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Consideration of issues in the area of micro, small and medium-sized enterprises

Compilation of comments on the draft legislative guide on an
UNCITRAL limited liability organization as contained in working
paper [A/CN.9/WG.I/WP.118](#)

Note by the Secretariat

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I. Introduction

1. At its forty-sixth session, in 2013, the Commission mandated its Working Group I (micro, small and medium-sized enterprises (MSMEs)) to develop legal standards aimed at reducing the legal obstacles faced by micro, small and medium-sized enterprises throughout their life cycle and, in particular, those in developing economies, and agreed that such work should start with a focus on the legal questions surrounding the simplification of incorporation.¹ In pursuance of that mandate, the Working Group was scheduled to devote its thirty-fourth session, to be held in New York from 23 to 27 March 2020, to considering the revised draft legislative guide on an UNCITRAL limited liability organization as set out in working paper [A/CN.9/WG.I/WP.118](#).²

2. Owing to the measures put in place by States and the United Nations in response to the spread of coronavirus disease 2019 (COVID-19), the thirty-fourth session of the Working Group could not be held as scheduled. In March 2020, the Secretariat therefore invited Governments and observer organizations to submit comments on the draft legislative guide with a view to their transmission to the Commission at its fifty-third session, scheduled to be held in New York from 6 to 17 July 2020.

3. The comments received are compiled in the present note in chronological order and transmitted to the Commission for its consideration.

II. Compilation of comments

1. Italy

[Original: English]
[2 April 2020]

[...] This note highlights a few selected matters that may deserve particular consideration at this stage of the discussion. Within such context, the note also contains some “proposed solutions”, which have been drafted mainly on the basis of this delegation’s understanding of the majority view expressed by the room at previous meetings of the Working Group.

1. Deliberations of the Working Group: recommendation 9

Issue: draft recommendation 9 is not consistent with the UNCITRAL Legislative Guide on Key Principles of a Business Registry, drafted by Working Group I and adopted by the Commission in 2018. In particular, recommendation 21 of the afore-mentioned Legislative Guide specifies the minimum information required for registration, listing five specific sets of information (from (a) to (e)), which are more than (and different from) those listed in draft recommendation 9.

Proposed solutions: we believe that draft recommendation 9 should be deleted, while in the commentary to draft recommendation 8 (according to which “the law should provide that the UNLLO is formed once it is registered”), a sentence should be inserted to make it clear that the minimum information required for registration of an UNLLO is that provided for in the afore-mentioned Legislative Guide. Alternatively, draft recommendation 9 should be amended and made fully consistent with recommendation 21 of the afore-mentioned Legislative Guide.

¹ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 321.

² *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17 (A/74/17)*, para. 155.

2. Deliberations of the Working Group: recommendation 11

Issue: recommendation 11 does not clarify what kind of rights the term “equal rights” refers to. In this regard, one should note that UNLLO members may have decision-making rights (recommendations 12 and 13), rights to transfer membership upon agreement (recommendation 24), rights to withdraw from the UNLLO (recommendation 25), rights to receive information (recommendation 30) as well as financial rights. While paragraph 63 of the commentary seems to indicate that the principle of equality applies also to financial rights, pursuant to draft recommendation 21, distributions are made to members “in proportion to their respective share of the UNLLO”. This seems to suggest that members’ rights to receive distributions are not equal and are not based on the principle of equality. Further, under draft recommendation 25, upon agreement or reasonable cause, members may withdraw from the UNLLO and be paid over a reasonable period of time “the fair value of their share of the UNLLO”. This does not seem to explicitly reflect the concept of equal rights in recommendation 11.

Proposed solutions: draft recommendation 11 should be revised in order to eliminate the above inconsistencies by clarifying the scope and content of “rights”. In the understanding of the Italian delegation, one solution – which seems to us to reflect the mood of the room – could be to distinguish between the role of members in the management of the UNLLO (in equal terms unless otherwise established) and the different financial rights attached to the share of UNLLO pertaining to each. This would also clarify the different patterns of an UNLLO managed directly by its members and an UNLLO managed by the appointment of third-party managers.

3. For consideration: list of mandatory provisions which members of the UNLLO cannot contract out of

Issue: the current draft of the guide includes certain recommendations for mandatory provisions that cannot be excluded by agreement among the members (see [A/CN.9/WG.I/WP.118](#), para. 23) as they reflect the core features of the UNLLO and in order to avoid a member’s abuse of the UNLLO form. At its last session, in October 2019, the Working Group agreed that it would determine which provisions could be considered mandatory at its next session.

Proposed solution: in the opinion of the Italian delegation, following its understanding of the debate so far and according to the current draft of the guide, the provisions included in the following recommendations should be considered as mandatory:

- (i) Law and rules applicable to the UNLLO (*recommendation 1*);
- (ii) Scope of the UNLLO’s activities (*recommendation 2*);
- (iii) Legal personality of the UNLLO (*recommendation 3*);
- (iv) Limited liability of the UNLLO members (*recommendation 4*);
- (v) Name of the UNLLO (*recommendation 6*);
- (vi) Formation of the UNLLO (*recommendations 7-9*);
- (vii) Decisions reserved to the UNLLO members (*recommendation 12*);
- (viii) Responsibility of managers (*recommendation 17 (a)*);
- (ix) Duties of the UNLLO managers (*recommendation 19*);
- (x) Improper distribution (*recommendations 22 and 23*);
- (xi) Circumstances for the dissolution of the UNLLO (*recommendation 27 (a)*);
- (xii) Winding-up activities (*recommendation 28*);
- (xiii) Record keeping, inspection and disclosure (*recommendations 29 and 30*).

We propose that delegations consider whether a new recommendation (or a new paragraph in the commentary) should be added in order to list, for the sake of clarity, the mandatory provisions.

