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Draft Legislative Guide on an UNCITRAL Limited Liability Organization

Note by the Secretariat

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Background information

1. At its forty-sixth session in 2013, the United Nations Commission on International Trade Law (UNCITRAL) decided to work towards reducing the legal obstacles encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle, with a particular focus on their context in developing economies.¹ The Commission understood that the life cycle of a business consists of several stages, which would include starting, operating, restructuring and dissolving a business. The mandate granted to Working Group I by the Commission was that work should start with a focus on the first stage in that life cycle, i.e. starting a business.²

2. Working Group I began its deliberations on that subject at its twenty-second session in February 2014 and from its twenty-third session, in November 2014, to its thirtieth session, in March 2018, it proceeded to consider two main topics, one of which related to a simplified business entity suited to the needs of MSMEs.³ Those deliberations were based on 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 a simplified business entity ([A/CN.9/WG.I/WP.89](#)), as well as other possible models (for example, that contained in the annex to [A/CN.9/WG.I/WP.83](#)).

3. Following its discussion of the framework of issues that might be considered in a simplified business entity regime, at its twenty-sixth session (New York, 4 to 8 April 2016), the Working Group decided that the legislative text it was preparing on a simplified business entity should be in the form of a legislative guide. To that end, the Working Group requested the Secretariat to prepare for discussion at a future session a draft legislative guide (consisting of recommendations and commentary) that reflected its policy discussions to date.⁴ This draft legislative guide has been prepared by the Secretariat in response to that request.

4. The Working Group started considering the draft legislative guide at its twenty-seventh session (Vienna, 3 to 7 October 2016) and continued such work at its twenty-eighth session (New York, 1 to 9 May 2017). At those sessions, it considered all sections of the draft legislative guide (as contained in [A/CN.9/WG.I/WP.99/Add.1](#)) save for sections G to K. The Working Group devoted its twenty-ninth (Vienna, 16 to 20 October 2017) and thirtieth (New York, 12 to 16 March 2018) sessions to reviewing the draft legislative guide on key principles of a business registry⁵ and resumed its discussion on the draft legislative guide on an UNCITRAL Limited Liability Organization (“UNLLO”) at its thirty-first session (Vienna, 8 to 12 October 2018). At that session, the Working Group considered a revised draft of the legislative guide (as contained in [A/CN.9/WG.I/WP.112](#)) including changes arising from

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. 134; *ibid.*, *Seventieth Session, Supplement No. 17 (A/70/17)*, paras. 220, 225 and 340; *ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, para. 347; *ibid.*, *Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 235; *ibid.*, *Seventy-third session, Supplement No. 17 (A/73/17)*, para. 112; *ibid.*, *Seventy-fourth session, Supplement No. 17 (A/74/17)*, para. 155.

² The Commission stated that “such work should start with a focus on the legal questions surrounding the simplification of incorporation” and confirmed in subsequent sessions 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*, footnote 1, and *ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, para. 224.

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

⁴ *Ibid.*, paras. 48 to 50.

⁵ The draft legislative guide was finalized and adopted by the Commission at its fifty-first session in 2018. See *Official Records of the General Assembly, Seventy-third session, Supplement No. 17 (A/73/17)*, para. 111.

deliberations at its twenty-seventh and twenty-eighth sessions. The following recommendations (and related commentary) were discussed: recommendations 7 to 12 (Sections B on Formation of the UNLLO and C on Organization of the UNLLO), save for recommendation 10; recommendation 15 (Section D on Management by managers of members) and recommendations 16 and 17 (Section E on Percentage of the ownership of the UNLLO and contributions by members).

5. The thirty-second session of the Working Group (New York, 25 to 29 March 2019) opened with a two-day colloquium on contractual networks and other forms of inter-firm cooperation (25 and 26 March). Following the colloquium, the Working Group resumed its consideration of the draft legislative guide (as contained in [A/CN.9/WG.I/WP.114](#)). The following recommendations and related commentary were discussed (some of which had already been considered at its thirty-first session): recommendation 9 (section B on Formation), recommendation 10 (Section C on Organization of the UNLLO), recommendations 11 to 16 (Section D on Management of the UNLLO) and recommendation 17 (Section E on Members' share of and contributions to the UNLLO). The Working Group also discussed several definitions included in the Terminology section.

