



# General Assembly

Distr.: General  
3 March 2023

Original: English

## United Nations Commission on International Trade Law

Fifty-sixth session  
Vienna, 3–21 July 2023

### Report of Working Group I (MSMEs) on the work of its thirty-ninth session (New York, 13–17 February 2023)

#### Contents

	<i>Page</i>
I. Introduction . . . . .	2
II. Organization of the session . . . . .	2
III. Deliberations and decisions . . . . .	3
IV. Consideration of a draft Guide on access to credit for micro, small and medium-sized enterprises (MSMEs) . . . . .	3
A. Presentation of <a href="#">A/CN.9/WG.I/WP.130</a> . . . . .	3
B. Chapter III – Measures to facilitate access to credit . . . . .	4
C. Chapter I – Introduction . . . . .	14
D. Chapter II – Sources of credit available to MSMEs . . . . .	14
E. Draft recommendations . . . . .	16
V. Next steps . . . . .	16



## I. Introduction

### Consideration of a draft guide on access to credit for micro, small and medium-sized enterprises (MSMEs)

1. At its forty-sixth session, in 2013, the Commission agreed that work on reducing the legal obstacles faced by MSMEs throughout their life cycle, in particular, in developing economies, should be added to the work programme of the Commission, and that such work should begin with a focus on the legal questions surrounding the simplification of incorporation. This resulted in two texts adopted by the Commission in 2018 and 2021 respectively: the *UNCITRAL Legislative Guide on Key Principles of a Business Registry* and the *UNCITRAL Legislative Guide on Limited Liability Enterprises*.
2. At its fifty-second session, in 2019, the Commission agreed to strengthen and complete the work on reducing the legal obstacles faced by MSMEs throughout their life cycles by requesting the secretariat to start preparing draft materials on MSMEs' access to credit, drawing, as appropriate, on the relevant recommendations and guidance contained in the *UNCITRAL Model Law on Secured Transactions*, with a view to their consideration by Working Group I.<sup>1</sup> The Working Group considered the topic for the first time at its thirty-sixth session (Vienna, 4–8 October 2021) and continued that work at its thirty-seventh session (9–13 May 2022) on the basis of revised documentation reflecting its previous deliberations prepared by the secretariat.<sup>2</sup>
3. At its fifty-fifth session, in 2022, the Commission expressed satisfaction with the progress made by the Working Group and the support provided by the secretariat and reaffirmed the mandate of the Working Group in accordance with its decisions at the fifty-second session in 2019.<sup>3</sup> At its thirty-eighth session (Vienna, 19–23 September 2022), the Working Group carried out another revision of the whole draft text and agreed to several revisions, including that the final title of the text should be “Guide to access to credit for micro, small and medium-sized enterprises (MSMEs)”. The Working Group also reiterated its previous agreement to continue using the term “micro, small and medium-sized enterprises (MSMEs)” though the main focus of the Guide would be on micro and small enterprises.

## II. Organization of the session

4. Working Group I, which was composed of all States members of the Commission, held its thirty-ninth session in New York from 13 to 17 February 2023.
5. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Democratic Republic of the Congo, Dominican Republic, Ecuador, France, Greece, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Italy, Japan, Mauritius, Mexico, Morocco, Nigeria, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Thailand, Türkiye, Uganda, Ukraine, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.
6. The session was attended by observers from the following States: Azerbaijan, Bolivia (Plurinational State of), Brunei Darussalam, Burundi, Cambodia, El Salvador,

<sup>1</sup> *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17 (A/74/17)*, para. 192(a).

<sup>2</sup> Additional information on the work of the Working Group on the topic of MSME access to credit may be found in document [A/CN.9/WG.I/WP.127](#), paras. 5–9.

<sup>3</sup> *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17 (A/77/17)*, para. 172.

Equatorial Guinea, Guatemala, Madagascar, Paraguay, Philippines, Qatar, Senegal, Sierra Leone and Sri Lanka.

7. The session was also attended by observers from the European Union: European Investment Bank (EIB).

8. The session was further attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: Universal Postal Union (UPU);

(b) *Intergovernmental organizations*: Andean Community and Gulf Cooperation Council (GCC); and

(c) *Invited international non-governmental organizations*: Association internationale des jeunes Avocats (AIJA), China Council for the Promotion of International Trade (CCPIT), European Law Students Association (ELSA), Forum for International Conciliation and Arbitration (FICA), Grupo Latinoamericano de Abogados para el Derecho del Comercio Internacional (GRULACI), Inter-American Bar Association (IABA), International Law Institute (ILI), International Union of Notaries (UINL), Kozolchyk National Law Center (NATLAW), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association (MAA), New York State Bar Association (NYSBA), Shanghai Arbitration Commission (SHAC) and World Union of Small and Medium Enterprises (WUSME).

