CHAPTER 24

CONTEMPORARY ISSUES IN THE HARMONIZATION OF COMMERCIAL LAW

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I INTRODUCTION

As a background to the various papers in this book, the present chapter examines some of the key issues of harmonization faced by United Nations Commission on International Trade Law (UNCITRAL) during 2014. Specific focus is put on the core issues arising out of the 47th Session of the Commission and some related matters addressed by the respective Working Groups, as they formed the contemporary reference to the UNCITRAL Asia Pacific Fall Conference 2014, which is the provenance of the present book[1].

The major issues addressed by the 47th Session that are of interest for the purpose of the present chapter can be categorised under a diverse set of topics namely

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1 Although, since then the 48th Session of the Commission has taken place (June 29 to July 16, 2015) and the author had a distinct privilege to partake in it as an official observer, the reference to the issues arising for harmonization in this chapter is intentionally kept limited to the deliberations of the Commission in its 47th Session as concluded on July 2014. This was because the 47th Session of the Commission was the latest Commission Session, at the moment when the papers published in this book were presented in the UNCITRAL Asia Pacific Fall Conference held on 17th and 18th October 2014 in Macau SAR. As the objective of the present chapter is to provide a backdrop to the papers presented in the Conference, confining the reference to the issues arising within 47th session was essential. However, the readers may want to take note that there was a Working Group II meeting held between the time when the 47th Session concluded in July 2014 and when the Conference was held. The readers who may want to update the deliberations in the area of Arbitration and Conciliation as they stood at the time of the Conference should also refer to the report of the Working Group II meeting held in September 2014. See *The Report of Working Group II (Arbitration and Conciliation) on the Work of its Sixty-first Session* Vienna A/CN.9/826 (2014) at 30.

arbitration and conciliation, micro, small and medium-sized enterprises (MSMEs), online dispute resolution, electronic commerce, insolvency law, security interests, technical assistance to law reform, uniform interpretation and application of UNCITRAL legal texts, promotion of the rule of law and future issues. The purpose of this chapter is to highlight the key issues, debates and concerns that were raised in each of the above fields. The objective is to set the context for the readers to facilitate their reference to the matters addressed in various papers presented in this book.

II ARBITRATION AND CONCILIATION

Privacy and confidentiality are some of the important traits of the arbitration process that parties to a commercial dispute cherish and value[2]. However, arbitration of investment disputes involving a state and private investor, especially those which are treaty based, should be more transparent in order to balance the interest of various stakeholders including those of the public, who have a stake on the matter. Transparency is equally critical in securing the legitimacy to the investor-state investment arbitration mechanism. Privacy in investor-state arbitrations can be challenged on the grounds that they often involve public interest and hence the argument that the public should be entitled to not only have the relevant information but also be allowed to participate in such arbitration proceedings. In this regard, apart from the publication of relevant information, the hearings of the arbitration proceedings may be conducted in public except when circumstances warrant the protection of confidential information or when the integrity of the arbitral process need to be safeguarded.

As a pinnacle of accommodating the public interest, investor-state arbitration proceedings may also allow relevant non-disputing parties or third parties to make submissions. The significance of the matter is evidenced by the fact that UNCITRAL, after having successfully adopted the Rules on Transparency in Treaty-based Investor-State Arbitration in (the "Transparency Rules ")[3], was called upon to

2 Michael Collins QC "Privacy and Confidentiality in Arbitration Proceedings" (1995) 11(3) Arbitration International at 321.

3 The Transparency Rules came into effect on 1 April 2014. The application of the Rules is foreseen in two different contexts namely to the disputes arising out of treaties concluded before and after the date the Transparency Rules came into effect. While the application of the Transparency Rules to the disputes arising out of earlier treaties require an agreement of the parties to the treaty or the disputing parties, its application is automatic when the disputes arise out of treaties concluded subsequent to the date of effect of the Transparency Rules and are initiated under UNCITRAL Arbitration Rules, unless the parties agree not to apply the Transparency Rules. See UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014) at <www.uncitral.org/pdf/english/texts /arbitration/rules-on transparency /Rules-on-Transparency-E.pdf>. Relevant amendments were also introduced to the UNCITRAL Arbitration Rules to give effect to application of the Transparency Rules. See UNCITRAL Arbitration Rules (with new

draft a Convention on transparency in treaty-based investor-State arbitration. The debate on the specific provisions of the draft Convention was one of the major agenda items during the 47th Commission session and it calls for closer examination. The draft Convention has since been approved by the Commission[4], adopted by the General Assembly Resolution[5] and subsequently opened for signature[6] and is officially known as the Mauritius Convention on Transparency[7] (the "Mauritius Convention").