4. For consideration: how to become a member of an UNLLO

Issue: further to the deliberations of the Working Group that contribution is not a requirement for membership in an UNLLO (recommendation 11), the current draft leaves it to UNLLO members to decide how to become a member in an UNLLO (see A/CN.9/WG.I.WP.118, para. 62). However, the absence of clearer guidance on how to become a member may attract potential disputes, even in consideration of the rights and obligations connected to the membership.

Proposed solution: a new recommendation should be added (and para. 62 should be amended accordingly) in order to explain how to become a member of an UNLLO. As a second best, a recommendation could be inserted that either requires UNLLO members to specify how to acquire membership in an UNLLO or expressly leaves this aspect to States.

5. For consideration: recommendation 29

Issue: according to recommendation 29, the organization rules must be recorded if and where such rules have been adopted in writing or otherwise recorded. This implies that organization rules may be in oral form and in no way registered. This option seems to contradict the key importance of the organization rules in the life of an UNLLO. The whole guide is based on freedom of contract (see para. 22), which is concretely formalized through the organization rules. The relevance of the organization rules is also testified to by the Model Organization Rules drafted in appendix 2 to the guide. Furthermore, paragraphs 126 to 130 make it clear how crucial it is for members of an UNLLO to be able to verify their rights and duties. In this respect, we believe that the organization rules need always to be recorded.

Proposed solution: recommendation 29 should be amended in order to require the organization rules to be recorded under any circumstances.

2. Canada

[Original English]
[2 April 2020]

[...] “Majority”: we recognize that the Working Group decided to use the term “number” rather than the expression “per capita” in the definition of “majority” as well as in the text of the guide. In our view, the expression “by number” is unclear and unnecessary. We suggest inserting a period after “members” in the definition and deleting “determined by number”. We also suggest deleting the expression “by number” in the remainder of the guide.

“Restructuring”: we suggest that the Working Group/Commission should consider the reference to “domestic legislation” in the definition of “Restructuring”. Referring to domestic legislation in general in the guide seems inconsistent with the recommendation set out at paragraphs 13 and following that a stand-alone regime should be adopted by legislators with respect to MSMEs.

The Secretariat suggests in its note to the Working Group, (4) Transfer of rights (at page 11 of the English version), that “The Working Group may wish to reconsider the ability of a member to transfer a portion of its membership, with the approval of the other members”. We believe that a member should have the freedom to transfer a portion of its membership.

At footnote 59, the Secretariat noted that it replaced “limited liability” with “legal personality”. We suggest reverting back to “limited liability”.

At paragraph 39, we would suggest replacing “all correspondence” with “negotiable instruments, contracts, invoices and purchase orders for goods and services”. We suggest replacing the second sentence of paragraph 39 with something along these lines: “Appropriate sanctions may depend on the facts and circumstances of the case (e.g., if the third party was aware that it was dealing with the UNLLO) and may best be left to courts to determine”. We suggest deleting the last two sentences of paragraph 39. Is there data supporting the conclusion that there are administrative costs of compliance? If there are, are they outweighed by the cost of eventual legal disputes which could stem from the failure to put third parties on notice, through the use of the acronym, that they are dealing with an UNLLO?

We would suggest making recommendation 6 stronger and providing that the UNLLO shall use its acronym in “negotiable instruments, contracts, invoices and purchase orders for goods and services made in writing”.

We agree with the text proposed in footnote 68.

In our view, the meaning of recommendation 7 (b) is unclear. Does it mean that the law may permit: (1) UNLLOs with only natural persons; (2) UNLLOs with only legal persons; (3) UNLLOs with at least one natural and one or more legal persons? We suggest that recommendation 7 (b) could be redrafted along these lines “Specify whether members of the UNLLO must be natural persons only, may be both natural persons and legal persons [, or may also be only legal persons]”.

At paragraph 73, since the guide promotes the creation of a stand-alone regime, in our view, the guide should suggest that the law enacted on the basis of the guide list the legal requirements rather than referring to domestic law.

We suggest including “financial rights” in the last sentence of paragraph 113 because the member is essentially being “bought out” and is no longer a member and so should no longer have financial rights.

We note that paragraph 121 refers to the resignation of members. We wonder if the concept of resignation could also be covered in the explanatory paragraphs to recommendation 25. Is a resignation considered a “reasonable cause”?

We suggest clarifying the penultimate sentence of paragraph 130 as it seems to be in conflict with the recommendation. In addition, it is stated that the “UNLLO” may impose restrictions and conditions on access, but it is unclear who is making this decision, the members or the managers?

3. Spain

[Original: English]
[2 April 2020]

[...] In general terms, it is considered that the document has improved from the previous version. However, this delegation would like to insist on the need to make the flexibility and simplification of formal requirements in the constitution of this entity compatible with the necessary protection of third parties, since we must not forget that this is a limited liability entity. On the other hand, since we are talking about a simple corporate form, it is difficult for us to contemplate the possibility of transformation or restructuring, since this involves carrying out complex operations.

4. France

[Original: English and French]
[3 April 2020]

A. Purpose of the legislative guide

It should be made clearer that a key objective of the work is to reduce the size of the informal sector in developing countries.

To this end, the following sentences could be inserted, for example after the third sentence of paragraph 3:

“Indeed, an oversized informal sector is an obstacle to a sound and balanced development. The definition of an appropriate legal framework that can be extended to all activities in a given country constitutes the basis of its fiscal and social system. Therefore, it is a major imperative for a well-organized society and economy”.

In paragraph 6, entitled “freedom, autonomy and flexibility”, it seems useful to us to temper the emphasis placed on these important concepts by introducing the need to balance them with the protection of the rights of third parties. The following sentence could thus be added to this paragraph:

“The principle of freedom of contract must, however, find a limit in the guarantees which must be provided for the protection of the rights of third parties, which is the basis of the trust placed in the enterprise by its environment”.