6. At its thirty-third session (Vienna, 7 to 11 October 2019) the Working Group completed the first review of all sections of the draft guide by discussing the following recommendations and related commentary (as contained in [A/CN.9/WG.I/WP.116](#)): recommendation 1 (Section A on General Provisions), recommendation 10 (Section C on Organization of the UNLLO), recommendation 11 (Section D on Membership in an UNLLO), recommendation 18 (Section F on Members' share of and contributions to the UNLLO), recommendations 19 to 21 (Section G on Distributions), recommendation 22 (Section H on Transfer of rights), recommendation 23 (Section I on Restructuring or conversion), recommendation 24 (Section J on Dissolution and winding-up), recommendation 25 (Section K on Dissociation or withdrawal), recommendations 26 and 27 (Section L on Record-keeping, inspection and disclosure) and recommendation 28 (Section M on Dispute resolution).

7. The current revision of the draft legislative guide includes the changes arising from the deliberations of the Working Group at its thirty-third session.⁶ The Secretariat has also made additional adjustments necessary to facilitate the cohesion and consistency of the text. When the adjustments have resulted in changing the order of the recommendations and the related commentary, the recommendations have been renumbered consecutively and any cross reference modified accordingly. Guidance to the changes made is reflected in footnotes throughout the text.⁷ In addition, a "Note to the Working Group" before chapter II of the draft Guide (Establishment and operation of the UNLLO) draws attention to issues that require further consideration by the Working Group.

8. The text of the draft legislative guide is reproduced as an annex to this Note of the Secretariat for consideration by the Working Group.

⁶ See the Report of the Working Group, [A/CN.9/1002](#).

⁷ The Working Group may wish to note that the current text of the draft guide retains a few footnotes referring to changes arising from the deliberations of the Working Group prior to its thirty-third session. The footnotes have been retained to facilitate the Working Group's revision of those changes.

Annex

Draft legislative guide on an UNCITRAL Limited Liability Organization (UNLLO)

I. Introduction

A. Purpose of the Legislative Guide¹

1. Most businesses in the world are micro, small and medium-sized businesses (MSMEs). They are the backbone of many economies, and account worldwide for a large share of the employment rate and of States' Gross Domestic Product (GDP). Despite this major role, however, several factors still affect their performance and capacity to develop. Unlike larger businesses, they lack the economies of scale to tap into new markets and expand business, thus missing the growth opportunities offered by globalization and economic integration. International forums and organizations, as well as individual States, recognize the importance of strengthening the economic role and position of MSMEs to enable them to benefit from an evolving international economic environment. UNCITRAL has underscored that importance through its decision to take up work on reducing the legal obstacles faced by MSMEs in their life cycle. This work has resulted in, inter alia, the preparation of this legislative guide on an [UNCITRAL Limited Liability Organization (UNLLO)].²

2. In order to support MSME formation and operation, various States representing different legal traditions around the world³ have adopted legislation on simplified business forms. Those business forms can be of a corporate, partnership or hybrid type.⁴ They may provide for single-member businesses⁵ or for multi-member business forms that permit assets partitioning without requiring a separate legal personality.⁶ Regardless of their more specific features, those laws all aim for simplified formation, flexibility of organization and operation, and asset partitioning.

3. Many of these business forms have succeeded in their respective jurisdictions. Their adoption lowered entry barriers, provided effective organizational solutions and reduced transaction costs, thus increasing employment opportunities and economic growth rates. Moreover, these new business forms have promoted migration of informal businesses to the formal economy. The various domestic

¹ The Working Group may wish to note that the Secretariat carried out an extensive revision of Section A ("Purpose of the Legislative Guide") in working paper [A/CN.9/WG.I/WP.114](#) (paras. 1 to 18) to eliminate redundancy. Additional adjustments were made in [A/CN.9/WG.I/WP.116](#) (paras. 1 to 14) for further improvement.

² The Secretariat has placed "[UNCITRAL Limited Liability Organization (UNLLO)]" in brackets to indicate that this is a temporary name pending a Working Group's decision on this matter, see *infra* footnotes 18 and 28.

³ A selection of such business forms included in the comparative analysis that the Working Group first considered in this regard ([A/CN.9/WG.I/WP.82](#)) was drawn from 11 different States from different regions of the world and included 16 different legal regimes in total.