9. The Working Group elected the following officers:

*Chair*: Mr. Siniša Petrović (Croatia)

*Rapporteur*: Ms. Natalia Fieden (Poland)

10. The Working Group had before it the following documents:

(a) Annotated provisional agenda ([A/CN.9/WG.I/WP.129](#)); and

(b) Note by the Secretariat on access to credit for micro, small and medium-sized enterprises (MSMEs) ([A/CN.9/WG.I/WP.130](#)).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of a draft guide on access to credit for micro, small and medium-sized enterprises.
5. Adoption of the report.

### III. Deliberations and decisions

12. The Working Group engaged in discussions on access to credit for MSMEs based on a Note by the Secretariat ([A/CN.9/WG.I/WP.130](#)). The deliberations of the Working Group on this topic are reflected below.

## IV. Consideration of a draft Guide on access to credit for micro, small and medium-sized enterprises (MSMEs)

### A. Presentation of [A/CN.9/WG.I/WP.130](#)

13. The Working Group heard a short introduction to document [A/CN.9/WG.I/WP.130](#) that highlighted some of the main changes made in accordance

with the deliberations of the Working Group at its thirty-eighth session. In particular, the reorganization of the whole document and considerable simplification of chapter II were noted. It was said that chapter II focused on debt tools and that reference to equity tools was maintained only in the context of family and friends support and Islamic finance. The description of various debt tools in chapter II was also streamlined. With regard to chapter III, it was noted that all measures relating to a legal framework to enhance MSME access to credit were grouped under part A, and part B addressed financial literacy as an additional measure to improve MSME access to credit. Finally, the Working Group was reminded of its decisions that the title of the final text would be “Guide on access to credit for micro, small and medium-sized enterprises (MSMEs)” and that the term “micro, small and medium-sized enterprises (MSMEs)” would continue to be used although the draft Guide focused on micro and small enterprises.

## **B. Chapter III – Measures to facilitate MSME access to credit**

14. The Working Group agreed to start its deliberations from chapter III, which is the core of the draft Guide as it examines and provides guidance on how legal, regulatory and policy interventions that help create the legal framework through which MSMEs access credit could be enhanced. The Working Group also agreed that delegations could send to the secretariat editorial revisions of chapter III and other chapters of the draft Guide and the secretariat could make the necessary changes in the Guide in order to accommodate them.

### **1. Section A: A legal framework to enhance MSME access to credit**

#### *Formalization*

#### **(a) Business formation and registration**

15. A suggestion was heard to improve the drafting of recommendation 3. In particular, it was said that reference to “formal economy” in draft recommendation 3(a) was redundant and could be deleted. In response, the importance of highlighting the purpose of the draft Guide and its link with the legislative texts previously prepared by the Working Group was stressed. It was observed that operating in the formal economy permitted MSMEs to gain access to formal credit and that a streamlined registration system, such as that crafted in the *UNCITRAL Legislative Guide on Key Principles of a Business Registry*, was instrumental to start a business in the formal economy.

16. Another comment was heard that letter (b) of the recommendation should only focus on UNCITRAL legislative standards and forgo reference to other international standards since the draft commentary did not discuss any other international standards. It was further said that such comment would also apply to other recommendations in the draft Guide with similar wording.

17. After discussion, the Working Group agreed to revise draft recommendation 3 along the lines of: “To facilitate access to credit, the law should promote the formation of a business, including MSMEs, in the formal economy by providing for an efficient and simplified system of business registration (such as the *UNCITRAL Legislative Guide on Key Principles of a Business Registry*)”.

#### **(b) Business operation**

18. The Working Group agreed to follow the approach adopted for draft recommendation 3 and to revise draft recommendation 4 along the lines of: “To facilitate access to credit by enabling their participation in the formal economy, the law should provide for simplified entities and other organizational forms for MSMEs, such as the form recommended by the *UNCITRAL Legislative Guide on Limited Liability Enterprises*.” It was noted that the term “incorporation” should be avoided given that the *UNCITRAL Legislative Guide on Limited Liability Enterprises* did not recommend a corporate form. It was also noted that the reference to “simplified legal

forms” should be removed as it might be erroneously interpreted as referring to simplified standard forms to be filled out to establish a business. Instead, the reference should be made to “simplified legal entities and other organizational forms” so as to clarify that some other organizational forms (e.g. partnership) may also help improve MSMEs’ participation in the formal economy.

19. With regard to the draft commentary, there was agreement to soften the language of the second sentence of paragraph 60 to state that MSMEs without formal status may face difficulties in accessing the banking sector.

#### *Secured transactions*

##### **(a) Existing international and regional standards**

###### *(1) Movable assets as collateral*

20. The Working Group agreed to revise draft recommendation 5 along the following lines:

“(a) To enable MSMEs to fully use their movable assets as collateral, the law should provide for a modern and comprehensive secured transactions regime such as the *UNCITRAL Model Law on Secured Transactions*.

