particular with identification of local needs for commercial law reforms or with enactment of a law on a particular commercial law subject. In response, the United Nations should endeavour to assist States with:

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<sup>7</sup> United Nations, *Treaty Series*, vol. 330, No. 4739. Also available at [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html) (accessed May 2013).

<sup>8</sup> [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html).

<sup>9</sup> E.g. the recurrent publication on the judicial perspective on cross-border insolvency cases ([www.uncitral.org/uncitral/uncitral\\_texts/insolvency/2011Judicial\\_Perspective.html](http://www.uncitral.org/uncitral/uncitral_texts/insolvency/2011Judicial_Perspective.html)), the Practice Guide on Cross-Border Insolvency Cooperation ([www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2009PracticeGuide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html)), and Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods ([www.uncitral.org/pdf/english/texts/electcom/08-55698\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/08-55698_Ebook.pdf)).

<sup>10</sup> New areas of work may be added. For the most updated list, please contact the UNCITRAL secretariat at the addresses indicated in the end of this Guidance Note or check the UNCITRAL website ([www.uncitral.org](http://www.uncitral.org)).

(a) Providing the basis and protection for rule-based commercial relations in the domestic legal framework (for guidance see the commentary to guiding principle 2 above);

(b) Assessing the general commercial law framework and the status of its implementation in the State, e.g.: (i) is the State party to fundamental conventions in the commercial law field (e.g. the New York Convention), which will be conducive to other commercial law reforms?; (ii) if yes, what is the status of their implementation?; (iii) if not, which measures are taken to consider becoming such? and (iv) is the local commercial law framework otherwise compliant with internationally accepted commercial law standards?

(c) In the context of a particular commercial law reform:

(i) Identifying an applicable internationally accepted commercial law standard and related readily-available tools and expertise designed to facilitate its enactment;

(ii) Identifying all stakeholders relevant to the commercial law reform, including domestic reform constituencies, international experts, various rule-of-law-assistance providers working in the same or related field, etc., and ensuring proper consultations and if necessary strategic partnerships with them;

(iii) Preparing a comprehensive legislative package to accompany the adoption of a new law (e.g. other necessary laws, regulations, guidance and/or codes of conduct) and ensuring the proper expert assessment of the legislative package before the law is adopted.

## **2. State institutions involved in commercial law reforms**

States may request technical assistance and capacity-building, in particular as regards:

(a) Development of capacity in various State institutions (parliamentary committees, ministries of justice, trade and economic development, public procurement agencies, monitoring and oversight bodies) to handle commercial law reforms and implement commercial law framework. Technical assistance and capacity-building in such cases may take the form of: (i) raising awareness of readily available internationally accepted commercial law standards, and tools and expertise designed to facilitate understanding, enactment and implementation of those standards; (ii) circulating texts of the relevant internationally accepted commercial law standards; (iii) organizing briefings or training; (iv) supporting efforts to centralize local expertise on commercial law issues, for example through the establishment of a national centre of commercial law expertise or national research centre and national databases on commercial law issues; and (v) facilitating responsible and continuous representation of local experts in international and regional commercial law standard-setting activities;

(b) Building capacity of local judges, arbitrators and other legal practitioners to better understand internationally accepted commercial law standards, apply them in a uniform way and achieve a better quality of judgments and awards. Means of assistance may include: (i) raising awareness of readily available international tools designed to facilitate understanding and uniform interpretation and application of

internationally accepted commercial law standards; (ii) supporting the establishment of a mechanism for collecting, analysing and monitoring national case law related to internationally accepted commercial law standards<sup>11</sup> and collecting relevant statistics, e.g. on the speed of adjudication and enforcement; (iii) supporting continuous learning courses for judges and including in the curricula of such courses the relevant readily available international tools referred to above; (iv) organizing local judicial training with the participation of experts; and (v) raising awareness about international judicial colloquia and facilitating participation of local judges in them;

(c) The establishment and functioning of arbitration and conciliation centres. Means of assistance may include: (i) attracting readily available expertise for the establishment of, and support to, such centres; (ii) facilitating access to ADR and ODR mechanisms available in those centres, for example by raising public awareness about them; (iii) organizing training for separate groups of ADR practitioners with the involvement of relevant experts to assist these mechanisms to become more responsive to the rights and needs of intended end-users (e.g. arbitrators on uniform application and interpretation of international commercial standards; mediators and conciliators on conflict resolution skills; and ODR providers on issues specific to e-environment); and (iv) addressing through court reforms and other measures the role of the judiciary in providing appropriate support to ADR and ODR mechanisms.