I. B. Terminology

Name of UNLLO

It seems to us that the current name UNLLO is suitable, as it is a new form of business that is not analogous to a corporation. In our view, the use of the term “grouping” could not be considered, as it may be a single-member form.

Note by the Secretariat to the Working Group

- The French delegation supports the Secretariat’s proposal to delete the word “share” in the guide, and to replace it with the word “membership”, which encompasses both the financial rights and the decision-making rights of members.

It also supports the proposal to amend recommendation 11 in order to establish a link with recommendation 21 on distributions.

- The French delegation shares, in part, the view expressed by the Secretariat regarding the model organization rules.

First, with regard to the number of model organization rules, a model for multi-member UNLLO and a model for single-member UNLLO would be required at a minimum. Logic would require, however, that there be three model organization rules: one for a multi-member UNLLO managed by all members, one for a multi-member UNLLO managed by “designated manager(s)” and one for a single-member UNLLO.

Secondly, with regard to the content of each of these model organization rules, we share the concerns raised by the Secretariat. Consequently, we consider it desirable to limit the content of the model essentially to the default rules of the guide, either by expressly providing for a choice where a recommendation of the guide leads to a clear choice, or, as the case maybe, by merely stating that another clause is possible without elaborating on it further.

- With regard to the possibility of transmitting a portion of the “membership”, we agree with the Secretariat's observation on the difficulties this raises. Indeed, in the absence of precision, economic logic would have it that the use of such a faculty would lead to the transition to a pro rata structure. We are therefore of the view that this faculty should either be deleted, or be maintained by expressly providing for a default rule to the effect that “the transfer of portion of membership does not call into question the default rule according to which the financial and political rights of members are equal, unless otherwise stated by the organizational rules”.

II. Constitution and functioning of the UNLLO

Recommendation 2

In § 24, the comments seem to be confusing the statutory and the legal purpose of the entity. It should not be implied from these comments that it is not relevant for a State to require a reference to a statutory corporate purpose.

The French delegation therefore proposes that the last two sentences of §24 be reworded as follows:

“With regard to the purpose clause, the guide leaves it to the members of the UNLLO to decide whether or not to include a clause to this effect in their organizational rules, when States do not make this indication mandatory in their legislation.”

Recommendation 4

The status of acts performed during the UNLLO formative period should be clarified in the recommendation.

To this end, the French delegation proposes the following wording: “Members who acted on behalf of the UNLLO during its formation before it acquired legal personality shall be liable for the acts thus accomplished, unless the UNLLO, after having acquired legal personality, takes over the said commitments. These commitments are then deemed to have been entered into from the outset by the UNLLO”.

If this proposal is adopted by the Working Group, §32 will have to be amended accordingly.

The French delegation has no objection to the proposed wording and to making this recommendation mandatory, as proposed in footnote 42.

Recommendation 5

We believe that footnote 51 can be retained as suggesting that paragraph 35 be included in a separate section of the commentary on creditor and other third party protection mechanisms.

- (i) With respect to point (a) relating to misuse of the entity by members, members should be liable to creditors but not to the UNLLO;
- (ii) With regard to point (b), it is not appropriate to provide that creditors should be able to oblige the UNLLO to act against its members. Point (b) should therefore be deleted.

In addition, because the UNLLO has a legal personality distinct from that of its members, it would be appropriate to provide for (i) a creditor action against the UNLLO, (ii) the possibility for UNLLO to act against the members and (iii) to clarify that the UNLLO is liable to third parties.

Recommendation 9

This recommendation deals with the information required for the establishment of the UNLLO. Only this information would necessarily be published and accessible

to third parties (excluding the documents and information listed under recommendation 29).

Therefore, in order to protect third parties, we consider that the list of minimum information to be published should be supplemented by the following elements:

- (i) Address of the person managing the UNLLO;
- (ii) Purpose of the UNLLO where applicable;
- (iii) Capital amount if any;
- (iv) Duration/term of the UNLLO.

The provision should make it clear, in accordance with the commentary to § 50, that this is a non-limitative list.

In any event, at a minimum, the element syndicated in §128 should be recalled in the comments of recommendation 9, namely that States may demand that further information, which the UNLLO is required to keep, be made public.

Recommendation 10

The Secretariat's proposal in footnote 97 to add the words "other applicable law" in recommendation 10 b) to make it clear that members may not derogate by agreement from other State laws that are applicable to the UNLLO can be accepted.

Recommendation 11

The Secretariat's proposal to include in recommendation 11 an "*equal membership*" in addition to "equal rights" can be retained in order to avoid any ambiguity.

Recommendation 13

We believe that it would be useful, as far as possible, to simplify the drafting of the recommendation.

In (a), decisions falling within the exclusive competence of the members should not be repeated; rather, reference should be made to "decisions referred to in recommendation 12" or "decisions falling within the exclusive competence of the members".

Recommendations 14 to 19

We note that there is one important point that needs to be addressed, in light of the Working Group's recognition that a legal entity can be a member of the UNLLO.

We consider it necessary not to allow a legal person to be appointed as a manager of the entity. This would not be consistent with the logic of the project, which is to develop a form for small businesses.

In the context of a legal person being a member, it will therefore be incumbent on the members to adapt the management structure (since, in the default management structure, all members have the status of manager).

Recommendation 14

With regard to this recommendation, which can be approved as it stands, the Secretariat's proposal, which refers to the case where one of the members does not meet the required qualifications, could be accepted.

Indeed, it might be useful to add an additional rule according to which management structure No. 2 (where the UNLLO is managed by one or more managers) would be used, despite the absence of a clause in favour of such a structure, where not all the members can have the status of managers (minors, protected adults).

Recommendation 15

Point (b) of the recommendation, which appears redundant with point (a), could be deleted.