(b) The secured transactions regime should:

(i) Facilitate the easy creation of security rights in movable assets;

(ii) Allow a security agreement to provide for the creation of a security right in future assets;

(iii) Ensure that a security right can easily be made effective against third parties by registration of a notice;

(iv) Enable lenders to determine the priority of their security rights when entering into the transaction by reference to the registry; and

(v) Enable simple and economically efficient realization on the collateral in the event of default; and

(c) The secured transactions regime should apply to all transactions in which movable assets are collateral for an obligation, including those in which the creditor retains the title of an asset or is transferred title to the asset in order to secure an obligation.”

21. It was explained that the reference to the functional approach adopted by the *UNCITRAL Model Law on Secured Transactions* and the reference to assets that an MSME already owns in draft recommendation 5 (b) raised distinct issues and should thus be addressed in separate paragraphs. A suggestion for letter (c) to specifically refer to transactions that take the form of security rights did not receive support, considering that the focus should not be placed on the form of transactions but their function. While the Working Group did not take up a suggestion to include an explicit reference to acquisition security rights, it agreed for letter (c) to refer to reservation of title and transfer of title transactions. It was agreed that draft recommendation 5 should avoid too many details on secured transactions law but should nevertheless make references to the registry system.

22. The Working Group also agreed to the following revisions in the draft commentary for recommendation 5:

- Paragraph 72: include a reference to the *United Nations Convention on the Assignment of Receivables in International Trade* and consider including a reference for the UNIDROIT Model Law on Factoring if that text is complete and adopted before the completion of the draft Guide and explain that the Model Law on Factoring draws on both the *United Nations Convention on the Assignment of Receivables in International Trade* and the *UNCITRAL Model Law on Secured Transactions*;

- Paragraphs 72–80: the reference to the *UNCITRAL Model Law on Secured Transactions* should be made up front in each paragraph; and
- Paragraph 77: delete the third sentence in the light of the reference to digital assets in the first sentence. It was explained that the *UNCITRAL Model Law on Secured Transactions* did not exclude digital assets from its scope of application, although it did not address them separately.

23. The Working Group also encouraged the secretariat to ensure that the terminology in the commentary to draft recommendation 5 avoid any confusion between movable and immovable assets.

(2) *Immovable assets as collateral*

24. The Working Group agreed to add a new general recommendation for immovable assets along the lines of: “The law should provide for a secured transactions regime where it should be possible: (i) to create security rights over immovable assets; (ii) to enforce security rights over immovable assets; and (iii) to assess ex ante the ranking of the claims over immovable assets with a degree of certainty.” It was noted that the term “possible” would be more appropriate than “easy” because creating security rights over immovable assets should not be easy in some contexts and enforcing security rights over certain immovable assets (e.g. personal homes) would raise complex issues. A proposal for the new recommendation to read “The law should address the key issues identified in recommendation 5 and adapt them to the context of immovable property” did not receive sufficient support. It was explained that linking the new recommendation with recommendation 5 concerning movable assets would inevitably refer to the standard of making it easy to create and enforce security rights.

25. With respect to the draft commentary, the Working Group agreed to the following revisions:

- Paragraph 84: delete the reference to customary rights in the second sentence, and revise the last sentence along the lines of “Making it possible for micro and small entrepreneurs to use their rights in immovable assets as collateral is a means of increasing their access to credit;”
- Paragraph 89: insert the word “general” before “objective” in the second sentence and revise the last sentence to make it clear that security rights were created over immovable assets;
- Paragraph 90: revise references to “inexpensive”, “as far as possible” and “necessarily mean” so as to better reflect diverse legal systems; and
- Paragraph 91: replace the term “easy” with “efficient”.

**(b) Possible areas for future improvement**

26. The Working Group agreed to the following changes:

(i) Relocate paragraphs 94 to 96 to the section on commercial credit in chapter II since they highlighted obstacles faced by MSMEs but did not identify solutions;

(ii) Relocate paragraphs 97 and 98 to Part B of chapter III (Other measures to enhance MSMEs access to credit: financial literacy) given that appraisal would require special knowledge;

(iii) Revise the title of the subsection along the lines of “addressing concerns of overcollateralization” to better reflect the contents in paragraphs 99 to 101; and

(iv) Replace the first two sentences of paragraph 101 along the lines of “As noted by the World Bank, the existence of liquid secondary markets where the asset provided by the micro and small enterprises as collateral can be disposed of would permit financiers to assess its value more accurately when determining whether to

extend credit on the basis of that collateral, how much credit to extend, and the cost of that credit. Thus, such secondary markets can result in financiers being more willing to extend credit to MSMEs and less likely to require excessive collateral in those transactions. This would be of critical importance to MSMEs, whose assets will often be difficult to value.” It was noted that well-functioning secondary markets, as well as collateral valuation, were not only important for addressing overcollateralization, but also for an efficient secured transactions regime.