During the 47th Session of the Commission, the UNCITRAL Working Group II, which was entrusted with the task of drafting the Convention, presented the text of the draft Convention on Transparency in Treaty-based Investor-State Arbitration after having held two Working Group sessions on the matter since 2013[8]. The chances of effectively achieving transparency across the board are much higher under the Convention as the relevant obligations may apply to the investment arbitration proceedings arising from past treaties or conducted under various arbitration rules. In spite of the modest objective set in the proposal for creating such a Convention[9], the prospects of achieving transparency under the Mauritius Convention is much higher as it provides for an enhanced set of obligations and consequentially could be seen as a more effective mechanism. The decision to include the wording from the proposal of the General Assembly Resolution (recommending the convention)[10] in the Preamble of the Mauritius Convention

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article 1, paragraph 4, as adopted in 2013) at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf> at art 1(4).

4 Annex I, *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17,* A/69/17 (2014).

5 Resolution 69/116 adopted by the General Assembly on 10 December 2014.

6 The Convention is not yet in force. However, since the Convention was opened for signature on 17 March 2015, as of June 2015, 11 states have signed the Convention. One state (Mauritius) has ratified the Convention and the Convention will enter into force when two more states follow suit.

7 The Convention is also referred as the "United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)" at <www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency -Convention-e.pdf>

8 For more details of the deliberations and results of the Working Group II (Arbitration and Conciliation) on the matter, see its reports namely Report No. A/CN.9/794 resulting from the fifty-ninth session of the Working Group II held in Vienna from 16 to 20 September 2013, and Report No. A/CN.9/799 resulting from the sixtieth session of the Working Group II held in New York from 3 to 7 February 2014.

9 When the proposal for a new convention was made, its objective was mainly aimed at providing an efficient mechanism to the states that already wish to embrace the Transparency Rules rather than to enhance the number of states accepting the rules as a binding mechanism.

10 *Report of the 59th Session of Working Group II,* A/CN.9/794 (2013) at para 41.

improves the legitimacy of the Convention. At the same time, the proposal made during the 47th session to add a specific reference to the relevant provisions of the UNCITRAL Rules on Transparency in the Preamble of the Mauritius Convention, ensures that the Transparency Rules remain relevant. Furthermore, the decision not to require an explicit written agreement by the claimant to apply the Transparency Rules reinforces the continued relevance of the specific provisions of the Transparency Rules and avoids redundancy[11]. Moreover, the caveat raised in the 47th Session regarding the possible use of MFN clauses in investment treaties by claimants to invoke or avoid the application of the Transparency Rules is equally important to keep the integrity of the scope of application of the Transparency Rules based on their own provisions rather than factors external to the Rules like the MFN provisions in an investment treaty[12].

The unanimous agreement of the Working Group II, as confirmed by the 47th Session, that it would be unacceptable for a party to the Mauritius Convention to accede to the Convention and then carve out its entire content by use of reservations, is an important measure to preserve the spirit of the Convention[13]. Similarly, the extended debate in the 47th Session on the issue of formulation of reservations and the ensuing modifications resulting in further refinement and enlargement of the key provisions[14] is commendable. The distinction about when reservations made at different times could take effect and delaying (for twelve months after the date of deposit) the taking effect of a reservation deposited after the entry into force of the Convention are some of the interesting measures, that provide a predictable time line and prevent any unexpected effects of a reservation. Finally, the efforts to establish the Transparency Repository for the implementation of the Transparency Rules and the specific measures made to enable the UNCITRAL Secretariat to assume the role of the Repository are crucial initiatives to achieve the dissemination of relevant information and documents to enhance transparency[15].

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11 Regarding the application of the Transparency Rules refer to the Mauritius Convention, above n 7, at art 2. See also the Rules on Transparency in Treaty-based Investor-State Arbitration, at art 1(2) and (9).

12 Mauritius Convention, above n 7, at art 2(5).

13 Specific reservations are, however, permitted under the Mauritius Convention under Articles 2(1)-(3) and only those reservations that are expressly authorised are permitted. See Mauritius Convention above n 7, at art 2(4).

14 It is interesting to note that the 47th Session not only modified several provisions relating to the issue of formulation of reservations but also added new provisions to the draft previously agreed at the Working Group II.