Recommendation 17

In point (b) of the recommendation, the term “disputes” should be replaced by “divergences” (at least in the French version).

Recommendation 20

The words “organization rules” should be retained.

Recommendation 21

The Secretariat rightly raises the difficulty resulting from the fact that the concept of “share” used by the recommendation has been abandoned in the rest of the guide.

It therefore appears desirable to substitute the term “membership” for “share” in recommendation 21, and to amend recommendation 11 to clearly state the principle of equal “membership” of members as a default rule.

Recommendation 24

A difficulty is rightly pointed out here again by the Secretariat, which arises from the possibility for a member to transfer a fraction of his membership (see §106).

In fact, this poses a problem insofar as an equivalence of the rights of each member and, implicitly, an equivalence of holdings has been agreed upon.

It therefore seems desirable to us not to allow this possibility, and in order to do so to delete the words “in whole or in part” in (a) or to provide a default rule that “the transfer of portion of membership does not call into question the default rule according to which the financial and political rights of members are equal, unless otherwise stated by the organizational rules”.

Recommendation 25

- Paragraph 113 refers to two quite distinct issues, namely the right of withdrawal and an expulsion/exclusion clause, which may lead to confusion.

The issue of exclusion should therefore be dealt with in a separate paragraph for the sake of clarity.

- Paragraph 114 mentions among examples of reasonable cause for withdrawal “the refusal of transfer of a member's rights in the UNLLO by other members”. This does not necessarily constitute a reasonable ground for withdrawal, as the refusal may be fully justified.
- From a wording standpoint, it seems more appropriate to say, instead of “unless otherwise agreed”, “unless otherwise provided for in the organizational rules”.

Recommendation 26

The recommendation raises the question of the definition of “restructuring”.

In this regard, we would find it helpful if the phrase “other fundamental changes provided for in national legislation” were clarified.

Instead of “other fundamental changes established in domestic legislation”, it would be advisable to write: “other fundamental changes qualified as restructuring in domestic legislation”.

Indeed, to the extent that unanimity is required for restructurings, it would be appropriate for the list of restructuring cases to be limitative.

Appendix: Model Organizational Rules

- *Footnote 1*: we think it is desirable to avoid complex options, and to limit ourselves to binary choices in the following terms:
 - (i) Choice 1: the default rule
 - (ii) Choice 2: single alternative solution or, in the case of multiple choices, the formulation “according to another solution agreed by the members”.
- *Footnote 2*: still for the sake of simplicity, we do not consider it desirable to give examples, which would moreover be likely to give rise to substantive discussions.
- *Footnote 5*: The proposal to maintain article 3 (a) ought to be adopted.
- *Footnote 6*: it would be appropriate as proposed to exclude the possibility of transferring a portion of the membership or, at the very least, to make it clear in the guide and in the model that “the transfer of portion of membership does not call into question the default rule according to which the financial and political rights of members are equal, unless otherwise stated by the organizational rules”.
- *Footnote 7*: The term “reasonable cause” should be retained, but it should be clarified that it should be understood in accordance with the sense given to it in domestic law.
- *Point 2 (f)*: this proposal is questionable as it adds to the recommendations and lacks clarity.
- *Point 3 (e)*: this model clause should be clarified. In this respect, the logic of recommendation 24 b) should be followed. To this end, the two sentences should be linked, for example as follows: “The membership is transferred to the heir, unless the members decide to purchase the membership of the deceased member from his or her heir within [...]”.
- *Art. 4 (b)*: it does not appear to us necessary to provide all these examples of limiting clauses or distribution of powers.
- *Art. 8*: similarly, the relevance of a reference to UNCITRAL instruments, which are intended for the settlement of disputes at the international level, should be ascertained.

5. Colombia³

[Original: Spanish]
[3 April 2020]

Given that the draft legislative guide on an UNCITRAL limited liability organization (UNLLO) has evolved from Working Group discussions held several years ago, it would be interesting to establish a (virtual) working committee at which it would be possible to hear first-hand the comments of those representatives of Colombia who have been involved in the drafting process, bringing together, to that end, representatives of the Office of the Superintendent of Companies, the Directorate for Micro-, Small and Medium-Sized Enterprises of the Ministry of Commerce, Industry and Tourism, the Office of the Superintendent of Industry and Commerce for issues relating to registration of the incorporation of UNLLOs, the Colombian Confederation of Chambers of Commerce and, for accounting issues, the Technical Council of Public Accounting.

Leaving the above aside, attention is drawn to the following observations and comments regarding the draft guide. The guide is aimed at reducing the legal obstacles facing MSMEs and at distilling good practices and key principles into a series of

³ Directorate for Regulation.

recommendations on how a State might devise and regulate a simplified legal form for MSMEs that can best facilitate their success and sustainability, stimulate entrepreneurship and promote participation and the creation of value in the economy.⁴ This business form, which differs from the types of entity currently provided for by law, is intended to offer, *inter alia*, greater flexibility in the establishment and registration of the entity (through the removal of legal obstacles to incorporation (simplification of incorporation) and with respect to financial information, tax burdens and other aspects such as the absence of a minimum capital requirement for the formation of the entity). Each Member State would regulate the size of such entities without preventing them from evolving into a more complex type of legal entity.

Recommendation 4

The formation of UNLLOs, as entities with limited liability, would involve separation of the assets of the UNLLO from those of its members (owners), which would promote entrepreneurship and stability and facilitate capital formation and access to credit at lower cost. However, such asset partitioning would not apply if the enterprise was used to commit unlawful acts (“piercing of the corporate veil”) or if its owner (in the case of a single-member entity constituted by a natural or legal person) or all of its owners (in the case of a multi-member entity constituted by natural or legal persons) personally undertook to secure the obligations of the UNLLO. It is therefore desirable to ensure that such personal guarantees given by the UNLLO members are imperatively limited in the guide.