⁴ See for instance, Colombia, France, Germany, India, Japan, New Zealand, Singapore, South Africa, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

⁵ Information shared with the Working Group has included, for example, that in respect of the "auto-entrepreneur", in force both in France (see paras. 22 to 23 of [A/CN.9/WG.I/WP.87](#) and [A/CN.9/WG.I/WP.94](#)) and the member States of the Organization for the Harmonization of Business Law in Africa (known by its French acronym, OHADA) (Acte Uniforme Révisé Portant Sur Le Droit Commercial Général, adopted 15 December 2010, see www.ohada.com/actes-uniformes/940/999/titre-2-statut-de-l-entreprenant.html). Other efforts to create particular regimes for single-member businesses have included that of the European Union (Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, European Commission, Brussels, 9.4.2014 (COM (2014) 212 final)).

⁶ See the alternative legislative models for micro and small businesses described by Italy and France in [A/CN.9/WG.I/WP.87](#) and [A/CN.9/WG.I/WP.94](#). The Secretariat has amended this sentence for greater clarity.

reforms to creating or improving such business forms – both MSME-specific and otherwise – demonstrate that good practices around the world share various key principles which could thus be said to be international in their application.

4. The Legislative Guide (the “Guide”) attempts to distil these good practices and key principles into a series of recommendations on how a State could 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. The commentary that precedes each recommendation relies both on specific legislative efforts to provide for single-member businesses or business entities, as well as broader reforms to assist MSMEs that have been implemented in various States,⁷ so as to explain in greater detail the rationale leading to those recommendations. States may adapt and in certain cases even deviate from the guidance provided in the recommendations. However, they should not defeat the purpose of the Guide to create a balanced regime that provides simplicity and flexibility of the MSME form and ensures legal certainty (see para. 12 below).⁸

1. “Think small first”

(a) Assessing the needs of entrepreneurs

5. A legislative regime for simplified business entities should start with a focus on the actual needs of the smallest business entities and avoid placing unnecessary legal burdens on them (“think small first”).^{9,10} To that end, the Guide considers how MSME entrepreneurs could most benefit from legislation based on its recommendations and be encouraged to conform to the principles they contain. Such entrepreneurs are mainly the micro and small businesses around the world for which the main characteristics are strong reliance on human capital rather than organizational processes, limited source and number of employees (usually drawn from family and friends), limited range of products or services offered to customers and limited capital. These entrepreneurs could range from individual street vendors, to small family business owners wishing to scale up and formalize their operations, and to small firms seeking to grow and position themselves in more innovative sectors, such as the information technology field. Reform should address in particular the needs of women and other entrepreneurs who may face unfavourable cultural, institutional and legislative frameworks, such as youth and ethnic minorities.¹¹ Regardless of the size of their businesses and their gender, those micro and small entrepreneurs share several common needs, as discussed below.

(i) *Freedom, autonomy and flexibility*

6. MSME entrepreneurs could be expected to want *freedom and autonomy* to decide for themselves how they operate their business without being constrained by rigid and formalistic rules and procedures or be subject to detailed mandatory requirements on the conduct of their activities. They also would want the *flexibility* to adapt to changing circumstances that may impact MSMEs more than larger companies, and consider how their business might evolve and develop over time,

⁷ Information in respect of such reform efforts in a number of States, including Chile, China, Colombia, El Salvador, Mexico, the Philippines, Rwanda, Thailand, and others has been shared in the Working Group.

⁸ At its thirty-third session, the Working Group agreed that the commentary should: (a) highlight that States were allowed to adapt the recommendations of the Legislative Guide (“the Guide”), but could not alter its purposes; and (b) emphasize that the proposed regime was aimed to strike a balance between the needs of MSMEs and those of the State (paras. 58 and 86, A/CN.9/1002). The Secretariat has reflected that deliberation in the final sentence of the paragraph.

⁹ See paras. 1 and 5 of A/CN.9/WG.I/WP.86/Add.1; para. 3 (iii) of A/CN.9/WG.I/WP.90; and paras. 2 and 39 of A/CN.9/WG.I/WP.89.

¹⁰ For consistency of the text, the Secretariat has removed the sentence “In keeping with ... taken in the Guide” from this paragraph and placed it at the opening of para. 11.