15 Under the Transparency Rules, the publication of information could start even when the notice of arbitration is issued and the relevant information at this stage could include the names of the parties and the investment treaty upon which the claim is based. After the arbitral proceedings are

The initiative to prepare and publish a guide to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention) debated under the 47th Session of the Commission reveals the caution member states would like to exercise in order to avert any potential misunderstanding as to the official nature of such works. Although, the initiative for the guide originally emanated out of the agreement of the Commission[16], once the Guide was prepared by the Secretariat in cooperation with some academic experts[17], concerns were expressed that "a guide would indicate preference for some views over others, and would therefore not reflect an international consensus on the interpretation of the New York Convention."[18] As a consequence of such concerns, a specific caveat was added, which categorically pointed out that the Guide was neither a reflection of views or opinions of the member States nor an official interpretation of the New York Convention. This experience indicates that although efforts to promote harmony in implementing UNCITRAL legal texts could receive the support of the Commission, in general any concrete outcome of such efforts may still warrant a closer scrutiny and approval by individual member states, if it has to gain any official sanctity. The initial support to the commissioning of the work on the guide to New York Convention and the subsequent concerns arising with regard to the outcome of the work need not be seen as a contradiction in the position of the Commission. The

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completed, a range of information could be published, which includes the notice of arbitration and relevant response, the statements of claim and defence, written statements and submissions by disputing parties, and non-disputing parties to the investment treaties and the third parties, list of documents submitted, transcripts of hearings and any relevant orders, decisions and awards. Moreover, the expert reports and witness statements not affecting the confidentiality could also be published upon request. However, any information considered as confidential in an investor-state arbitration process need not be published. See "FAQ on UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration" at <www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_FAQ.html>. For a sample of some published information relating investor-state arbitration proceedings see "UNCITRAL Transparency Repository" at <www.uncitral.org/transparency-registry/registry/index.jspx>

16 The 41st session of the Commission in 2008 recognised the need for undertaking work to eliminate or limit the effect of legal disharmony regarding the implementation of the New York Convention and the outcome of the work should consist in the development of a guide to the New York Convention. The Commission, therefore, requested the Secretariat to study the feasibility of preparing such a guide.

17 This progress was informed to the member states in the 45th Session of the Commission and the Commission also expressed its appreciation for work done by the Secretariat, as well as by the experts and their research teams. The Commission further requested the Secretariat to pursue efforts regarding the preparation of the guide on the New York Convention. Moreover, this decision of the Commission to request the Secretariat to pursue its efforts towards the preparation of a guide on the New York Convention in cooperation with international experts was subsequently noted with appreciation by the relevant UN General Assembly resolution.

18 *Report of the United Nations Commission on International Trade Law,* Forty-sixth session A/68/17 (2013) at para 140.

fact that the Guide was ultimately approved for publication, albeit with the relevant caveat, only demonstrates the importance given to the need to promote harmony in the implementation of the legal texts. But at the same time keeping the distinction between official and non-official views and interpretation of the legal texts is equally valued.

The 47th Session of the Commission also looked into the specific areas of future work in the field of arbitration and conciliation. Firstly, the Commission called upon the Working Group II to undertake the revision of UNCITRAL Notes on Organizing Arbitral Proceedings, which were originally published in 1996 (Arbitration Notes, 1996). However, this was a reiteration of a call, which was originally made in the 46th Session, when the Commission recognised the priority of the updating of the Arbitration Notes 1996. The Commission then called upon the Working Group II to take up the mandate (subsequent to the completion of the draft Convention on transparency) with an emphasis on the need to ensure that the universal acceptability of the Notes is preserved[19]. Second, the issue of enforcement of international settlement agreements was proposed for inclusion in the future agenda of UNCITRAL. The need for the topic was justified on several grounds including the relative difficulty in enforcing settlement agreements reached through conciliation (in comparison with arbitration awards) and the consequent disincentive to use conciliation, and the burdening and time consuming method of enforcing such agreements in a cross border context using contract law. As a result, a proposal to develop a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation was made. However, doubts also prevailed on the feasibility of such a project and a range of questions were raised with regard to work on that issue in the future. However, the Commission ultimately agreed that the issue will be taken up for consideration by the Working Group II and it should report back to the Commission in 2015 about the feasibility and the possible form of work on the issue.

Finally, the 47th Commission Session took cognizance of the interesting issue of concurrent proceedings in investment treaty arbitrations, which was also earlier raised in the 46th session of the Commission in 2014. Due to the potential of parallel proceedings posing serious consequences to treaty-based investor-State arbitration, the issue was considered to be worthwhile for the UNCITRAL to study[20]. The Commission expressed support for further exploration on the issue and requested the

19 Above n 18, at para 130.

20 It is interesting to note that support and concerns were raised for the need to expand this mandate beyond treaty-based investor-State arbitration, especially to the field of commercial arbitration. However, support seems to ultimately prevail for UNCITRAL taking up the issue in both the fields.

Secretariat to report back in the future about the possible work that might be usefully undertaken by UNCITRAL addressing the issue. All the above three issues identified for future work are crucial and can be expected to dominate the debates on harmonization in the field of international arbitration and conciliation in the coming years. Although these issues were raised under the auspices of UNCITRAL, it is fully aware of the importance of the need to take note of the work done by other international organisations and bodies on these emerging issues. This is crucial to ensure that international harmonization efforts taken by different organisations supplement each other and do not overlap.

