

Guidance Note on Strengthening United Nations Support to States, Upon Their Request, 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. 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 international 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 the resilience of economies to economic crisis; (f) good governance, including public procurement reforms and e-governance; (g) empowerment of the poor; (h) preventing and combating economic crimes through education (e.g. commercial fraud, forgery and falsification); (i) addressing the 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 field of international commercial law and related areas.

B. Guiding principles

1. The United Nations work in the field of international commercial law as an integral part of the broader agenda of the United Nations

3. 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.

4. The modern and harmonized international commercial law framework is the basis for rule-based commercial relations and an indispensable part of international trade, bearing in mind the relevance of domestic law and domestic legal systems in this regard. 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 legality, 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 frameworks are also essential for advancing good governance, sustained economic development and the eradication of poverty and hunger. Accordingly, they may contribute to the achievement of the purposes of the United Nations Charter and those specified in the United Nations General Assembly resolution 2205 (XXI) of 17 December 1966 on the establishment of the United Nations Commission on International Trade Law (UNCITRAL).

5. For these reasons, the United Nations work in the field of international commercial law should be better integrated, where and as necessary, at the headquarters and country levels in United Nations operations in development, conflict-prevention, post-conflict-reconstruction and other appropriate contexts.

2. United Nations assistance to States, upon their request, with the assessment of local needs for commercial law reforms and their implementation

6. Commercial law constantly evolves in response to new business practices and global challenges. This necessitates the implementation of commercial law reforms that keep pace with those developments. States often request assistance with the assessment of the need for commercial law reforms and their implementation.

7. To achieve better integration of the United Nations work in the field of international commercial law in the broader agenda of the United Nations, United Nations entities operating on the ground should be able to respond to such requests. For that, they should be aware of standards, tools and expertise readily available in the United Nations system in the field of international commercial law. Guiding principle 5 below provides sources of information about such standards, tools and expertise and section C of this Guidance Note illustrates steps that may need to be taken to assist States with the assessment and implementation of commercial law reforms.

8. United Nations entities should promote the harmonization of the local legal framework regulating commercial relations with internationally accepted commercial law standards, where appropriate. Such harmonization would: (a) facilitate recognition, protection and enforcement of contracts and other binding commitments; (b) make commercial law more easily understandable to commercial parties; (c) promote uniform interpretation and application of international commercial law frameworks; and (d) provide legal certainty and predictability in order to enable parties to commercial transactions to take commercially reasonable decisions.

9. States also often request assistance with the assessment of the effectiveness of their mechanisms for adjudicating disputes and enforcing binding commitments in the context of trade and investment, in particular commercial arbitration and alternative dispute resolution mechanisms (jointly referred to in this Guidance Note as ADR). In this context, United Nations entities should be aware of the applicable internationally accepted standards, compliance with which may help to ensure that such mechanisms operate on the basis of internationally recognized norms and are easily accessible, affordable, efficient and effective. Where ADR is promoted by a

State as an option to seeking adjudication of commercial disputes in a neutral forum, United Nations entities should be aware that court reforms may be needed so as to equip the judiciary to efficiently and effectively support ADR.

3. United Nations role in assisting States, upon their request, to implement holistic and properly coordinated commercial law reforms

10. 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 impacts, including gender-unbalanced impacts, in addition to the obvious, economic impacts.

11. Commercial law reforms should therefore involve close consultation and coordination among all relevant stakeholders, including non-governmental organizations (representing the general public), lawyers, legislators, judges, arbitrators and other legal practitioners, such as officials responsible for drafting legislation. In particular, the close link between policymaking and law-making and institutional reforms needs to be ensured.

12. Commercial law reform is strongly linked to international legal obligations. Involvement of international experts may be desirable to ensure consistency between domestic law and international obligations where risks of creating gaps or conflicts between the two exist. United Nations entities should also support and encourage cooperation and exchanges of good practices between States as an important means of promoting sound commercial law reform.

13. The proper coordination among United Nations entities themselves and between them and other donors, as well as domestic governmental departments, engaging in reform efforts should also be achieved. The results of coordination and cooperation gained at the country level must be preserved at the headquarters level and vice versa. Such coordination is essential in order to avoid duplication of efforts and promote efficiency, consistency and coherence in the modernization and harmonization of international commercial law.

4. United Nations support to States, upon their request, with building local capacity to effectively implement sound commercial law reforms

14. Adequate local capacity to enact, enforce, implement, apply and interpret sound commercial law frameworks is necessary for the expected benefits of rule-based commercial relations and international trade to accrue. Often States request international assistance with building the required local capacity.

15. The effective way to provide such assistance is through technical cooperation, training and capacity-building sessions aimed at strengthening local expertise to draw on readily available international standards, tools and expertise for carrying out commercial law reforms at the country level. United Nations entities should support the organization of those and similar activities and facilitate participation of local experts therein.