¹¹ The Secretariat has revised this sentence (“Reform should ... legislative frameworks”) in keeping with a suggestion of the Working Group at its thirty-third session that inclusion of vulnerable groups was to be highlighted as one of the goals of the Guide (para. 76, A/CN.9/1002).

including the ability to establish branches or representative offices without having to change their legal form.¹²

(ii) *Simplicity and accessibility*

7. MSME entrepreneurs are likely to want *simplicity and accessibility* to characterize the rules on the legal establishment of their business, and on its administration and operation. These rules should be in simple and *accessible* terms, and the use of modern technology, such as mobile applications to complete payments or prepare balance sheets, should be encouraged.

(iii) *Identity and visibility*

8. MSMEs need an *identity and visibility* in order to more successfully compete in domestic and globalized markets and to attract more and better quality clients. In addition to the obvious protections and advantages associated with taking on a legally recognized identity and operating within a recognized legal framework,¹³ the business can also use such legally recognized identity to develop its reputation and “brand” and increase its value.¹⁴

(iv) *Certainty and protection of property rights*

9. Regardless of the size of their business, all entrepreneurs need *certainty in and protection of their property rights*. MSME entrepreneurs will thus wish to control the assets of their business and be able to take advantage of asset partitioning to protect their personal assets from claims of business creditors. Conversely, personal creditors of business owners and managers should not be able to seize business assets in order to satisfy personal debts.

(v) *Control and management*

10. Finally, MSME entrepreneurs generally want *to control and to manage their business*, rather than leave administrative and strategic decisions to an external manager.

(b) Drafting the Guide from a “think small first” perspective

11. In keeping with the desire to create a legal text that can accommodate the needs of micro entrepreneurs, the Guide proposes a legal business form that moves away from the more traditional, hierarchical and formal governance models usually associated with public companies, which may not be appropriate for small businesses. For example, the Guide acknowledges the MSME entrepreneurs’ need for freedom and flexibility and stresses the importance of freedom of contract. However, the Guide recognizes through many default provisions that such entrepreneurs may also require protection against unforeseeable circumstances or events. Simplicity and accessibility characterize all aspects of the establishment and operation of the business, as well as the terminology used in the Guide. To provide MSMEs with identity and visibility, the Guide sets out a simple vehicle for the entrepreneur to create a legally recognized business with its own legal personality. Limited liability protection for the business entity and rules on the transfer of rights of its members are some of the mechanisms that provide certainty and protection for the property rights of MSME entrepreneurs.

¹² At its thirty-third session, the Working Group agreed to include reference to the flexibility of the UNLLO form to accommodate its evolution from a very small entity to a more complex form of the UNLLO (para. 37, A/CN.9/1002). The Secretariat has included this discussion in both the Introduction and in Section J on Conversion or restructuring.

¹³ Such protections and advantages have been enumerated in para. 31 of A/CN.9/941, and include, inter alia, asset partitioning, protection against potential administrative abuse and other abuse of rights, easier access to credit, labour law protection for employees, and similar features.

¹⁴ On the importance of business registration to provide a commercial identity to a business, see the UNCITRAL Legislative Guide on Key Principles of a Business Registry (the “UNCITRAL Business Registry Guide”).

Finally, control by MSME entrepreneurs over the operation and management of their business is assured through an emphasis on management by the members of the business entity as the default governance approach and the horizontal organizational structure that characterizes the UNLLO.

12. At the same time, the Guide recognizes that the needs of micro entrepreneurs must be balanced against the needs of the State, creditors and other third parties doing business with them. Lack of transparency about the operations of the UNLLO could result in a lack of legal certainty that would undermine the effectiveness of this new legal form. The Guide therefore contains a number of mandatory provisions that cannot be departed from by contract.¹⁵

(c) Creating a stand-alone regime

13. The Guide also takes the view that the optimal solution for the creation of an appropriate simplified legal regime for MSMEs should not be to reform and simplify existing company law regimes, but rather to develop a separate legal regime that focuses on the needs of MSMEs.¹⁶ The structure envisioned in this text is thus neither dependent upon nor specifically linked to existing partnership, corporation or company law in any State.