III MICRO, SMALL AND MEDIUM-SIZED ENTERPRISES (MSMES)

The objective of UNCITRAL regarding the issue of MSMEs mainly pertains to the reduction of various legal obstacles faced by those enterprises, especially in developing economies. Although there could be different legal obstacles facing MSMEs, the Commission prioritised its focus on the legal questions surrounding the simplification of incorporation of MSMEs. Based on the recommendation of the 46th Commission Session in 2013, Working Group I started its work on related legal questions and submitted a report to the 47th Session. The work carried out was only a preliminary discussion in nature and it highlighted a range of legal issues that need to be addressed by any legal text that is aimed at simplifying the incorporation of MSMEs. The pertinent issues identified include "limited liability, legal personality, the protection of third parties and creditors dealing with the enterprise, registration of the business, sole ownership, minimum capital requirements, and transparency in respect of beneficial ownership, internal governance issues and freedom of contract"[21]. Among the various issues identified as relevant, some seem to be quite broad and tangential. How far all of above issues warrant a close study to develop a legal text addressing the simplification of incorporation process of MSMEs remains to be seen. Moreover, among the issues identified, some could manifest more strongly in the context of developing economies than others. For example, the issues like the transparency in beneficial ownership, protection of third parties and creditors, business registration, capital requirements and corporate governance could be more of a concern in the context of developing countries and hence may warrant a special attention.

To facilitate the process of the work with regard to the issue of incorporation of MSMEs, the Commission requested the Secretariat to identify the best practices relating to business registration and prepare a template for simplified incorporation

21 *Report of the United Nations Commission on International Trade Law*, Forty-seventh session A/69/17 (2014) at para 132.

and registration. This is expected to facilitate the future drafting of the legal text, which could take the form of a model law or other types of legal instrument on the subject matter. Although the concern was mainly on the incorporation challenges faced in developing countries, the Commission has called upon all the states to fully participate in the process of drafting the legal text in order to provide a diverse input in creating the relevant legal standard. Beyond the issue of incorporation, two other concerns facing MSMEs namely 'access to credit' and the challenges relating to 'alternative dispute resolution' are also identified as matters requiring the future attention of Working Group I. The set of issues lined up for Working Group I, gain significance due to the fact that they are focused on one of the very important engines of growth in developing economies namely the MSMEs.

IV ONLINE DISPUTE RESOLUTION

Online dispute resolution (ODR) has been brought within the mandate of Working Group III for quite some time now. Although progress has been made in some respects, there are some fundamental challenges that remain unaddressed. The focus of the work since 2010 has been mainly related to the issue of ODR arising in the specific context of cross-border electronic transactions. The impediments faced in making a concrete progress is visible in the dilemma faced by Working Group III even with regard to some of the preliminary questions like the approaches to be taken and priorities to be made[22]. One of the major challenges faced by the Working Group in drafting the rules was related to question of the nature of the final stage of online dispute resolution proceedings. Diverse views prevailed on the question and reconciliation forced the Working Group to propose the need to develop the rules based on a two-track system relating to ODR, the first one ending in arbitration (Track I) and the second one not ending with arbitration (Track II). Moreover, the Working Group also faced calls to develop a global ODR system that would encompass jurisdictions that recognised the binding nature of pre-dispute arbitration agreements upon consumers and those that did not recognise such agreements. At the same time calls were made to develop the rules governing business-to-business transactions first, prior to addressing the business-to-consumer segment.

In spite of the obvious divisions, it is important to note that the Commission has called upon Working Group III to focus its work on certain issues addressing the needs of not only the developing countries but also countries which are in a post-conflict situation. One of the important considerations in this regard is whether an arbitration phase should be part of the ODR process. The other issues recommended

22 See for a more detailed discussion on the fundamental questions faced by the Working Group III on the matter paras 218-222 of the *Report of the United Nations Commission on International Trade Law*, Forty-sixth session A/68/17 (2013).

for consideration include the effects of ODR on consumer protection (especially in cases where a consumer is a respondent) and the means to ensure effective implementation of the outcomes of ODR. Finally, it is also interesting to note that the Commission has clearly acknowledged the low-value and high-volume nature of cross-border electronic transactions and called upon Working Group to specifically address this fast growing field of electronic commerce. The 47th Session noted that progress has been achieved on the text of the procedural rules on cross-border electronic transactions relating to Track II. Progress on different functional issues was also noted. The Commission called upon the Working Group III to address the rules relating to Track I and the other remaining issues that were discussed earlier. However, those issues have raised many open ended questions and have triggered further proposals from specific member states, which have made it difficult to achieve practical solutions. In spite of the divisions and challenges, the Commission has confirmed the continued mandate of the Working Group and whether any breakthrough can happen in achieving a concrete result on the issue of ODR remains to be seen.