An UNLLO will be deemed to have been formed with full effect once it has been registered in the registry (electronically or on paper). For those purposes, it is recommended that the imposition of requirements that might discourage the registration of such entities be avoided. Furthermore, its rules must be agreed upon by its members in accordance with the legal framework established for this type of entity. It is suggested that those rules should be recorded in writing in full and made available to the public (through the registry), thus preventing the entity from being misused for illicit purposes and ensuring that the liability of the entity or its managers, as appropriate, in respect of third parties is made clear.

Recommendation 7

The creation of a limited liability organization with a single member would conflict with Colombian law in that the Commercial Code establishes distinct forms of business association, each with its own specific characteristics, including with respect to the number of members that constitute those entities.

Under Colombian law, a limited liability entity can be incorporated only if it has at least two members, while a business with only one member is considered a single-member enterprise, each of those two business forms having special characteristics.

A single-member enterprise is a legal entity formed by a natural or legal person that uses a portion of its assets to perform one or more activities of a business nature.

A limited company is constituted by means of a public instrument concluded between a minimum of two and a maximum of twenty-five members, each of whom must make a contribution in order for the company to be established (the liability of each member being limited to the value of that contribution). In certain cases, limited liability may be authorized.

Thus, the adoption of this recommendation would cause confusion with respect to the two modalities for establishing an enterprise or company, since the requirement that an entity must have at least one member in order for it to exist would go beyond the requirements of the aforementioned Colombian regulatory framework, specifically those of the Commercial Code.

⁴ Draft legislative guide on an UNCITRAL limited liability organization, paragraph 4.

Recommendation 8 (paragraph 49)

The draft guide proposes that evidence of the identity of each UNLLO member should not be required but evidence of the identity of managers designated by the members should be disclosed, emphasizing that the latter requirement provides greater transparency to State authorities and third parties dealing with the UNLLO. In this regard, it is necessary to establish an instrument that prevents an UNLLO founder from committing fraud, corporate abuse or criminal acts under cover of a formal framework such as the incorporation of a micro-enterprise or of a small or medium-sized enterprise.

A legal mechanism for identifying and thus establishing the liability of the members is necessary in order to enable legal practitioners and/or the competent authorities to take measures to prevent possible activities that might be contrary to the legal order. To that end, a rule on piercing the corporate veil could be established. Such rules should be used not only to distinguish the assets and liability of the entity from the personal assets and liability of its members but also to prevent the commission of fraudulent acts, separately establishing the legal liability of the founder or founders of the company.

Recommendation 10

Members should also refrain from any abuse of the UNLLO legal form and any other rights granted to them. However, the reality that companies sometimes do commit rights abuses harming third parties and company members themselves, or engage in money-laundering, unjust enrichment or fraud, should be taken into account. Without prejudice to the principle of good faith established by the Political Constitution, a mechanism enabling identification of the founders in the cases described is needed.

Recommendation 14

The guide provides that the UNLLO should be managed by all of its members and leaves open the possibility that a manager might be a legal person. In order to support the objectives of the UNLLO model, consideration should be given to the effects of the control that would be exercised over the UNLLO in such cases (if the UNLLO were managed by another legal entity), including with regard to any financial information relating to the UNLLO that might be used for the purpose of decision-making by all interested parties.

Recommendation 29

By approaching this issue from the perspective of accounting and financial information, Colombian law covers aspects that go beyond what is dealt with in the guide, such as the existence of a statement of financial performance for micro-enterprises and three further statements, in addition to a statement of financial position in the case of small enterprises (annexes 2 and 3 of Decree No. 2420/2015 and amendments thereto).

Accordingly, it is proposed that at least one additional financial statement be included, namely a simplified statement of financial performance as provided for in annex 3 of Decree No. 2420 of 2015 (as amended), in line with article 2 of Act No. 1314 of 2009, which establishes that the Government may authorize certain entities, on the basis of the volume of their assets, the number of their employees, their legal form or their socioeconomic circumstances, to use a simplified accounting system and to issue abridged financial statements.

Recommendation 30

With regard to the inspection of records and access to information as provided for in the guide, in Colombia the relevant provisions are contained in the Commercial Code and the regulations derived therefrom, which go beyond what is set out in the guide by providing for the manner in which those records should be kept, set out and stored.

However, the guide does refer to “electronic or other records that are reasonable for a business of its size and complexity” and mentions the use of a mobile application as a means of storing and accessing electronically available information. In this regard, Act No. 1314 of 2009 provides that the Government may, on the basis of provisions governing economic intervention, allow or order accounting materials, including media, supporting documents and records, together with management reports and accounting information, especially financial statements and accompanying notes, to be prepared, kept and disseminated electronically. To that end, the provisions in question may serve to determine the rules applicable to the electronic registration of business records and the electronic submission of information, which all public registries, such as the business registry, would be required to apply. Those provisions guarantee the authenticity and integrity of documents and may regulate record registration once the records have been processed.

The Technical Council of Public Accounting, which is the body responsible for standardization in this area, is expected to prepare a comprehensive proposal in relation to this issue.

Recommendation 31

Alternative dispute resolution consists of leveraging all possible means of facilitating a solution that is satisfactory to all parties to a dispute without the intervention of a judge duly appointed by law.

In Colombia, one of the methods widely used as an alternative mechanism is conciliation, which is a hybrid method in that the parties seek to resolve their dispute independently but with the assistance of a third party unconnected to the dispute who acts as moderator or conciliator.

Of course, and as in other legal disciplines, disputes in the area of commercial or trade law can be resolved through methods such as conciliation and arbitration provided that the dispute relates to rights that can be exercised, waived and relinquished and in respect of which a settlement can be reached.

Colombian legislation establishes a series of activities or acts that are specifically considered to be commercial acts and that determine whether a dispute arising from a commercial activity involves such rights or whether it concerns unclear and contestable rights.