14. One clear advantage of that approach is that it enables States to more easily adopt a regime that implements the recommendations of the Guide and permits them to craft appropriate legislative measures using a clean slate method. Furthermore, a separate legal regime for MSMEs can provide internationally recognized standards for the establishment of simplified business entities, which would limit problems arising from the lack of international recognition of the legal form of the business thus facilitating cross-border transactions.¹⁷

15. In pursuit of this approach to MSME law reform, the Guide uses as much as possible a neutral terminology. In order to consider existing company law solutions but not to rely on their more prescriptive rules, the Guide avoids “corporate” and “company” terminology. Instead, the Guide describes a new entity: the “UNCITRAL Limited Liability Organization” (the “UNLLO”).¹⁸ The term is an indication that the business form created through the Guide’s recommendations is innovative and independent from existing company law regimes and their more prescriptive rules. The creation of the UNLLO aims to fulfil the desired goals and considerations outlined above.

16. It should be noted that in developing legislation based on the Guide, States should consider the provisions included in the following recommendations as mandatory: [*to be determined by the Working Group*]. The members of the UNLLO can modify by agreement the following recommendations: [*to be determined by the Working Group*] (see also recommendation 10(b)). In order to facilitate micro entrepreneurs to craft their agreement on the structure and governance of the UNLLO, it would be desirable for States to clarify in their legislation which provisions are non-mandatory and can be varied by the UNLLO members (see para. 22 below).¹⁹

¹⁵ At its thirty-third session, the Working Group agreed to include in the Introduction of the Guide considerations on the importance of balancing the flexibility of the UNLLO with the need of States to ensure transparency in the UNLLO operations (para. 58, A/CN.9/1002). The Secretariat has reflected that deliberation through a new para. 12.

¹⁶ As agreed by the Working Group at its twenty-fourth session (para. 54, A/CN.9/831). See also different approaches to legal reform as outlined in paras. 5 to 7 of A/CN.9/WG.I/WP.82.

¹⁷ See Note by the UNCITRAL Secretariat, A/CN.9/780.

¹⁸ At its twenty-seventh session, the Working Group agreed to use the term “UNLLO” on an interim basis until it could decide on a preferred term to denote the simplified business entity being discussed (para. 43, A/CN.9/895).

¹⁹ At its thirty-third session, the Working Group agreed to highlight in the commentary that domestic legislation based on the UNLLO Guide should make clear when deviations from its non-mandatory provisions are allowed (para. 86, A/CN.9/1002). The Secretariat has included that deliberation in this new paragraph of the Guide. The Secretariat suggests listing the mandatory and non-mandatory recommendations in this paragraph so as to avoid using the phrase “unless

B. Terminology

17. The definitions provided below are intended to guide the reader and assist in ensuring that the concepts discussed in the Guide are clear and widely understood. It should be noted that whenever terms such as “data”, “documents”, “agreements”, “tax returns”, “financial statements”, “records” and other similar expressions are used, reference is intended to include both their electronic and paper versions unless otherwise indicated in the text.²⁰

- *Financial statement*: “Financial statement” means the report that presents information on the financial activities and conditions of the UNLLO.
- [...].²¹
- *Designated manager*: “Designated manager” means the person or persons responsible for managing the UNLLO when the UNLLO is not managed by all of its members exclusively. A “designated manager” can be either a non-member or a member of the UNLLO or some combination thereof.²²
- *Majority*: “Majority” means more than half of the UNLLO members determined by number.²³
- *Member(s)*: “Member(s)” means the owner(s) of the UNLLO (cf. “UNLLO”).
- *Organization rules*: “organization rules” means the set of rules agreed by and binding on all members on the [establishment and] management of the UNLLO and the rights and obligations of the members between themselves and the UNLLO.²⁴
- [...].²⁵
- *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.²⁶
- *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.²⁷

otherwise agreed” in all default recommendations of the Guide.

²⁰ The Secretariat has redrafted the paragraph (para. 27 of [A/CN.9/WG.I/WP.112](#)) for greater clarity.

²¹ At its thirty-second session, the Working Group agreed that the term “formation data” could be removed from the terminology section and the Guide could instead refer to “information provided to the business registry” (para. 26, [A/CN.9/968](#)). This change has been implemented throughout the Guide.

²² At its thirty-second session, the Working Group confirmed the need for a specific term that would be applicable to situations in which the UNLLO was not managed by all of its members exclusively (para. 35, [A/CN.9/968](#)). The Secretariat has therefore retained “designated manager” as a defined term.

²³ The Secretariat has replaced “per capita” with “by number” in keeping with deliberations of the Working Group at its thirty-third session (para. 28, [A/CN.9/1002](#)). The Secretariat had revised the definition of majority in [A/CN.9/WG.I/WP.116](#), further to the Working Group decision at its thirty-second session that differences among members were to be resolved by a majority of members by number (para. 37, [A/CN.9/968](#)) and not by share.