V ELECTRONIC COMMERCE

In contrast to the issue of ODR, the work of UNCITRAL relating to electronic commerce has been quite progressive in the past and it continues to expand to other interesting issues in field. One of the important set of issues faced by Working Group IV in the past few years pertains to the legal questions governing electronic transferable records. Subsequently, proposals were made to expand the work to address related matters like identity management[23], use of mobile devices in electronic commerce and single window facilities. In addition, a concrete proposal relating to the legal issues governing cloud computing was also made. This proposal was however limited to some preliminary matters, whereby the Secretariat was requested to gather some relevant information[24], based on which the Commission could subsequently consider the issue of cloud computing as a potential topic for future work. Interestingly, the support for UNCITRAL to focus on the issue of cloud computing was based on concern of its potential implications for SMEs and others.

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23 The 47th Session of the Commission also received proposal that the Secretariat should continue to closely follow legislative developments in the field of identity management and authentication and also organise workshops to collect relevant information on such matters. See the 47th Session Commission Report, above n 21, at para.148.

24 Based on the information collected, the Secretariat was asked to prepare a document identifying the potential risks arising from the current practices relating to three different contexts namely a) the conflict of laws, b) the lack of supporting legislative framework, and c) the possible disparities of domestic laws. See the 47th Session Commission Report, above n 21, at para.146.

While support for addressing cloud computing was discernible among members in general, a range of concerns were raised. Issues like data protection, privacy and intellectual property, were particularly pointed out as matters that will be difficult to harmonize and would fall beyond the mandate of the UNCITRAL. The need to take into account of the best practices and the works achieved by other international organization in order to avoid overlap and duplication was also emphasised. Although the need to give a broad mandate to the Secretariat to collect the relevant information was recognised, the actual scope of the future work on the matter was left to the subsequent determination of the Commission. The 47th Session finally reaffirmed the mandate to develop a legislative text on electronic transferable records and called upon the Secretariat to compile information on various other related matters discussed earlier for its future consideration. Clearly, the accomplishments of the Working Group IV and its proactive outlook and willingness to grapple with a range of emerging issues in electronic commerce makes the contributions of UNCITRAL quite progressive in this field.

VI INSOLVENCY LAW

On the subject of insolvency, the UNCITRAL has recently been focusing on the issues relating to enterprise group insolvency and contemplating taking up insolvency issues specifically faced by the MSMEs. On the matter of enterprise group insolvency, focus was on the issue of the obligations of directors of enterprise group companies in the period approaching insolvency[25]. Along with the focus on the MSME insolvencies, a mandate for work on the issue of recognition and enforcement of insolvency-derived judgements was also considered. During the 47th Session, the work on insolvency of enterprise groups gained support and Working Group V was urged to bring the work to a conclusion at an early date. Given the fact that the current UNCITRAL Model Law on Cross-Border Insolvency did not provide any guidance on the issue of the recognition and enforcement of insolvency-derived judgements, support was also extended for Working Group to develop a model law or model legislative provisions on that specific issue. Subsequent to the work related to recognition and enforcement of the insolvency-derived judgments, the Working Group V was asked to prioritise the development of a text on insolvency of MSMEs. In this regard, coordination with Working Group I was foreseen in order to promote consistency of UNCITRAL standards in the field of MSMEs.

25 On this issue, as well as on some other insolvency related issues like the feasibility of developing an insolvency convention and studying the issues facing states in adopting the UNCITRAL Model Law on Cross-Border Insolvency, the Working Group V has been utilising informal groups for preliminary work before it took up the matter itself. However, such a practice has been subjected to caution due to the possible perception that informal groups could be less inclusive by their very nature.

Due to the three major agenda lined up for Working Group V, it was considered that certain other issues like insolvency of large and complex financial institutions, and further work on financial contracts do not require the priority consideration by the Group. But at the same time, the need for the Working Group to continue its study was emphasised on two other important issues namely the feasibility of developing a convention [26] on selected international insolvency issues and the potential for further adoption of the Model Law on Cross-Border Insolvency. The range of insolvency issues that are within the harmonization agenda of Working Group V of UNCITRAL, not only shows a categorical progress but also a clear direction for the future. This could be attributed to the practice of utilizing informal groups to handle various preliminary matters. The fact that there were suggestions during the Commission Session asking the Working Group to utilise the informal group to study certain matters[27], in spite of some concerns expressed, acknowledges the importance of such practice in achieving efficiency.

