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Observations and model provisions from the Government of Colombia: dissolution and liquidation of MSMEs*

Note by the Secretariat

The Government of Colombia has submitted to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) a document containing observations and model provisions on the dissolution and liquidation of micro, small and medium-sized enterprises (MSMEs). This document is reproduced as an annex in the form in which it was transmitted to the Secretariat.

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* This document was submitted late as it was received by the Secretariat on 24 April 2017.



Annex

Observations by the Government of Colombia

I. Introduction

1. The Government of the Republic of Colombia would like to submit the following observations concerning the dissolution and winding up of MSMEs. As a point of departure it must be highlighted that during its forty-sixth session in 2013, the United Nations Commission on international Trade Law (UNCITRAL) requested that work be initiated aimed at reducing the legal obstacles and barriers encountered by micro, small and medium-sized enterprises (MSMEs) *throughout their life cycle*, with a particular focus on their context in developing countries.¹ The life cycle of a business could be said to consist of several stages, which may be summarized as starting a business, operating it, undergoing its restructuring and dissolving and winding up a business.²

2. At its most recent sessions (Twenty-Sixth Session, New York, 4 to 8 April 2016 and Twenty-Seventh Session, Vienna, 3-7 October 2016), Working Group I continued its consideration of two main topics, namely, a discussion regarding a legislative guide on Simplified Business Entities as well as the key principles of business registration. These deliberations have taken place on the basis of the framework of issues drawn from the key features of simplified business regimes (outlined in [A/CN.9/WG.I/WP.86](#)), and as illustrated in the draft model law on simplified business entities ([A/CN.9/WG.I/WP.89](#)), as well as other possible models (such as the one contained in the annex to [A/CN.9/WG.I/WP.83](#)).

3. Until recently, most efforts by the WG have been focused on the useful simplification of business incorporation and registration. In that sense, the WG I discussions have covered specifically the initial stages of business formation, registration and operation of an MSME.³ Marginal discussions have also taken place on the topics related to the end stages of a corporation, which relate specifically to its dissolution and winding up. The Government of Colombia respectfully submits that it could be useful for the Working Group to consider an additional evaluation of the above-referred topic. For that purpose it is also suggested the possible adoption of an Annex to the draft legislative guide ([A/CN.9/WG.I/WP.99/](#) and [A/CN.9/WG.I/WP.99/Add.1](#)) in order to include a few provisions that could be used to illustrate the manner in which the winding up process could be regulated.

II. Observations on Dissolution and Liquidation of MSMEs

4. The observations of Colombia are based on the premise that a vast majority of businesses in both the developing and the developed world are MSMEs,⁴ and that it is important to consider both the legal framework for their formalization, as well as

¹ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 321; reiterated at subsequent sessions of the Commission: *ibid.*, *Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 321 and *Seventieth Session, Supplement No. 17 (A/70/17)*, paras. 220, 225, 340 and 321.

² The Commission stated that “such work should start with a focus on the legal questions surrounding the simplification of incorporation” and has confirmed Working Group I’s approach that such work should proceed on two relevant issues: legal questions surrounding the creation of a simplified business entity and key principles in business registration. *Supra*, note 1, and *ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, under preparation.

³ Report of Working Group I (MSMEs) on the work of its twenty-sixth session, [A/CN.9/866](#), paras. 22 to 47.

⁴ 2nd OECD Conference Of Ministers Responsible For Small And Medium-Sized Enterprises (SMES) Promoting Entrepreneurship And Innovative SMES In A Global Economy: Towards A More Responsible And Inclusive Globalization Istanbul, Turkey 3-5 June 2004, Page 5.

the rules relating to their dissolution and winding up.⁵ Therefore, it would be useful to thoroughly evaluate the entire cycle of a business, so that it can be formalized at the outset in accordance with up-to-date legal provisions and also be able to close its operations and resolve all relations with creditors and shareholders at the end of such a cycle. This is particularly relevant in light of the obvious fact that many of the business entities will not be successful and therefore will need to close their operations and resolve all outstanding legal situations before extinction. In that sense, it could be useful to provide a set of suggested rules to govern its dissolution and liquidation. The Colombian Government believes that Recommendation 24 of the draft legislative guide could be expanded and further regulated by means of some legislation provisions as herein developed.

5. The global financial crisis of 2007-2008, that led to a recession in many parts of the world during the following 4 years is still being felt in many nations around the globe, and its effects will probably last for several more years. Many businesses were pushed into a state of instability and although some countries have slowly but greatly recovered, the annual number of business failures still remains above the levels that existed before the crisis in several countries.⁶ Businesspeople, and entrepreneurs alike are now facing important decisions that need to be taken with regard to the viability of the business entity that they have created. This situation is particularly relevant in developing nations.