### **3. Private sector, academia and general public**

Measures towards raising public awareness of commercial law matters, mobilizing and supporting grass-roots initiatives that are able to monitor effectiveness of the commercial law framework and initiate necessary reforms may include:

(a) Raising public awareness, in particular among micro-, small- and medium-sized enterprises and individual entrepreneurs, about internationally accepted commercial law standards, the readily available tools designed to facilitate understanding and use of those standards, and commercial opportunities linked thereto (e.g. e-commerce, cross-border trade, access to domestic and foreign public procurement markets, access to credit, viable options for recovery in case of financial difficulties). Efforts should be made to seek translation of those standards into local languages, and circulating them widely, including electronically, and creating readily available local databases of those texts with links to their international source and supporting tools;

(b) Supporting community-based institutions that contribute to economic activity, empowerment of the poor, private sector development, access to justice, legal education and skills-building, such as chambers of commerce, bar associations, arbitration and conciliation centres, legal information centres and legal aid clinics;

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<sup>11</sup> In this regard, please consult in particular the UNCITRAL CLOUT system that relies on a network of national correspondents designated by those States that are parties to a Convention, or have enacted legislation based on a Model Law, emanated from the work of UNCITRAL, or the New York Convention [www.uncitral.org/uncitral/en/case\\_law/national\\_correspondents.html](http://www.uncitral.org/uncitral/en/case_law/national_correspondents.html).

(c) Maintaining regular dialogue with civil society organizations and groups that represent various segments of society (e.g. consumers, local communities, end-users of public services, individual entrepreneurs, micro-, small and medium-sized enterprises and academia) as regards their views on measures required to improve the commercial law framework in the State;

(d) Assisting members of academia with developing local legal doctrine on commercial law issues in line with internationally prevailing ones, in particular by facilitating establishment of, or participation in, existing regional and international exchange platforms, including electronic ones;

(e) Educating people on international commercial law issues and increasing their awareness of basic rights and obligations arising from commercial relations as directly relevant to entrepreneurship (e.g. start-up and management of business) and employment opportunities. Means of achieving that include assistance with: (i) including in curricula of schools, vocational and technical training courses and universities international commercial law subjects; (ii) organizing moot competitions and sponsoring participation of local student teams in relevant international moot competitions;<sup>12</sup> and (iii) raising awareness about international courses on international commercial law matters<sup>13</sup> and facilitating participation of interested individuals in them; and

(f) Building capacity of various actors in informal justice systems and ADR (e.g. village elders) to use mediation and conciliation skills in accordance with internationally accepted standards and to better understand international commercial law standards, apply them in a uniform way and achieve a better quality of decisions.

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The UNCITRAL secretariat<sup>14</sup> is interested in learning about any problems encountered in practice with the implementation of this Guidance Note. It can be contacted on all issues addressed in this Guidance Note, including as regards provision of assistance with the identification of local needs for commercial law reforms, implementation of commercial law reforms and training on commercial law issues in countries of the United Nations operation and across the United Nations system.

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<sup>12</sup> See e.g. [www.cisg.law.pace.edu/vis.html](http://www.cisg.law.pace.edu/vis.html).

<sup>13</sup> See e.g. [www.itcilo.org/en/training-offer/turin-school-of-development-1](http://www.itcilo.org/en/training-offer/turin-school-of-development-1).

<sup>14</sup> Vienna International Centre, P. O. Box 500, 1400 Vienna, Austria (e-mail: [uncitral@uncitral.org](mailto:uncitral@uncitral.org), fax: (43-1-26060-5813)).