VII SECURITY INTERESTS

On the issue of Security Interests, based on the UNCITRAL Legislative Guide produced in 2007[28], the Working Group VI was asked to develop a Model Law in 2013. The Working Group was required to ensure that the development of such a Model Law would be consistent with any other texts on secured transactions prepared by the Commission. Since then, the Working Group initiated the work on the Model Law and completed the first reading of its draft, which was duly noted by the 47th Session of the Commission. After the draft of the Model Law was developed, one of the important issues, which was due for consideration was whether the draft Model Law should develop provisions on security interests in non-intermediated securities. With regard to the underlying issue, the Working Group first considered a set of definitions and draft provisions [29] and then positively recommended the Commission for the inclusion of provisions addressing security interests in non-intermediated securities within the draft Model Law. The major justification for such a recommendation was based on the significance of non-intermediated securities as an important source of credit for businesses and small and medium-sized enterprises.

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26 It is interesting to note that although concerns were expressed earlier about the use of open-ended informal groups, the Working Group was asked to recommend an informal group to consider whether developing a convention would have value in encouraging states to adopt cross-border insolvency measures in order to justify the initiatives to develop a convention.

27 See above n 26.

28 UNCITRAL *Legislative Guide on Secured Transactions 2007* (Vienna: United Nations, Sales No. E.09.V.12, 2010).

29 Annex to UNCITRAL *Draft Model Law on Secured Transactions: Security Interests in Non-Intermediated Securities* A/CN.9/811 (2014) at 2.

It was pointed out that in spite of such significance there was a dearth of provisions addressing the matter in other related legal instruments that already exist[30].

The 47th Session of the Commission agreed with the suggestion and requested the Working Group to expedite the drafting of the Model Law along with the definitions and provisions on non-intermediated securities and submit the same along with a guide to enactment. The Commission, moreover, clearly acknowledged the importance of modern secured transactions law for two main purposes - namely the availability and cost of credit. It is also relevant to note that the Commission emphasised that urgent guidance on this important issue is needed for states in general and for developing economies and economies in transition in particular. The examination of the issues under consideration by Working Group VI evidences its careful approach in filling the gaps in the works of other international legal harmonization bodies and of its own rather than reinventing the wheel. Such caution is highly important among all international organisations aspiring for legal harmonization to supplement each other in a healthy manner in order to ensure that their common and shared goals are achieved effectively.

VIII OTHER ISSUES

Other than the various legal issues arising in harmonization efforts in the six specific areas discussed earlier, there is a whole gamut of issues raised and discussed in the 47th Commission Session. A brief reference to them would throw a better light on some other contemporary challenges facing harmonization. In order for harmonization efforts to be effective, it is not sufficient to produce international legal instruments but they have to be followed up with several other initiatives. For example, technical assistance to law reform in domestic jurisdictions, promoting the adoption of legal texts and promoting uniform interpretation and application of the legal texts are some of the essential measures that have to be carried out on a continuous basis in order to achieve and maintain an effective harmonization. These issues can be briefly examined next.

In the 47th Session of the Commission, concerns as to the challenges, particularly those related to the cost associated in providing technical assistance were raised and the Commission provided various suggestions to tackle the situation[31]. With regard to technical assistance, the Commission also commended the cooperation developed by the Secretariat with an Asia Pacific Economic Cooperation (APEC) project

30 For example, the legal instruments pointed out were the UNIDROIT Convention on Substantive Rules for Intermediated Securities 2009, the Hague Conference Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary 2006 and the UNCITRAL Legislative Guide on Secured Transactions 2007.

31 47th Session Commission Report, above n 21, at para 165-169.

focusing on the issue of "Ease of Doing Business". It expressed support to develop further cooperation with APEC and its member economies [32] to improve their business environment and to promote UNCITRAL legal texts. In this regard, a specific plan to design and develop an accession kit to assist States with the ratification of or accession to the Rotterdam Rules[33] was approved.

The 47th Session of the Commission also deliberated on measures aimed at the promotion of uniform interpretation and application of the UNCITRAL legal texts. The importance of present initiatives like the case law database on UNCITRAL legal texts referred as the CLOUT, the digests of case laws published on specific legal texts and some other information provided by UNCITRAL through websites was highly emphasised. In the process of carrying out its harmonization efforts, the UNCITRAL coordinates and cooperates with several entities. Therefore, any research or study of the legal harmonization in specific areas or topic should therefore go beyond the UNCITRAL instruments and verify the ongoing work or outcome on those topics arising out of a range of other bodies[34], both within and outside the UN system.