6. As mentioned before the proposed Annex provides provisions governing the stages of dissolution and winding up of a corporation. These rules, which could be particularly useful for corporations that have gone out of business, but need not resort to an insolvency proceeding to close their operations and resolve all situations with creditors and shareholders. This situation frequently takes place in MSMEs in cases in which the corporation's liabilities do not exceed the value of available assets after dissolution. In these situations it is necessary for those responsible for the business venture to provide publicity concerning the state of liquidation, appoint liquidators, prepare inventories and other financial statements, sell corporate assets, pay liabilities according to legal priorities and eventually return any remaining assets to the shareholders. Furthermore, it is also relevant to have access to mechanisms for the reactivation of a dissolved corporation and the reopening of the liquidation process after it has been completed when new assets are found. Pursuant to a contemporary approach, it would also be useful to provide a legal framework that allows for a corporation undergoing a winding up process to participate in restructuring proceedings such as mergers and divestitures.

7. Finally, it is important to note that the observations of Colombia on the topics of dissolution and winding up of corporations are drawn from best practices reflected in recent legislation, model acts, and directives including: Spanish Law 25/2011, which amended the Capital Companies Act Title X, Dissolution and Liquidation; the OHADA Uniform Act Relating to Commercial Companies and Economic Interest Groups; Regulation 1346/2000 of the European Union, which was updated by Regulation 2015/848, which will come into effect on June 26 of 2017; South Africa's Companies Act 71 of 2008, the Colombian Commercial Code, as well as Colombian Law 1429 of 2010.

8. Of course, as has been usual with discussions within the Working Group, the Colombian Delegation encourages all delegations that would like to comment on this Annex and welcomes those who would like to join it in supporting the proposal.

⁵ As it was done by means of Chapter 6 of document [A/CN.9/WG.I/WP.83](#) as well as Recommendation 24, contained in [A/CN.9/WG.I/WP.99/Add.1](#).

⁶ Deloitte Legal. A Guide To pre Insolvency and Insolvency Proceedings Across Europe. January 2017.

Annex

Draft Model Provisions on Dissolution and Liquidation of MSMEs

Article 1. Dissolution as per the law, by laws or by a mandatory court decision

1. Corporations shall be wound up as per the law upon the expiration of the term of duration set forth in the by-laws, provided that it has not been extended and provided further, that extension is duly registered before the Mercantile Registry, prior to such expiration.

2. The initiation of an insolvency process of a corporation shall not, necessarily, result in a cause of dissolution, unless liquidation in bankruptcy proceeding is instituted.

3. Corporations shall also be dissolved for the causes provided under the by-laws or the law, as follows:

(a) The termination or impossibility to fulfill the objects set forth in the corporation's purpose clause;

(b) The situation in which the corporation fails to carry out the objects set forth in the corporation's purpose clause for two consecutive years;

(c) When the general meeting of shareholders comes to a deadlock in a manner that it becomes impossible to carry out the objects set forth in the corporation's purpose clause;

(d) The occurrence of any other cause set forth in the corporation's by-laws.

4. Dissolution as a result of a court decision

(a) If the general meeting of shareholders shall not be called upon, or the meeting cannot take place or the decision is not adopted, any interested party may file a motion before a court that has jurisdiction over the corporation.

Article 2. Winding up decisions

In any of the causes of dissolution referred to above, the liquidation of the corporation shall be subject to a decision adopted by the general meeting of shareholders. During the same meeting, the shareholders, by majority vote, shall appoint one or more liquidators who can be legal or natural persons.

Article 3. Public disclosure of dissolution

The dissolution of the corporation shall have legal effects before third parties as of the moment of its publication by the notice in the corporation's official website. In the absence of such a website, the notice shall be published in a newspaper of broad circulation in the city where the corporation has its domicile. Furthermore, the dissolution of a corporation shall be filed before the Mercantile Registry.

Article 4. Corporation in liquidation

1. Any corporation that has been dissolved shall retain its legal personality during the liquidation proceedings. Furthermore it shall add the expression "in liquidation" to their corporate name whilst the winding up process takes place.

2. The name of the liquidator shall, as well, appear on all instruments and documents issued by the corporations to third parties, including letters, invoices, notices and various publications.

3. During the liquidation period, all provisions set forth in the by-laws concerning the manner in which general meetings of shareholders shall be conducted will continue to be in place.

Article 5. **Directors and Liquidators**

1. As of the date in which the dissolution has been declared by a decision rendered by the general meeting of shareholders or by court order the following legal consequences shall ensue:

(a) Except for the provision contained in article 13, the legal capacity of the corporation shall be restricted to carrying out acts aimed at the immediate liquidation of the corporation;

(b) The directors will cease in their duties and all powers of representation shall continue to be carried out by the liquidator who shall act as the sole legal representative of the corporation and its powers shall extend to all operations necessary for the corporation's liquidation, unless a different provision is set forth in the corporation's by-laws.