Thus, under Colombian law, only matters relating to the exercise, waiver and relinquishment of rights and settlement in respect of those rights may be subject to conciliation, that is, matters that give rise to asset-related disputes in relation to a legal transaction, such as a partnership agreement, from which a dispute may arise with respect to the non-payment of contributions.

However, there may be situations arising from a business relationship that cannot be resolved through conciliation, such as violation of the confidentiality of industrial or business information, questions concerning the evidentiary value of business records or the legal incapacity of a trader.

The comments above are intended to draw attention to the legal uncertainty and regulatory inconsistency that would arise in Colombian law if a provision were adopted to the effect that all disputes relating to the governance and operation of the limited liability organization – understood as a limited liability company – should be resolved internally using alternative dispute resolution methods, as it would not be possible to use conciliation to resolve all disputes arising from a business transaction in accordance with internal regulations since such disputes might not concern clear and incontrovertible rights as referred to in the examples given in the previous paragraph.

6. United States of America

[Original: English]
[3 April 2020]

These comments specifically address the issues raised by the Secretariat in its note to the Working Group (A/CN.9/WG.I/WP.118).

Member's share of the UNLLO and use of the term share. This delegation believes the terms “membership” or “membership rights” necessarily encompass both financial and decision-making rights. We believe this is consistent with how the guide is currently drafted. However, there are times when it may be necessary to treat these bundles of rights separately both in the recommendations of the legislative guide, and by members themselves. Thus, the definition of “membership” and/or “membership rights” should make clear that these rights can be severable in certain circumstances. For example, members may wish to follow the default rule that all members have equal decision-making rights, but provide that members will receive different allocations of financial rights, perhaps reflecting their contributions. The guide should encourage the law to facilitate such flexibility. While this delegation does not object to the use of “share”, we can also support the suggestion of the Secretariat to refer to financial rights in appropriate circumstances. If the definition clarifies that membership rights are a bundle of rights that may be severable, then the default rule in recommendation 11 does not need to be redrafted.

Model organization rules. Although the legislative guide is not a model law, this delegation believes model rules and certain other model forms may nonetheless be valuable for states implementing a law based on the guide. Indeed, the Working Group should consider whether model legislative provisions could be provided based on the recommendations. It will not always be possible to provide such a provision, as some recommendations require states to make decisions about policy matters before drafting. However, in most cases the recommendation is fairly clear, and could easily be translated to a model provision that would undoubtedly be helpful for legislators around the world.

Mandatory provisions. The Working Group has not yet had significant discussions on which provisions are mandatory, and this delegation looks forward to discussing this matter with the Working Group at the next meeting. As a general matter, the wording of the recommendations frequently provides the necessary guidance, as the guide recommendations generally provide that a rule applies “unless otherwise agreed.” In all cases where members may agree otherwise, the rule is by definition not mandatory. Although mandatory provisions are essential, this delegation believes they should be kept to a minimum to ensure the significant freedom of contract for UNLLO members.

Transfer of rights. As outlined above in response to (1), if membership rights are severable so that financial rights may be distinguished from decision-making rights, the transfer provision may be limited to financial rights. This would maximize the economic utility of the membership to members, without complicating the decision-making structure.

7. Honduras

[Original: Spanish]
[3 April 2020]

The National Service for Entrepreneurship and Small Businesses (SENPRENDE), the Economic Affairs Office and the Ministry of Foreign Affairs and International Cooperation of the Republic of Honduras agree that the draft legislative guide is very comprehensive and in many respects the laws of Honduras are in line with the guide. Moreover, the guide offers an opportunity to reform the Act on Support for Micro and Small Enterprises (approved through Decree No. 145-2018) and the regulations

implementing that Act or to work on a new legal entity as part of the unification of legislation and regulations applicable to MSMEs, since in Honduras there are currently a number of laws that many entrepreneurs are unaware of and that are applicable with respect to a range of issues.

In this regard, it has been suggested that all relevant provisions, which are currently scattered, be compiled in a single instrument so that entrepreneurs can acquaint themselves with and apply those provisions more easily. In addition, in relation to the principle of accessibility, SENPRENDE suggests that Honduras draw up a list of any barriers or obstacles and include an appropriate provision in any instrument it ultimately decides to draft given that most entrepreneurs cannot open a bank account if they do not have bank or business references.

With regard to terminology, the Economic Affairs Office has queried whether at the regional level it might be appropriate to incorporate “venture”, “start-up” and the like. With respect to recommendation 30 of the guide – that the law should provide that each member has the right to inspect and copy records of the UNLLO and to obtain available information concerning its activities, finances and operations – it is noted that there is no mention of non-disclosure beyond the membership of the UNLLO or of the penalties that might apply if such information is disclosed outside the UNLLO.

8. Germany

[Original: English]

[6 April 2020]

In paragraph 16 the first sentence reads: “It should be noted that in developing legislation based on the guide, States should consider the provisions included in the following recommendations as mandatory”.

Comment: as this is a legislative guide the consideration of any recommendation being mandatory is of course in itself only guidance to the State. That being said Germany would recommend considering mandatory (for the State, not necessarily for the UNLLO member): recommendations 1-4, 6, 7 (a), 8, 10 and 11 (even though the member can contract out of this requirement, States should allow members to do so and establish the default rule of equal rights mandatorily), recommendations 13-23, 24 (a), 26, 28-29 (the form of records is voluntary, not the record-keeping in itself), and 30-31.

Germany would not consider mandatory for States: recommendation 5 (States can opt for a minimum capital even if it is not advised to do so), recommendation 7 (b) (States may decide against allowing legal persons to be members of an UNLLO), recommendation 9 (the necessary information for the formation of the UNLLO is non-exhaustive) recommendation 12 (the list is non-exhaustive), recommendation 24 (b) (might be considered non-mandatory in order to respect the different legal traditions in inheritance law), recommendation 25 (the list of causes for withdrawal is non-exhaustive, States can add other instances) and recommendation 27 (the list of events causing the dissolution can be modified by domestic law).