In addition to its mandate on harmonization, UNCITRAL has also been playing an important role in the promotion of the rule of law both at national and international levels and in situations of post-conflict reconstruction. Ever since 2008, its role in this regard has also been discussed in the annual Commission Session. The

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32 Other than the regional focus made through APEC that was discussed earlier, the 47th Commission also emphasised the mandate of the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) and appreciated the specific contributions made by the RCAP including the development of joint academic programme on teaching and researching electronic commerce law, joint organization of several regional conferences and technical assistance initiatives. It is interesting to note that momentum is being gained to establish similar regional centres elsewhere. The need to emulate such centres in other regions of the world was reiterated during the 47th Session of the Commission and the Secretariat was called upon to initiate consultations in that regard.

33 See the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008. It is important to note that the accession kit planned will not have any bearing on the interpretation of the Convention as such and is only intended to facilitate the accession or ratification process to the Convention.

34 For example, a good starting point for that are those bodies with which UNCITRAL has established coordination and cooperation. The bodies mentioned in this regard during the 47th session includes the UN/CEFACT, the United Nations Conference on Trade and Development, the United Nations Economic Commission for Europe, the United Nations Environment Programme, the United Nations Inter-Agency Cluster on Trade and Productive Capacity, the Hague Conference, OECD, UNIDROIT, the World Bank and the World Trade Organization. It is important to take note there are other international organisations, intergovernmental organisations and non-governmental organisations that have established relations with UNCITRAL and the relevance of the work and contributions of such entities should also be considered in examining any harmonization issues. For more details of those entities and specific areas of their work see the 47th Session Commission Report, above n 21, at paras 185-207.

contribution of UNCITRAL in promotion of the rule of law in commercial relations is part of the broader agenda on the matter of the United Nations and its bodies. The relevance of the contributions of UNCITRAL to the promotion of rule of law in commercial relations can be evidenced by the impact of its works in different areas. For example, the UNCITRAL standards in enhancing transparency in the context of investor-State relations have positive implications on accountability and access to information, which are important elements that will enhance rule of law in international investment matters. Interestingly, some positive implications of harmonization of commercial law upon development agenda are also visible. The nexus between providing sound regulatory framework for businesses and achieving private sector contribution to sustainable development was recognised in the Commission. This ultimately implies that increasing attention on harmonization of commercial law should be seen as part of the development agenda. Similarly, "establishment of enabling environments for rule-based business, investment and trade as critical elements for conflict prevention, post-conflict reconstruction and the promotion of rule of law and governance in commercial relations" was recognised.[35]

In spite of various positive implications arising out of the work, concerns pertaining to political sensitivity of certain issues like the rule of law and its potential to affect the neutrality of UNCITRAL were also noted. Moreover, embarking on such areas was also considered to have the potential to dilute the mandate of UNCITRAL. Doubts also prevailed about the value that may be added by the integration of UNCITRAL work with the rule of law strategies of the UN. However, such concerns were countered with arguments that pointed to the clear assertion by various UN General Assembly Resolutions about the role UNCITRAL in promoting the rule of law in commercial relations[36]. Moreover, it was also argued that the integration of UNCITRAL work to relevant UN mandates would also benefit the end-users of UNCITRAL's standards. In the end, the role of UNCITRAL in promoting various allied goals found support in the Commission, which expressed its positive conviction on the matter. Since the Commission believed that private law standards in international trade are necessary for good governance, sustained economic development and even eradication of poverty and hunger, it found favour in promotion of the rule of law in commercial relations. Finally, the role of

35 47th Session Commission Report, above n 21, at para.221.

36 It was also noted that the very resolution establishing the UNCITRAL itself has reference to its role in promotion of rule of law. Moreover, various decisions of UNCITRAL itself have alluded to such a reference. See the 47th Session Commission Report above n 21, at para 225.

UNCITRAL in strengthening the rule of law was confirmed by the Commission, particularly through the process of facilitating access to justice[37].

IX CONCLUDING REMARKS AND FUTURE ISSUES

The diverse range of legal issues that are taken up in each of the specific areas discussed in this chapter demonstrates an effective agenda for harmonization facing UNCITRAL. In each area of legal harmonization, it is noticeable that when a set of issues are being addressed by specific Working Groups, some new issues are being identified and lined up for parallel or immediate successive consideration. Except, in some Working Groups where there may be a relative stalemate on the specific agenda issues, the progress of harmonization and the output of legal instruments have been quite impressive. Although, this method of creating a substantial and continuous agenda has at times resulted in some Working Groups having too much to handle, the overall results and the quality of the outcome are commendable. In spite of the productive results achieved, the potential for producing more useful work by the Working Groups or the Secretariat seem to be reduced by the limitation of resources, particularly budgetary constraints. Various ad hoc measures have been suggested by the member states in the Commission to address such problems but a more permanent and long term solution needs to be devised and implemented. In this regard, the establishment of the UNCITRAL Trust Fund seeking contributions from organisations, institutions and individuals to support specific initiatives is a good start although it needs to be promoted among specific target groups who are relevant stake holders or beneficiaries of the work of the UNCITRAL. A more proactive promotion of the Trust highlighting the unique nature of the work carried out as well as the intangible benefits that accrue to the private sector, especially to the multinational corporations or transnational businesses, will improve the contributions to the Trust.