27. Finally, it was also noted that reference to independent appraisal mechanisms (para. 98) could be retained in the subsection, since they were a response to overcollateralization. It was however agreed that the link between those mechanisms and overcollateralization should be made clearer.

#### *Personal guarantees*

28. There was general agreement that since draft recommendations 6 and 7 were quite similar in scope they could be consolidated into one single recommendation along the following lines: “The law should identify both the formalities and content requirements necessary to make a guarantee effective and ensure that guarantors and financiers are aware of their rights and obligations”.

29. There was also agreement to delete draft recommendation 8 and to consider recommending a less burdensome insolvency procedure at a later stage in the context of support for MSMEs in financial distress.

30. With respect to draft commentary, the Working Group agreed to insert a new paragraph before paragraph 102 along the lines of:

“A personal guarantee is a promise by a third party to fulfil the obligations of a debtor to a creditor. The existence of such a guarantee can increase access to credit in two ways. First, if the guarantor is able to satisfy the obligation, this can lower the creditor’s risk of suffering a loss as a result of the debtor’s default and, thus, may enable the extension of credit to the debtor where it would not otherwise be available, or lower the cost of that credit, even where the debtor is unable to supply sufficient collateral to bring about those benefits under the applicable secured transactions regime. Second, the prospect of the guarantor being liable for the debt will often provide the guarantor with an incentive to assure that the debtor satisfies its debt so that the guarantor will not have to do so.”

31. It was explained that the first sentence in the above paragraph did not contain any reference to the debtor’s default because it was not the only trigger for the guarantor’s obligations. The first sentence also did not refer to conditions specified in the guarantee agreement since a guarantee could be provided without a specific agreement (e.g. a provision in the loan agreement). It was further noted that a guarantor may satisfy the obligation due to sufficient assets or income. The importance of carrying out a proper credit risk analysis (as mentioned in paragraph 102) was highlighted.

32. The Working Group also agreed to the following revisions:

- Paragraph 102: delete the last two sentences;
- Paragraph 103: delete it entirely;
- Paragraph 109:
  - (i) Insert a new sentence to explain what surety bonds are;
  - (ii) Delete the fifth sentence and make it clear that the key difference between personal guarantee and surety bonds was that surety bonds were issued for a fee;
  - (iii) Replace the term “professional insurers” with “professional issuers” so as to distinguish surety bond providers from insurance companies;

- Paragraph 112:
  - (i) In the first sentence: (a) replace the term “notarized written agreements” with “notarized documents”, and the word “safeguards” with “conditions” given that in some jurisdictions notarized documents did not prove to be effective in minimizing the risks of unawareness; and (b) revise the phrase “an explicit declaration of responsibility”, as appropriate;
  - (ii) Delete the second sentence; and
  - (iii) Merge the paragraph with paragraph 111;
- Paragraph 117: delete the second sentence which was said to be an embedded recommendation;
- Paragraph 120: replace the contents after the first sentence with a new sentence along the lines of “Guarantors may not realize that, in such cases, the creditor may recover the full amount of the debt from any of the guarantors, leaving that guarantor to try to recover a share of that payment from the other guarantors”;
- Paragraph 121: replace the first sentence with a new sentence along the lines of “It is possible for a guarantee to cover only a particular extension of credit or to provide that it covers future extension of credit as well”; and
- Paragraphs 123–125: delete them entirely.

#### *Credit guarantee schemes*

33. Two different views were expressed. One was in favour of deleting a large part of this section, which was said to be too long and mainly dealing with fiscal and economic matters not pertaining to UNCITRAL’s mandate. Further, several paragraphs included value judgments or embedded recommendations. On the other side, it was noted that while the focus of the section was not on trade law, public credit guarantee schemes were the most important funding mechanism for many MSMEs and the draft Guide could not ignore it. The section could however be shortened and further improved.

34. After discussion, the Working Group agreed to the following improvements:

- Paragraphs 126–129:
  - (i) Delete references to “emerging economies or economies in transition” since credit guarantee schemes were relevant for all countries; and
  - (ii) Delete paragraphs 127 and 128 save for the second sentence of paragraph 127 that could be moved to paragraph 126;
- Paragraphs 130–131:
  - (i) Delete the last sentence of paragraph 130 which was too broad in scope for the discussion in the draft Guide;
  - (ii) Delete the last two sentences of paragraph 131 since it would be unlikely for public credit guarantee schemes to motivate financiers to extend additional unguaranteed credit to MSMEs; and
  - (iii) Clarify in paragraph 130 that for certain countries credit guarantee schemes were too expensive compared to the benefit of the loan to MSMEs;
- Paragraphs 132–135: delete the entire subsection on “Foundations of public credit guarantee schemes” as it mainly addressed regulatory issues; and
- Paragraphs 136–139:
  - (i) Retain the first two sentences and the last sentence of paragraph 136 and revise the beginning of the second sentence along the lines of “Transparency and clarity of such criteria also help the State...”;



(ii) Redraft paragraph 137 along the lines of “Consistent with the applicable legal and regulatory framework, credit guarantee schemes could establish programmes dedicated to subclasses of firms or create a list of ineligible MSMEs on the basis of certain criteria”;

(iii) Retain paragraph 138 without changes; and

(iv) Delete paragraph 139.