Regarding the second sentence (“The members of the UNLLO can modify by agreement the following recommendations:”), Germany suggests:

recommendations 11-12 (the list seems also to be non-exhaustive for members, which means they could give themselves more decision-making power. Cf. also recommendation 17 (a)), recommendations 13-18, 20 (members need not agree on contributions), recommendations 21, 24, 25 and 27 (members can alter the list of events causing the dissolution in the organization rules).

In paragraph 17, eighth bullet point (“Restructuring: “restructuring” means modifying the structure, operation or finances of the UNLLO through mergers, split-ups or other fundamental changes established in domestic legislation. “Restructuring” does not include scaling-up the UNLLO to a larger business form.”)

Comment: could it be specified what scaling up means? The growth of the UNLLO to a larger business or the conversion in another legal form?

In paragraph 17, ninth bullet point (“Share: “share” means the ownership stake of an UNLLO that a member has. It includes the member’s financial stake in the profits and losses of the UNLLO and the right to receive distributions.”)

Comment: the definition of share only covers the financial aspects not the membership aspects such as voting rights. Germany agrees thus with the proposal to delete share and substitute it by “membership”, which should be understood as encompassing both financial and decision-making rights.

“Note to the Working Group, (1) Member’s share of the UNLLO and use of the term share”:

“(a) “Membership” is intended to be synonymous with “share” or encompass both financial rights and decision-making rights. The Secretariat suggests removing the term “share” from the guide and referring to financial rights in the appropriate contexts”.

Comment: Germany agrees with the understanding that membership encompasses both financial and decision-making rights.

“(b) Recommendation 11 should be revised so as to include reference to the members’ equal ownership stake of the UNLLO or a new default provision should be drafted”.

Comment: recommendation 11 should be left as it is because “equal rights” refers in our understanding to both financial and decision-making rights; thus a reference to “ownership stake” would depart from the decision taken at the thirty-third session.

“Note to the Working Group, (4) Transfer of rights”, reads:

“The Working Group may wish to reconsider the ability of a member to transfer a portion of its membership, with the approval of the other members. The guide is based on the principle of equality and the default rule towards decision-making is by number. Transferring a portion of a membership would have the effect of converting decision-making to a pro rata structure, which raises additional complexity for members of the UNLLO.”

Comment: Germany does not think the transfer of a portion would necessarily lead to a pro rata structure (which would be too complex as a default, it is agreed). It is understood that a transfer of a portion conveys complete membership to the newcomer, leading to a doubling of decision-making rights if the default rule “equal rights” is in place. Thus a transfer of a portion would only have an effect if there are deviations from the “equal-rights” rule in place.

This could be specified in the commentary to recommendation 11; Germany would, however, keep the reference to “a portion thereof” in the recommendation in order to show the principle that membership can be divided.”

Paragraph 57: the second sentence reads: “Broad flexibility for the form of the organization rules recognizes that, because of legal tradition in many States, MSMEs may have no formal written agreement on the organization rules, and that, in such cases, States may wish to enable members to rely on other agreement forms.”

Comment: this is contrary to system neutrality as it alludes to a majority of legal traditions with no formal requirements. We are not sure if this is true or if rather MSMEs choose to not have a written agreement when given the option even though legal traditions might largely advise against it. Germany would thus recommend leaving the commentary as it was in [A/CN.9/WG.I/WP.116](#) or rephrasing it along the following lines: “(...) recognizes that because of the perceived complexity of a written agreement MSMEs may have no (...)”.

Paragraph 63: the second sentence reads: “Those rights include: rights to make decisions on certain aspects of the UNLLO and financial rights to partake in the

profits and assets of the UNLLO during the existence and after dissolution and liquidation of the business as in any other corporate structure.”

Comment: Germany recommends deleting “as in any other corporate structure” because corporate structures might vary considerably from jurisdiction to jurisdiction.

Recommendation 12 (c) says “Member’s share of the UNLLO, if not equal”:

Comment: according to our criticism of share, it is recommended to replace it with a descriptive term: “financial rights” (if the recommendation shall only address decision making-rights as regards the financial aspect of membership) or “member’s rights” (if the recommendation shall address all members rights). As the list is non-exhaustive, Germany would be fine with both options. The same goes for paragraph 65.

Recommendation 13 (iii): “A member’s share of the UNLLO, if not equal”.

Comment: our commentary on “members share” in recommendation 12 applies here as well.

Paragraph 96:

- (i) The first sentence reads: “The Guide applies the principle that distributions should be made in proportion to a member’s share of the UNLLO.”

Comment: if “share” is not kept, this (and the following uses of “share”) would need to be replaced by another term, e.g., “in proportion to a member’s financial rights”. Possibly “ownership stake” could also be used if “financial rights” might seem to be circular, as the right to distribution is also a financial right.

- (ii) The second sentence reads: “This recognizes that when the members have an equal share in the UNLLO, distributions will also be made evenly.”

Comment: Consistent with our earlier criticism of the use of “equal share”, this should also read “equal rights” instead of “equal share”.

Paragraph 104: the second sentence reads: “Membership also provides decision-making rights to participate in the management and control of the UNLLO.”

Comment: we recommend substituting the beginning of the sentence with “Membership among other rights provides...” – thus it is clear that membership is not exhaustively defined by financial rights and decision-making rights but, e.g., also grants rights of inspection.

Paragraph 105: the last sentence reads: “For these reasons, members may resist transfers of membership of the UNLLO without the approval of other members.”

Comment: Germany would keep the following sentence, “In addition, there might not be a ready market for the transfer of a share of an UNLLO”, because this does not seem wrong judging from business experience. It would also ensure consistency with paragraph 111.