Apart from addressing a current set of issues (existing mandate), the UNCITRAL annual Session in 2013 has interestingly agreed to reserve time to discuss future works of UNCITRAL as a separate topic at every Session of the Commission. Such an approach will not only enable the planning of activities to be more effective but also trigger contributions on future topics by other sources and experts. For example, identification of issues for future work will no doubt encourage research and publications on the matter, especially by academic and research organisations, which are proved to be valuable references for the work of the UNCITRAL Working Groups. While providing a head start for the work on those issues, they also increase

37 Interestingly, the Commission provided some detailed comments on how promotion of the rule of law is achieved through its work that facilitates access to justice. See the 47th Session Commission Report above n 21, at para 240.

the awareness and significance of those issues among various stakeholders including member states, which in turn will facilitate achieving a more consensual process during the approval of the relevant legal texts in the annual Sessions of the Commission. Moreover, the advance identification of issues for the future will also enable the Commission to distinguish what needs to be prioritised and to make a more effective judgement on the choice of issues to be addressed, especially in circumstances facing resource or budgetary constraints. However, the attempt to have an exclusive section on future works of UNCITRAL during the 47th Session met with some challenges. For example, a presentation on possible future work on ODR was challenged on the ground that the existing mandate of Working Group III as set in 2010 would already encompass such a proposed work. Moreover, concerns surfaced with regard to the status of the conclusions already reached in the earlier parts of the Commission Session on the future work of each of the six Working Groups. This warranted an agreement that conclusions reached earlier would not be reopened. These challenges even led to a suggestion that in future sessions, the reports of Working Groups and plans for future work should be considered together implying that a separate section on future work should be avoided.

Finally, with regard to future work proposed in different areas, the Commission reaffirmed its support for holding a colloquium to explore possible future work in the area electronic commerce, focusing mainly on the issues of identity management, trust services, electronic transfers and cloud computing. However, the proposal for possible legislative development in the field of public-private partnerships (PPPs) did not gain the support of the Commission. Although, the subject-matter was considered to be very important for developing country members and some members even made a concrete proposal to allocate the mandate to a Working Group in 2015, the Commission postponed the consideration of the question to its future sessions. Even on the question of whether the Secretariat should do some preparation for possible legislative development on PPP in the future, the opinions expressed in the Commission Session were divided. The challenges faced in delineating the future works, as well as the limited acceptance of the topics proposed for such future works during the 47th Session of the Commission do not diminish the prospects for a distinct articulation of issues of future mandate in the Sessions of the Commission. Instead, these experiences clearly indicate that a cautious approach is needed in the process of identifying the future issues to be included within the mandate of UNCITRAL.

The experience shows that although several legal issues may be identified for possible harmonization in free deliberations like colloquia or academic conferences, not all of them can be accepted by UNCITRAL as part of its mandate. As a body, where the sovereign will of the member states will be a key determinative factor of its future direction, the diversity in opinions and lack of unanimity in accepting

proposals are a common phenomenon. Under such circumstances, the lack of immediate support for any specific proposal for future harmonization within UNCITRAL should not in itself lead to the scepticism of the utility and value of the process of identification of the underlying issues using informal methods. Indeed, this is clearly evidenced from the support of the Commission for the use of informal methods and bodies, especially for preliminary work on matters to be taken up by different Working Groups. The support in the Commission for formal working methods was mainly prescribed to the works of legislative development (ie development of legal texts). The preference for formal method for legislative development was due to its transparent, inclusive and multilingual nature that supports the universal applicability of UNCITRAL texts. Moreover, the Commission discourages the use of any working method that may have the effect of reducing the voice of developing countries in such works. This clear distinction between informal and formal methods recognised in the harmonization process of UNCITRAL underlines the importance of the potential role international conferences like the UNCITRAL Asia Pacific Fall Conference 2014 could play in making effective contributions to the works of UNCITRAL. The comprehensive analysis of contemporary issues of harmonization arising out of the 47th Session of UNCITRAL in this chapter, reveals a paramount requirement for such informal pursuits to take cognizance of the position of the Commission with regard to the specific issues, in order to ensure that any resulting outcome or recommendations reflect the reality and are not discounted as ideals conceived in ivory towers.