35. As regards the subsection on “Mitigating risks”, views that the discussion was beyond legal matters and excessively focused on technical financial details and regulatory matters were supported in the Working Group. The Working Group agreed to streamline and shorten this subsection as follows:

- Subheading: revise it as “Mitigating risks to the financial system”;
- Paragraph 140: retain the first two sentences and the fourth one without “in addition” since policymaking processes were not a matter for the draft Guide and risk-based fee policies raised controversial issues;
- Paragraph 141: delete the last sentence;
- Paragraph 142: delete the entire paragraph; and
- Paragraph 143: move the discussion on minimal collateral requirements to paragraph 140 and delete the remaining of the paragraph since the issue of moral hazard was relevant for any loan not just those provided under credit guarantee schemes.

36. Further, the Working Group agreed on the following revisions to the rest of the section on Credit Guarantee Schemes:

- Paragraph 144: include reference to maximum ceiling of individual loans to MSMEs (see para. 140 of the draft Guide) as guarantees’ fees can depend on the size of the loan;
- Paragraph 146: delete the entire paragraph;
- Paragraph 149: delete the entire paragraph since it was unclear whether there were jurisdictions applying policies similar to those described here; and
- Paragraphs 151 to 156: delete the paragraphs since they referred to private and international guarantee schemes that were outside the purview of States.

#### *Assessment of MSMEs’ creditworthiness*

37. The Working Group agreed to revise draft recommendation 9 along the lines of: “To enable financiers to more accurately assess the creditworthiness of potential MSME borrowers, the law should establish a legal and regulatory framework for the creation and operation of public or private commercial credit reporting systems. The law should specify the nature and scope of reporting obligations with respect to such systems.” A suggestion for the law to facilitate the creation and operation of such systems did not receive sufficient support, given that certain credit reporting systems may need to be heavily regulated. It was noted that the word “scope” could be interpreted broadly to capture issues concerning how reporting obligations should be performed.

38. The Working Group agreed to the following revisions to the draft commentary in the introductory paragraphs:

- Paragraph 157: delete the third sentence referring to large companies as being less relevant;
- Paragraph 158: delete the first two sentences;

**(a) Public agencies: a complementary source of relevant information**

39. The Working Group agreed to the following revisions:

- Subheading: revise it to read “complementary sources of relevant information”;
- Paragraph 170: delete the second and the last sentences;
- Paragraph 171:
  - (i) Delete the reference to “taxation and social security” in the first sentence as they may contain highly confidential information and be subject to relevant regulations;
  - (ii) Rephrase the term “business registry” in the first sentence in line with the definition of business registry in the UNCITRAL Legislative Guide on Key Principles of a Business Registry; and
  - (iii) Replace the phrase “registration of a security right” in the last sentence with “registration of notice of a possible existence of a security right”;
- Paragraph 172: clarify that access to information maintained by public agencies may require the debtor’s consent; and
- Paragraph 173: delete it entirely.

**(b) Alternative data**

40. The Working Group also agreed to the following revisions:

- Paragraph 174: delete the last three sentences. The linkage between digital data and fraud detection was questioned. It was pointed out that the last sentence erroneously suggested that MSMEs would not provide reliable information;
- Paragraph 175: replace the term “unlawful” with “inappropriate”; and
- Paragraph 176: delete it entirely.

*Support for MSMEs in financial distress*

41. The Working Group agreed to revise draft recommendation 10 along the lines of: “In order to address MSMEs’ financial needs in the context of insolvency, the law should reflect existing international standards such as the *UNCITRAL Legislative Guide on Insolvency Law and the Legislative Guide on Insolvency Law for Micro- and Small Enterprises*. A specific reference to facilitating pre-commencement finance in the draft recommendation 10 was not considered appropriate without addressing relevant safeguards.

42. The Working Group took up a suggestion to include the following sentences at the end of paragraph 178, noting the need to avoid embedded recommendations:

“In assessing whether pre-commencement financing will be beneficial, consideration should also be given to the terms of any proposed pre-insolvency financial transactions by the business to determine if the terms and condition of the finance would restrict the business from effectuating a reorganization if a bankruptcy filing became necessary. Examples include where the pre-insolvency lender takes a security interest and lien on all the assets of the business or the lender requires a transfer of those assets to the lender for lease back to the business.”