2. In the event of death or dismissal of any of the liquidators, the general meeting of shareholders shall appoint the natural or legal person who will replace the deceased or dismissed liquidator. Unless otherwise provided in the by-laws, liquidators shall be appointed for an indefinite tenure.

Article 6. **Duties of the Liquidators**

1. Within three months of starting the liquidation proceedings, the liquidator shall prepare the inventory and balance sheet as of the date of dissolution.

The liquidators shall finalize any operations outstanding and conduct new transactions as necessary for the winding up of the corporation. In particular, the liquidators shall be bound to sell all the corporate assets, irrespective of their nature, except for those that according to the by-laws shall be distributed in kind.

2. Within six months of the liquidators appointment, he or she shall convene a general meeting of shareholders in order to present a report on the current status, the corporations assets and liabilities, the liquidation process and the time needed to complete it. The liquidator shall also request, where appropriate, any authorizations that shall be needed for the purposes of the liquidation.

3. The liquidators shall collect any outstanding amounts on shares subscribed by shareholders before the initiation of the winding up proceeding.

4. The liquidators shall keep company accounts, books and records and keep custody of relevant documentation and correspondence.

5. Upon completion of the liquidation proceedings, the liquidators shall submit before the general meeting of shareholders, for its approval, the following documents:

(a) A final balance sheet;

(b) A complete report on the operations performed during the liquidation;

(c) A proposal for distribution of the remaining assets among shareholders;

(d) The above-mentioned documents shall be approved by an absolute majority of shares represented in the meeting;

(e) Dissenting shareholders may challenge the decision referred to in number 5, above, within two months from the date in which it was taken.

Article 7. **Liability of Liquidators**

The liquidators shall be liable to the corporation and third parties for damages arising from violation of his or her duties of care and loyalty. Shareholders' derivative lawsuits or individual suits for civil liability against the liquidators shall be timed-barred after two years, from the date of the damaging fact or, from the date of its disclosure, in case it was concealed. Nonetheless, when the damaging fact is

subject to criminal liability, any legal action shall be time-barred after a period of 6 years.

Any lawsuit against shareholders, who did not act in their capacity as liquidators, shall be time-barred after three years from the date of the registration of the dissolution before the Mercantile Registry.

Article 8. Payments and Distributions

1. The liquidators shall proceed to the payment of liabilities with third parties in accordance with the priorities established under the law. For this purpose the liability of the liquidators shall be restricted by the assets and liabilities included in the balance sheet and inventory referred to in subsection 1, article 6.
2. After all liabilities with third parties have been paid in full, any remaining assets shall be distributed according to the provisions set forth under the corporation's by-laws or, in the absence of a specific provision in such by-laws, the distribution shall be made on a pro-rata basis.
3. Any amount allocated for distribution among the shareholders shall be paid to them within the following eight days after the meeting described in subsection 5 of article 6 of this law.

Article 9. Right to payment of the liquidation dividend in cash

Unless the shareholders, unanimously, decide otherwise in the meeting set forth in subsection 5 of article 6, they shall be entitled to receive their share of the remaining corporate assets in cash.

Article 10. Simplified Liquidation Proceeding

If it becomes clear that the corporation lacks liabilities with third parties once the inventory referred to in subsection 1 of article 6 has been approved, the liquidators shall convene a general meeting of shareholders to approve, along with the balance sheet and inventory, the documents referred to in subsection 5 of article 6. Approval of these decisions shall be taken by the absolute majority of the shares present or represented in the meeting, as soon as the approval has taken place, the liquidators shall proceed to the distribution of remaining assets among the shareholders.

If it is determined by the court that there are outstanding liabilities with third parties, that were not included in the inventory, the shareholders and liquidators, will be jointly and severally liable to the creditors.

This liability shall be time-barred after five years from the moment of the filing before the Mercantile Registry of the decisions set forth under subsections 5 of article 6.

Article 11. Reopening of a Liquidation Process

If, after filing of the documents provided under subsections 1 and 5 of article 6 of this law, new assets of the company shall appear, or by means of a judicial decision rendered after such a date, or due to any other circumstance, a reopening of the liquidation will take place.

Article 12. Reactivation of a wound-up company

1. The general assembly of shareholders may agree to revoke the solution in order to reactivate a wound-up company provided that the cause for which it was dissolved has been remedied. A reactivation decision shall not be made where dissolution was instituted as per the law.
2. The decision on reactivation shall be adopted pursuant to the requirements established for any amendment of the by-laws.

3. Shareholders not voting in favor of reactivation shall be entitled to a dissenters remedy. By means of such remedy they will be allowed to demand their share of the corporate assets at the fair market value.

Article 13. Restructuring Operations

Any corporation which is undergoing a corporate liquidation shall have legal capacity to participate in restructuring operations such as mergers, sale of all or substantially all assets and corporate divestitures.