## Annex

### **List of indicators relevant in the assessment of the state of commercial law framework in a particular country**

1. The legal framework provides for the recognition and enforcement of property rights and legal relationships.
2. Local commercial law framework is compliant with internationally accepted commercial law standards:
  - (a) Local laws regulating commercial relations are enacted on the basis of internationally accepted commercial law standards.
3. Local capacity to implement sound commercial law reforms is continually built:
  - (a) Training courses on commercial law matters for government officials are held regularly [but at least twice a year];
  - (b) Participation in such courses is improving, in particular the number of attendees, disaggregated by age, gender, specialization, affiliation (e.g. ministry or other state agency) and other relevant criteria, is steadily increasing, and assessment test results are adequate;
  - (c) The number of rule-formulating activities of regional and international bodies on commercial law issues attended by local experts is steadily increasing;
  - (d) Local expertise on commercial law issues is centralized, readily available and easily deployed when necessary (e.g. for coordinating State's position in rule-formulating activities of regional and international bodies on commercial law issues and for identifying and following up on local needs in commercial law reforms at the local, regional and international levels);
  - (e) Local needs in commercial law reforms are assessed on a regular basis, including within the development assistance framework.
4. Capacity of local judges, arbitrators and other legal practitioners to understand internationally accepted commercial law standards, apply them in a uniform way and achieve a better quality of judgments and awards is adequate:
  - (a) Continuous learning courses for judges are held regularly [but at least twice a year] and their curricula include courses on uniform interpretation and application of internationally accepted commercial law standards;
  - (b) Participation in such courses is improving, in particular the number of attendees, disaggregated by age, gender, specialization, court affiliation (e.g. court of first instance, appeal court, state or federal or supreme court) and other relevant criteria, is steadily increasing, and assessment test results are adequate;
  - (c) The number of local judges participating in the international judicial colloquia and other international and regional judicial training is steadily increasing;

(d) A mechanism for collecting, analysing, monitoring and publicizing national case law relating to internationally accepted commercial law standards is in place;

(e) A number of reported cases on commercial law issues referencing as appropriate internationally accepted commercial law standards is steadily increasing.

5. Mechanisms for adjudicating disputes and enforcing binding commitments in the context of trade and investment are easily accessible, affordable, efficient and effective:

(a) Alternative mechanisms for resolution of commercial disputes (commercial arbitration, mediation and conciliation) are available as an option to seek adjudication of commercial disputes in a neutral forum;

(b) Those mechanisms function on the basis of internationally accepted standards;

(c) Mechanisms to monitor speed and effectiveness of court decisions and their enforcement as well as enforcement of arbitral awards are in place.

6. People are educated on international commercial law issues, basic rights and obligations arising from commercial relations and employment opportunities linked thereto:

(a) Subjects of commercial law are included in curricula of technical schools, universities and vocational training courses;

(b) Local courses for members of academia designed to facilitate developing local legal doctrine on commercial law issues in line with internationally prevailing ones are held regularly [but at least twice a year];

(c) Participation in such courses is improving, in particular the number of attendees, disaggregated by age, gender, specialization, affiliation (universities and other academic institutions) and other relevant criteria, is steadily increasing, and assessment test results are adequate;

(d) The number of local law students, disaggregated by gender, income and other relevant criteria, participating in local, regional and international moot competition on commercial law matters is steadily increasing.

7. Effective mechanisms for legal empowerment on commercial matters are in place:

(a) Internationally accepted commercial law standards are translated into local languages and the translation is made readily available to the public;

(b) The use of readily available authoritative sources of information on international commercial law matters, including tools designed to facilitate understanding, implementation and uniform interpretation and application of internationally accepted commercial law standards, is widely promoted;

(c) There are institutions that support economic activity, such as chambers of commerce, bar associations, commercial arbitration and conciliation centres, and they are evenly distributed throughout the country.

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Some outcome and output indicators, such as those below, although not commercial law specific, influence the effectiveness of the commercial law framework:

8. Laws, regulations and other legal texts with any amendments thereto as well as judicial decisions and administrative rulings of general application or precedent value are:
    - (a) Easily understood;
    - (b) Capable of uniform interpretation and application; and
    - (c) Made promptly accessible to the public.
  9. The authoritative source of legal texts and other government information is widely publicised and systematically maintained;
  10. Institutions and work force therein are well-structured, financed and trained;
  11. There are mechanisms to monitor and oversight actions and decisions of public authorities.”
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