*Enforcement*

43. The Working Group agreed to the following revisions:

- General comments: replace the reference to “court” with “court or other authority”;
- Paragraph 183: delete it entirely;

- Paragraph 184: replace the phrase “the issue of enforcement” with “the issue of a timely, predictable and affordable enforcement”, and ensure a clear distinction between the enforcement of monetary claims and claims from secured transactions;
- Paragraph 185: rephrase negative statements to emphasize how well the *UNCITRAL Model Law on Secured Transactions* dealt with the issue of enforcement;
- Paragraph 186: replace the term “restrictions” in the last sentence with “exemptions”; and
- Paragraph 187: delete it with the exception of a reference to the recommendations in the UNIDROIT project on best practices for effective enforcement, if available.

44. In respect of the structure, the Working Group agreed to list chapter III, sections 6–8 in the order of dispute resolution mechanisms, enforcement and support for MSMEs in financial distress.

#### *Dispute resolution mechanisms*

45. A concern was expressed that the section on dispute resolution mechanisms was unbalanced since it seemed to assume that judicial proceedings were usually slow and cumbersome while alternative dispute resolution mechanisms would provide cost-effective and high-quality solutions. It was noted that this may not reflect reality, and it was also not consistent with the section on enforcement. The Working Group thus agreed to revise the section in a more balanced way and in particular to revise paragraph 189 as a descriptive paragraph for the court system.

46. Noting that an effective dispute resolution system was one of the factors that could encourage MSMEs to borrow, the Working Group also agreed to soften the language of the opening sentence of paragraph 188. There was also support for a proposal to avoid reference to credit reporting providers in the paragraph since they were not mentioned in the remaining of the section. The Working Group thus agreed to delete (i) “including credit reporting providers” in the first sentence and (ii) the last sentence in paragraph 188.

#### **(a) Dual track dispute resolution system**

47. It was noted that the phrase “dual-track” was confusing as it seemed to suggest that internal complaint procedures were not optional but mandatory. A suggestion was made to delete references to “dual track” and to present internal complaint procedures and external redress mechanisms as two options available to MSMEs that were not necessarily mutually exclusive. There was general support for this suggestion. In addition, the Working Group agreed to use the term “unnecessary burdens” when referring to best practices in the operation of internal and external mechanisms (para. 190) and to simplify paragraph 191 so that it would only focus on the main features of internal complaint procedures without too detailed examples.

#### **(b) External redress mechanisms**

48. The Working Group agreed on a number of changes in regard to this subsection:

- Paragraph 192:
  - (i) Revise the first sentence of the paragraph to clarify that internal procedures were optional and not mandatory (see para. 47 above); and
  - (ii) Delete the negative features of ombudsman and combine that description with paragraph 196 in a new stand-alone paragraph;

- Paragraph 193:
  - (i) Revise the opening sentence to clarify that mediation was an appropriate mechanism to help preserve relationship without any comparison with ombudsman;
  - (ii) Delete the third sentence and highlight that the role of the mediator is to facilitate settlement; and
  - (iii) Delete reference to the United Nations Convention on International Settlement Agreement Resulting from Mediation (“Singapore Convention on Mediation”) as not relevant for the draft Guide;
- Paragraph 194:
  - (i) Revise the first sentence to highlight that expedited arbitration was time and cost-efficient;
  - (ii) Delete the second and third sentences in relation to mandatory arbitration clauses; and
  - (iii) Revise the fourth sentence to avoid any comparison between arbitration and litigation; and
- Paragraph 195: discuss online dispute resolution mechanisms in a stand-alone subsection as those mechanisms could apply to both internal procedures and external redress mechanisms.

**(c) Features of external redress mechanisms**

49. The Working Group agreed to delete the entire subsection. It was noted that the features in paragraphs 201 to 204 were addressed in paragraph 190.

**(d) Resolving disputes between MSMEs and providers of FinTech products**

50. The Working Group agreed to delete the entire subsection, also considering that the topic of FinTech was no longer addressed in detail in the draft Guide.

*Fair lending practices, including transparency*

51. As regards the subsection on transparency, the Working Group agreed to revise draft recommendation 11 along the lines of: “To ensure that MSMEs are aware of their rights and obligations, the law should provide that terms and conditions of the credit agreement are presented by financiers to MSMEs in a clear, legible and understandable way”.

52. A suggestion for the law to ensure that the key contract terms and conditions were presented clearly in credit agreements with MSMEs did not receive sufficient support, on the basis that transparency requirements also focused on financiers’ obligation to disclose information before signing credit agreements. Another suggestion for the recommendation to refer to “information on terms and conditions of a credit agreement” also did not receive sufficient support. It was explained that such reference might be interpreted as requiring financiers to disclose information in a separate document (other than the credit agreement itself), which was not the business practice in some jurisdictions. Such requirement could also be problematic as a separate disclosure document might be treated as part of the credit agreement or an interpretive document for the credit agreement. It was noted that the standard “easily understandable” was not appropriate as being too subjective and unclear. A concern was expressed that transparency requirements might be more suitable as a recommendation for business practice, rather than legal requirement.

