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## Commercial fraud

### Note by the Secretariat

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## I. Introduction

1. The Commission has considered the issue of international commercial fraud on several occasions beginning with its thirty-fifth session in 2002,<sup>1</sup> and the reports of the Secretariat to the Commission describing work undertaken in this regard are available on the UNCITRAL website.<sup>2</sup> In addition, a colloquium on commercial fraud was held by UNCITRAL in April 2004 covering the topic in the context of the following broad areas: work in other international organizations; banking and trade fraud; investigation; cyber fraud; prevention; transport; insurance; recovery; money-laundering; insolvency; prosecution; procurement; the role of professionals; and securities (see A/CN.9/555). Following the colloquium, the Commission approved the preparation of a study intended to assist Governments and the international commercial community in combating commercial fraud.<sup>3</sup>

2. Two meetings of a group of experts on commercial fraud were held in October 2005 and January 2007, respectively. Those sessions contributed to the preparation of the study requested, which is referred to as the “Indicators of commercial fraud” (A/CN.9/624, Add.1 and Add.2), and serves to identify common characteristics in typical fraudulent schemes that provide warning of their nature, and to explain those characteristics. At the request of the Commission, the “Indicators of commercial fraud” were circulated to Member States for comment in 2007 (A/CN.9/659, Add.1 and Add.2), following which the Commission in 2008 requested the Secretariat to make such adjustments and additions as were advisable to improve the materials and then to publish the materials as a Secretariat informational note for educational purposes and fraud prevention. The Commission also expressed its view that the materials could be incorporated by the Secretariat as a component of its broader technical assistance work, which could include dissemination and explanation to Governments and international organizations intended to enhance the educational and preventive advantages of the materials. Further, Governments and international organizations could be encouraged in turn to publicize the materials and make use of them in whatever manner was appropriate, including tailoring them to meet the needs of various audiences or industries.<sup>4</sup>

3. In addition, as requested by the Commission,<sup>5</sup> the Secretariat has continued to participate in the work of the United Nations Office on Drugs and Crime (UNODC)

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<sup>1</sup> *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17)*, paras. 279-290; *Ibid.*, *Fifty-eighth Session, Supplement No. 17 (A/58/17)*, paras. 231-241; *Ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 108-112; *Ibid.*, *Sixtieth Session, Supplement No. 17 (A/60/17)*, paras. 216-220; *Ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 211-217; *Ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17 (Part I))*, paras. 196-203; *Ibid.*, *Sixty-third Session, Supplement No. 17 (A/63/17)*, paras. 339-347; *Ibid.*, *Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 345-355; and *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 232.

<sup>2</sup> See A/CN.9/540, 2003; A/CN.9/555, 2004; A/CN.9/600, 2006; A/CN.9/624, Add.1 and 2, 2007; and A/CN.9/659, Add.1 and 2, 2008.

<sup>3</sup> *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 108-112.

<sup>4</sup> *Ibid.*, *Sixty-third Session, Supplement No. 17 (A/63/17)*, paras. 342-343 and *Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 348.

<sup>5</sup> *Ibid.*, *Sixty-third Session, Supplement No. 17 (A/63/17)*, para. 347 and *Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 354.

on economic crime and identity fraud. In particular, the UNCITRAL Secretariat has participated in UNODC's core group of experts on identity-related crime, which was formed to bring together on a regular basis representatives from Governments, private sector entities, international and regional organizations and academia to pool experience, develop strategies, facilitate further research and agree on practical action against identity-related crime. The most recent meeting of the core group of experts took place in January 2013, and resulted in a draft Economic and Social Council resolution (E/CN.15/2013/L.6/Rev.1) requesting UNODC to continue its efforts, in consultation with UNCITRAL, "to promote mutual understanding and the exchange of views and expertise between various stakeholders, and in particular between public and private sector entities, on issues pertaining to identity-related crime through the future work of the core group of experts on identity-related crime, including draft model legislation on identity-related crime".

4. At its forty-fifth session in 2012, the Commission was reminded that more than a decade had passed since it first considered the issue of commercial fraud. It was said that "commercial fraud remained a major obstacle to international trade and noted that, given the vital role of the private sector in combating commercial fraud, UNCITRAL was in a unique position to coordinate ongoing efforts in that field and thereby help draw the attention of legislators and policymakers to that important issue".<sup>6</sup> In addition, it was proposed that the Secretariat could organize a colloquium on commercial fraud, resources permitting.<sup>7</sup> In order to consider the feasibility and desirability of holding such a colloquium, the Secretariat held an informal meeting of experts in the field who met in Vienna, Austria, from 29-30 April 2013.

5. The informal meeting of experts reviewed the work on commercial fraud undertaken by UNCITRAL to date and considered whether or not future work in the area would be useful and, if so, the possible scope of that work.

## II. The Indicators of commercial fraud

6. The informal meeting of experts reviewed the Indicators of commercial fraud and made several suggestions to align the text with developments in the field since the document was last revised in 2010.

7. The informal meeting of experts agreed that the Indicators of commercial fraud should be published in an appropriate manner as soon as practicable and given the widest possible circulation. In this regard, it was suggested that, were a Colloquium to be held, it could be of significant benefit in facilitating the distribution and further updating of the Indicators of commercial fraud.

<sup>6</sup> Ibid., *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 232.

<sup>7</sup> Ibid.