16. In addition, active participation of domestic governmental and non-governmental stakeholders in international legislative forums such as UNCITRAL (see guiding principle 5) (at the level of both working groups and the Commission) can significantly contribute to the understanding of the benefits of

using international legal instruments to facilitate commercial law reform. Such participation can allow stakeholders to gain familiarity with the drafting of international commercial law and the different modalities which can be later used domestically. It can also serve as a platform for exchange of best practices with counterparts from a wide and diverse professional and geographical background. Close coordination of a State position in various regional and international rule-formulating bodies active in the field of international commercial law helps to avoid the appearance of conflicting rules and interpretations in those bodies. All efforts should therefore be made by United Nations entities to support States in their endeavours to achieve representation of their position in a sustained and coordinated manner in UNCITRAL and other regional and international rule-formulating bodies active in the field of international commercial law.

17. Achieving transparent, consistent and predictable outcomes in jurisprudence on commercial law matters in compliance with the relevant international obligations of States¹ is important for rule-based commercial relations. Judges, arbitrators, law professors and other legal practitioners play primary roles in this regard. Their capacity to interpret international commercial law standards in a way that would promote uniformity in their application and the observance of good faith in international trade should also be a continuous concern. There are tools specifically designed by the United Nations for such purposes (see guiding principle 5). United Nations entities should promote their development and use.

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 by United Nations entities in their support to States, upon their request, to implement sound commercial law reforms

18. UNCITRAL is the law-making body of the United Nations system in the field of international commercial law. It is an intergovernmental forum composed of Member States elected by the General Assembly. Its composition is representative of the various geographic regions and the principal economic and legal systems. Additionally, intergovernmental organizations, professional associations and other non-governmental organizations with observer status participate in its work.

19. UNCITRAL standards represent what the international community considers at a given time to be the best international practice 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 the confidence of the private sector, including foreign investors, in the ease of doing business in a country that adheres to them.

20. Most standards are adaptable to local circumstances and needs of commercial parties.² A particular feature of UNCITRAL model laws and similar instruments issued by other international organizations is that they can be used by States as a

¹ 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.

² For the up-to-date list of the UNCITRAL standards, see www.uncitral.org/uncitral/en/uncitral_texts.html.

basis or inspiration for legislation that forms part of commercial law reform: they can be adapted to domestic circumstances, and States can select which provisions are most relevant to their legal systems.

21. In addition to internationally accepted commercial law standards, UNCITRAL provides readily available technical assistance, capacity-building and other tools, such as CLOUT,³ digests of case law,⁴ databases related to the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, on 10 June 1958⁵ (the New York Convention),⁶ and other databases and publications,⁷ 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.

22. 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 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) developing an enabling legal environment for micro-, small and medium-sized enterprises.⁸

C. Operational framework

23. Sections below illustrate steps that may need to be taken by United Nations entities that are requested by States to assist with the assessment and implementation of commercial law reforms.

1. Legal framework

24. 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, with enactment of a law or with updating and modernizing

³ www.uncitral.org/uncitral/en/case_law.html.

⁴ www.uncitral.org/uncitral/en/case_law/digests.html.

⁵ United Nations, *Treaty Series*, vol. 330, No. 4739. Also available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

⁶ www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

⁷ E.g. the recurrent publication on the judicial perspective on cross-border insolvency cases (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), 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).

⁸ 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).

existing rules on a particular commercial law subject. In response, the United Nations should endeavour to assist States with the following, bearing in mind that reform of the legal framework should remain a process which is country led, country owned and country managed:

(a) Preparing a structured workplan that would identify the goals and objectives of the different steps for commercial law reform (for both providing assistance and taking reform measures), set up a schedule, develop strategies to address the weaknesses or inadequacies of the different legislative norms or practices, appoint appropriate focal points to coordinate a specific reform initiative and allocate resources;

(b) Assessing the general commercial law framework and the status of its implementation in the State, e.g.: (i) whether the State is 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, the status of their implementation; (iii) if not, measures to be taken to consider becoming a party; and (iv) whether the local commercial law framework is 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 donors working in the same or related field, etc., and appropriate focal points in each entity to coordinate a specific reform, in order to facilitate proper consultations with them, where necessary;

(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

25. 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 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 standards⁹ and collecting relevant statistics, e.g. on the speed of adjudication and enforcement; (iii) supporting continuous learning courses for judges and inclusion in the curricula of such courses of 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 colloquiums and facilitating participation of local judges therein;

(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 the ADR and ODR mechanisms 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

26. States may request assistance with:

(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 their understanding and use, 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). Assistance in such cases may take the form of: (i) translation of those standards into local languages; (ii) creation of readily available local databases of those standards with links to their international source and supporting tools; and (iii) dissemination of information about those standards by other means;

⁹ 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.

(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;

(c) Maintaining regular dialogue with non-governmental organizations 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 international commercial law subjects in curricula of schools, vocational and technical training courses and universities; (ii) organizing moot competitions and sponsoring participation of local student teams in relevant international moot competitions;¹⁰ and (iii) raising awareness about international courses on international commercial law matters¹¹ and facilitating participation of interested individuals therein; 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.

The UNCITRAL secretariat¹² is interested in learning about experience 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 in which the United Nations operates and across the United Nations system.

¹⁰ See e.g. www.cisg.law.pace.edu/vis.html.

¹¹ See e.g. www.itcilo.org/en/training-offer/turin-school-of-development-1.

¹² Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria (e-mail: uncitral@uncitral.org, fax: (43-1-26060-5813)).