**(a) Transparency**

53. The Working Group agreed to the following revisions:

- Paragraphs 208 and 209: merge these paragraphs and clarify that transparent requirement only refers to information given by financers, not information provided to financers; and
- Paragraph 213: delete it entirely as similar issues were addressed in chapter III, part B on financial literacy.

**(b) Other fair lending practices**

54. As regards the subsection on other fair lending practices, the Working Group agreed to add a new recommendation along the lines of: “The law should identify both the formalities and content requirements necessary to make a credit agreement effective.” The Working Group did not take up the suggestion for the recommendation to state that the law should ensure that MSMEs are aware of their rights and obligation, considering that the law could not ensure but only provide for certain measures towards that objective. Another suggestion for the phrase “to ensure that MSMEs are aware of their rights and obligation” to be placed in the preamble to the recommendation also did not receive sufficient support given that it might limit the scope of the recommendation.

55. The Working Group agreed to the following revisions:

- Paragraph 214: revise the paragraph to avoid embedded recommendations and clarify the meaning of “a user agreement”;
- Paragraph 215: delete it entirely;
- Paragraph 216: retain the first sentence only as some examples provided were not considered as abusive practice in some jurisdictions;
- Paragraph 218: revise the paragraph to avoid embedded recommendations and clarify that the examples were from the World Bank’s publication entitled “Good Practices for Financial Consumer Protection”;
- Paragraph 219: delete it entirely as it focused on regulatory matters; and
- Paragraph 220: delete it entirely as most examples provided were not considered as unfair business practices in some jurisdictions.

**2. Section B: Other measures to enhance MSME access to credit: financial literacy**

56. It was noted that financers and regulators would benefit from knowledge on how legal reforms on secured transaction regimes can facilitate the efficiency of such transactions. The Working Group agreed to include in both subsections (b) and (c) language that would clarify the importance to build the capacity of financers and regulators for them to understand how the *UNCITRAL Model Law on Secured Transactions* would apply as well as to identify transactions involving movable assets as collateral that were made economically possible. In this regard, it was said that reference to the *UNCITRAL Practice Guide to the Model Law on Secured Transaction* should be added, since the *Practice Guide* was a capacity-building tool.

57. The Working Group also agreed to revise draft recommendation 12 along the following lines: “States should further enhance the legal and policy measures supporting MSME access to credit with relevant programmes and policies for improving the legal and financial literacy of MSMEs and the capacity of financers and regulators.”

## C. Chapter I – Introduction

58. There was agreement in the Working Group for a proposal to include a short explanation on the structure of the draft Guide in paragraphs 11–13, which discussed the focus of the Guide, so as to make the text more user friendly.

## D. Chapter II – Sources of credit available to MSMEs

59. Noting that some of the sources presented in chapter II were sources of capital rather than credit, e.g. factoring, the Working Group agreed to revise the title of the chapter as “Sources of credit and capital available to MSMEs”. A view was expressed that the sources described in the draft Guide offered MSMEs legitimate ways to access credit thus reducing the risk of MSMEs resorting to illegal credit markets. The Working Group agreed to add a short explanation in this respect (possibly in the introductory paragraphs of chapter II) and cautioned the secretariat against using the term “informal” to define such markets in order to avoid confusion with informal sources of credit such as microcredit or family and friends support.

60. With regard to paragraph 14, the Working Group agreed to delete: (i) the third sentence, since it included an embedded recommendation; and (ii) the last two sentences since the tools discussed therein were not simply for transactions involving long-term payment schedules. In addition, each tool was discussed in detail in various sections in the chapter.

### 1. Section A: Family and friends support

61. The Working Group agreed to the following revisions:

- Paragraph 16: amend the opening sentence as follows: “In addition to their own financial resources (e.g. savings), MSME’s owners often rely on friend, family, and peer networks for initial capital and sometimes continue such reliance even beyond that stage. (This is commonly known as “friends and family” support.)”;
- Paragraph 17: delete the fourth sentence, as there may not be records of timely repayment of loans provided by family or friends; and
- Paragraph 18:
  - (i) Delete the first sentence, since it might suggest that States should adopt specific laws on financial support to MSMEs provided by family and friends;
  - (ii) Revise the second sentence as “Direct support from friends and family often comes on an informal basis”; and
  - (iii) Revise the remaining of the paragraph so as to eliminate value judgment (e.g. reference to unreliable and untimely source of financing).

### 2. Section B: Commercial credit

62. The Working Group agreed to the following revisions:

- Paragraph 19:
  - (i) Replace the term “credit” with “secured and unsecured credit” in the opening line of the paragraph, so as to introduce the concept of secured transactions; and
  - (ii) Add reference to secured transaction laws in the last sentence;
- Paragraph 20: delete the third sentence and the phrase “although competition per se does not necessarily mean cheaper credit” in the fourth sentence; and
- Paragraph 21:
  - (i) Delete the second sentence;

- (ii) Clarify that the examples in the paragraph did not apply globally but only to certain countries; and
- (iii) Delete the final sentence.