### III. Possible future work on commercial fraud

#### A. Colloquium

8. The informal meeting of experts suggested that a number of important areas in respect of commercial fraud warranted further attention in a broader forum. It was recalled that the UNCITRAL colloquium in 2004 provided a useful model for addressing issues in a context that attracted interest and participation from a wide spectrum of those combating commercial fraud.

9. In particular, it was observed that developments in electronic communications posed particular challenges through identity theft of corporations and banks, the inability of receivers of messages to identify senders with certainty, and the proliferation of websites that mimicked those of legitimate entities but that were controlled by fraudsters. It was observed that the consequences of such developments impacted every aspect of business, finance and trade from the sale of goods, information and services to online dispute resolution.

10. It was also suggested that the areas explored in the 2004 colloquium warranted revisiting in light of recent developments such as cloud computing, mobile payment systems, and expanded access to the Internet and the global financial crisis, which had exacerbated the impact of commercial fraud. It was noted that Internet usage has expanded at a dramatic rate around the world, increasing by 528 per cent over the last decade. It was further noted that 1/3 of the world's population is now connected to the Internet, increasing over the last decade by 3,000 per cent in Africa, 2,250 per cent in the Middle East, 1,200 per cent in Latin America and 800 per cent in Asia.<sup>8</sup>

11. It was recalled that the Commission agreed in 2004<sup>9</sup> that it would be useful if, wherever appropriate, examples of commercial fraud were discussed in the particular contexts of projects undertaken by UNCITRAL so as to enable delegates involved in those projects to take the problem of fraud into account in their deliberations, and the Secretariat was requested to facilitate such discussions where appropriate. The informal meeting of experts expressed the view that while some of the UNCITRAL texts address issues of fraud, many do not and that even where fraud is addressed, the attention given to it is focused on its impact on existing obligations and not in identifying and preventing it. However, it was noted that identity management and mobile payments were on the list of topics for possible future work by Working Group IV.<sup>10</sup> It was also suggested that the type of expertise necessary to formulate normative rules of commercial law in discrete fields is not necessarily the type of expertise necessary to identify possibilities of commercial fraud or how to address them; therefore, it was suggested that it might be useful to focus separately on the commercial fraud potential and dangers in the areas on which UNCITRAL Working Groups are focused.

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<sup>8</sup> Internet World Stats: Usage and Population Statistics, [www.internetworldstats.com](http://www.internetworldstats.com) (last visited 6 May 2013).

<sup>9</sup> *Ibid.*, *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 111.

<sup>10</sup> *Ibid.*, *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 236-237 and 239. See also two notes by the Secretariat: "Present and possible future work on electronic commerce" (A/CN.9/728) and "Overview of identity management" (A/CN.9/WG.IV/WP.120).

12. Recognizing the unique value of the Indicators of commercial fraud, it was suggested that a colloquium could update the text and consider additions that might be appropriate, consider how to promote them, and to mobilize energies outside the United Nations to promote and keep them up to date.

13. The informal meeting of experts was of the view that in light of the continued threat to international trade posed by commercial fraud, the need for further coordination and education, and the unique position occupied by UNCITRAL to bring together governmental representatives and other organizations affected by commercial fraud, an international colloquium sponsored by UNCITRAL should be considered.

## **B. A mechanism for future work**

14. The informal meeting of experts recalled that the report to the Commission on the 2004 colloquium had emphasized that education and training played a significant role in fraud prevention and could help address the problems resulting from under-reporting the incidence of commercial fraud.<sup>11</sup> The report further noted that prevention was primarily within the purview of commercial law and self-regulation by the commercial community, and was manifested through standards such as those affecting corporate governance, standards of professional conduct and audits.<sup>12</sup> The meeting suggested that a process through which the Indicators of commercial fraud could be regularly updated would be invaluable.

15. The informal meeting of experts suggested that there was coordination, education and cooperation among commercial fraudsters and that similar efforts were essential in order to prevent and combat commercial fraud.

16. The meeting highlighted the need for regular opportunities to gather together to exchange information for those engaged in combating commercial fraud. In light of the limited resources available to UNCITRAL, it was suggested that private organizations could be encouraged to continue anti-fraud activities in the future through informal cooperation with, as well as encouragement and support from, UNCITRAL.

17. The informal meeting of experts recommended that attention be given to encouraging coordination, ongoing education and training by other organizations.

## **IV. Recommendations for consideration by the Commission**

18. In light of these considerations, the informal meeting of experts suggested that it would be valuable for a colloquium to be organized by UNCITRAL, in consultation with UNODC, on the following topics:

- (a) Commercial fraud in the emerging technological landscape including:
  - (i) Theft of corporate identities;
  - (ii) Impact of commercial fraud on and misuse of cloud computing;

<sup>11</sup> Document A/CN.9/555, para. 63.

<sup>12</sup> Ibid.

- (iii) Abuse of mobile payments including its impact on microfinance initiatives;
  - (iv) Abuse of online dispute resolution by fraudsters;
  - (b) Impact of the global financial crisis on commercial fraud;
  - (c) Emerging commercial fraud threats to global trade;
  - (d) Endorsement, promotion and updating of the Indicators;
  - (e) Identification of work being done to combat commercial fraud and consideration of projects in the fields addressed at the 2004 Colloquium, particularly banking and trade fraud, cyber fraud, securities fraud, and fraud prevention; and
  - (f) The feasibility and desirability of informal coordination to continue opportunities for coordination.
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