Recommendation 24 (b): the second sentence reads: “In the case of the death of a member of a multi-member UNLLO the other members may be permitted to purchase [the membership] of the deceased member.”

Comment: it is recommended to not give precedence to one safeguard over others but rather stipulate the general principle. Wording cf. below.

The third sentence reads: “In the case of a single-member UNLLO, [the membership] may be transferred to any successor.”

Comment: it is recommended to use the same general principle for single- and multi-member UNLLOs, meaning that its shares can generally be transferred to successors but that States are advised to install safeguards against free succession in the case of multi-member UNLLOs. The recommendation could read as follows: The death of a member shall not cause the dissolution of the UNLLO. Membership in an UNLLO shall be transferrable to any successor. In the case of a multi-member UNLLO states

should protect the remaining members from being forced to accept the successors of the deceased member as a new member. Such safeguards could constitute:

- (a) A requirement of the consent of the members;
- (b) The permission to the remaining members to purchase [the membership] of the deceased member.

Paragraph 113, first sentence: “The Guide therefore shows a preference for facilitating the continued existence of the business, thus preserving its economic stability and value, by permitting a member to dissociate from the UNLLO, upon agreement or reasonable cause, by expulsion by other members of the UNLLO, or upon the occurrence of a qualifying event as established by the organization rules or the domestic law of the State.”

Comment: this seems not to be reflected in recommendation 25. It seems that this is also not covered by “unless otherwise agreed” in recommendation 25 because this only refers to a deviation by the members of the UNLLO from agreed organizational rules not to a deviation by the State. It is thus recommended to add the following instances to recommendation 25 or to indicate in recommendation 25 that “agreement or reasonable cause” is non-exhaustive.

A possible wording of recommendation 25 could read as follows:

“the law should provide that upon agreement, reasonable cause or other instances stipulated by the law of the enacting state members may withdraw or be expelled from the UNLLO and be paid over a reasonable period of time the fair value of their share of the UNLLO, unless otherwise agreed.”

Recommendation 25: “The law should provide that, upon agreement or reasonable cause, members may withdraw from the UNLLO and be paid over a reasonable period of time the fair value of their share of the UNLLO, unless otherwise agreed.”

Comment: regarding “fair value”: if we consider expulsion (para. 113) should we then not also consider a reduction in the fair value in case of a “bad leaver” event? As it is quite specific, this need not necessarily be part of a recommendation but could be reflected in the commentary to show that members may also deviate from the principle of “fair value”.

Comment: regarding “their share of the UNLLO”: recommendation 25 refers to a complete withdrawal, so “share” in its understanding of “financial rights” falls short of what is meant in this recommendation. It is thus recommended to change the recommendation as follows “(..) the fair value of their membership in the UNLLO unless (...)”. The same applies for the commentary, where “share” should also be replaced by “membership”.

Recommendation 26 (b): “Ensure protection of third parties dealing with the consequences of a conversion or restructuring”.

Comment: it could be phrased shorter: “ensure protection of third parties affected by a conversion or restructuring” or – with view to the wording in recommendation 27 (b): “Ensure protection of third parties.”

Recommendation 28: “The law should provide that the UNLLO shall continue after dissolution only for the purpose of winding-up for the protection of third parties.”

Comment: it is recommended to use the wording proposed at the thirty-third session, “(..) the UNLLO shall wind up and shall continue after dissolution only (...)”, because it stipulates a duty to actually wind up, whereas the current wording allows also for an immediate end of the company at the time of dissolution.

Paragraph 128, last sentence: “Even when the information to be retained by the UNLLO further to recommendation 29 is not required to be publicly disclosed, it should be shared with all members and subject to their inspection.”

Comment: should it read “it should be shared with all members and **be** subject to their inspection”? (Insertion in bold).

Appendix II, 2. c: “Distributions are made to members [take one option]:

- In proportion to the value of their [share] of the Organization.

Comment: it is recommended to use “rights” or “financial rights” instead of “share”.

- Equally among them.

Comment: the reference to equal distributions might be superfluous, as the default rule is equal rights, and thus a distribution in proportion to the value of the “share” would also cover all cases where members opt for equal rights in 2 (a). The second option in (d) would only apply to such cases when distributions rights are not to be supposed equal to other membership rights. For this case it is recommended to substitute “equally among them” with “pursuant to the following criterion” in order to emphasize that there are more options than “equal distribution”.

Appendix II, 3. Members’ rights and obligations, d: “Each member may withdraw from the Organization with the approval of the other members or upon reasonable cause and be paid the fair value of their [share] within [insert a reasonable time period].”

Comment: this would need to be brought into alignment if changes were made to recommendation 25: “Each member may withdraw from the Organization with the approval of the other members, upon reasonable cause or other instances stipulated by law (...)”.

Appendix II, 3. Members’ rights and obligations, e, second sentence: “The remaining members may purchase the membership of the deceased member from the successor within [insert a reasonable period of time].”

Comment: If recommendation 24 were to be changed, the model rules could still remain like this in the interest of simplicity, as the purchase seems to be a sensible option. If such a precedence should not be given, they could be rephrased like this:

“(...) The membership transfers to the successor. [The transfer shall only become effective upon the consent of the members]/[The remaining members may purchase the membership of the deceased member (...)]”.

Appendix II, 5. Decision-making, f, last option:

Written communication where no meeting is required.

Comment: Where does this item belong? Shall it be an additional, optional item for the communication between members outside of meetings that they may select optionally? For reasons of consistency it is recommended to rephrase it into a sentence like the other items under 5. The wording could read as follows:

“Where no meeting is required, communication shall be effected in written form.”

We could, however, also go along with a deletion of this option because we are doubtful if it is really helpful for the needs of small businesses to complicate the lesser important communication by a requirement of written form.