### 3. Section D: Platform-based lending

63. The Working Group agreed to explain the definition of crowdfunding in paragraph 24 and to revise the heading to “platform-based crowdfunding”.

### 4. Section E: Leasing

64. The Working Group agreed to delete the reference to the Convention on International Interests in Mobile Equipment (2001, the “Cape Town Convention”) in paragraph 32.

### 5. Section F: Receivable financing

65. The Working Group agreed to the following revisions:

- Paragraph 36:
  - (i) Add the phrase “as the basis for advancing funds to the party to whom the payment is owed” at the end of the first sentence; and
  - (ii) Replace last three sentences with a sentence along the lines of “financing can take the form of an outright sale of the receivable at a discount or the receivable may be used as collateral to secure a loan”; and
- Paragraph 37:
  - (i) Delete the phrase “by purchasing receivables” in the first sentence;
  - (ii) Delete the second sentence; and
  - (iii) Replace the phrase “some other jurisdictions” with “some jurisdictions” in the last sentence.

### 6. Section H: Letters of credit

66. The Working Group agreed to the following revisions:

- Paragraph 41: revise the last sentence to read that most commercial letters of credit are issued as subject to the ICC’s Uniform Customs and Practice for Documentary Credits; and
- Paragraph 42:
  - (i) Replace the fourth sentence with “Moreover, a letter of credit requires the beneficiary to provide precisely defined documentation that the bank will need to review in order to honour the letter of credit”; and
  - (ii) Revise the last two sentences to clarify that in a letter of credit transactions only the creditworthiness of the issuer is important for the beneficiaries. The creditworthiness of MSMEs (as customers) is relevant for banks when determining whether a letter of credit should be issued.

### 7. Section K: Public financial institutions

67. The Working Group agreed to the following revisions:

- Paragraph 49: include a brief description of development banks; and
- Paragraph 50: replace the third sentence with “Public financial institutions may even play an important role in financing fully-formed MSMEs, as providers of credit for research and development, innovation, exports and good practices on environmental, social and corporate governance. Public financial institutions, however, may be less agile than commercial banks in satisfying MSMEs’

applications as they tend to be subject to stricter audit, reporting and documentation requirements.”

## 8. Section L: Islamic finance

68. The Working Group agreed to the following revisions:

- Paragraph 51: add the phrase “offered by financial institutions” at the end of the first sentence; and
- Paragraph 52: delete the second sentence referring to the purchase of solar home systems.

## E. Draft recommendations

69. Having reviewed the draft recommendations as revised during the session, the Working Group agreed to the following revisions:

- Recommendation 1: replace the phrase “birth or other status, disability” with “birth, disability or other status”. It was noted that the commentary should clarify that this recommendation did not prohibit States from adopting certain measures favouring its citizens. A suggestion to include a reference to “age” did not receive sufficient support;
- Recommendation 3: remove the brackets around “such as the *UNCITRAL Legislative Guide on Key Principles of a Business Registry*”
- Recommendation 4: replace the phrase “simplified entities and other organizational forms” with “simplified organizational forms”;
- Recommendation 5:
  - (i) Replace the terms “lenders” and “creditor” with “financers” for consistency; and
  - (ii) Replace the phrase “title of an asset” with “title to an asset” in subparagraph (c).
- Recommendation 6 (new recommendation concerning immovable assets): it should read along the lines of “The law should provide for a secured transactions regime with respect to immovable assets under which (i) it is possible to create security rights in immovable assets (ii) it is possible to realize security rights in immovable assets, and (iii) financers can determine the priority of their security rights when entering into the transaction.”
- Recommendation 7: redraft along the lines of “To help ensure that guarantors and financers are aware of their rights and obligations, the law should provide that terms and conditions of the guarantee agreement are clear, understandable and legible. The law should identify both the formalities and content requirements necessary to make a guarantee effective”; and
- Recommendation 11: replace the term “ensure” with “help ensure”.

## V. Next Steps

70. While a concern was expressed about transmitting the text to the Commission at its next session in 2023 given the tight timeline for delegations to provide editorial suggestions, the view prevailed that the draft Guide, as revised at the current session, would be considered sufficiently mature for transmission to the Commission. It was noted that the Working Group had already finalized the draft recommendations during the session. A suggestion to transmit only the draft recommendations did not receive sufficient support. After discussion, the Working Group agreed to transmit the draft Guide, as revised at the current session, to the Commission at its fifty-sixth session



in 2023 for adoption. The Working Group also agreed to recommend to the Commission to request the secretariat to refine the draft commentary, as appropriate.

71. Some delegations expressed concern about the practice of making available the English version of the working papers earlier than other language versions.

---