²⁴ At its thirty-third session, the Working Group agreed to replace the definition of “organization rules” with the current drafting (para. 83 of [A/CN.9/1002](#)).

²⁵ The Secretariat has deleted the definition of “qualified majority”, since the Guide refers to it no longer.

²⁶ The Secretariat has included a definition of “restructuring” further to a decision of the Working Group at its thirty-third session, that such term should be either clarified in the commentary or defined in the Terminology Section (para. 36, [A/CN.9/1002](#)).

²⁷ At its thirty-second session, the Working Group agreed to limit the definition of share to economic rights (para. 46, [A/CN.9/968](#)), and the Secretariat has adjusted the text of the Guide accordingly.

- *UNCITRAL limited liability organization [UNLLO]:*²⁸ “UNCITRAL limited liability organization [UNLLO]” means the legal business form with limited liability and legal personality discussed in the Guide.

Note to the Working Group

(1) Member’s share of the UNLLO and use of the term share

At its thirty-third session, the Working Group agreed to include in the draft Guide a new default provision to emphasize that “membership rights shall be equal” (para. 56 of A/CN.9/1002). The Secretariat has implemented that deliberation in recommendation 11, which is silent to whether this default approach should also apply to the member’s ownership stake of the UNLLO. The approach is implicit in the current draft of the Guide, while in its previous iteration (A/CN.9/WG.I/WP.116) recommendation 20 (former rec. 18) clarified this aspect.

Furthermore, at its last session the Working Group reintroduced in its deliberations the terms “membership” and “membership rights” that seem to encompass both the financial and decision-making rights of the UNLLO members, while at its thirty-second session, the Working Group had determined that “share” referred only to the economic rights of the members (para. 46 of A/CN.9/968). In this regard, the Working Group agreed to reconsider at its thirty-fourth session whether “share” was still necessary (para. 89 (b) of A/CN.9/1002).

The Working Group may thus wish to clarify whether:

(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; and

(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.

(2) Model organization rules

At its thirty-third and previous sessions, the Working Group requested the Secretariat to prepare model organization rules that the UNLLO members may use as appropriate. It was suggested that different model rules could be prepared in order to cater for single member UNLLOs, multi-member UNLLOs managed by all members exclusively and multi-member UNLLOs managed by designated managers. The Secretariat has, however, drafted only one set of rules for consideration by the Working Group (see Appendix II).

The Secretariat suggests that before adding other models, the Working Group might wish to further clarify the purpose and the extent of these models. The text on the UNLLO is a legislative guide and as such it is not intended to be enacted in the domestic legal framework but simply to provide guidance to States on how they may draft that framework. The models may provide guidance for States when creating their own model rules based on the legislation prepared on the basis of the Guide. It may however be incongruous to provide multiple sets of model forms for organizational rules if these models are to include provisions beyond the default rules in the Guide since the legislation prepared on the basis of the Guide may include additional recommended rules or deviate from rules that are provided for in the text.

²⁸ The Working Group may wish to note that the term “UNLLO” is defined only in order to facilitate consideration of these materials, in accordance with the Working Group decision that such term be used on an interim basis (see supra footnote 18).

(3) Mandatory provisions

The Working Group may wish to note that pending its decision on which provisions of the Guide should be considered mandatory (para. 89 (a), A/CN.9/1002), the Secretariat has not removed or bracketed reference to specific provisions indicated as mandatory in the previous working papers. The Working Group may also wish to note that the determination of mandatory provisions will affect how the model organization rules will be revised.

(4) Transfer of rights

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.

II. Establishment and operation of the UNLLO**A. General provisions****(a) Legislative framework**

18. Although the legal forms for businesses that are not publicly traded may vary from State to State, one of their characteristics is that they tend to function as independently as possible from the strict rules that govern corporations. For example, such businesses tend to receive waiver from the rules governing public companies in the form of, for instance, simpler formation rules; nominal or no minimum capital requirement; greater freedom of contract; and fewer disclosure requirements.²⁹

19. For this reason, (see also para. 13 above), rather than proposing adjustments or variations to the company structures that exist in most States, the Guide proposes a distinct business form which, while sharing various features of other corporate forms, is intended to be enacted as a stand-alone legislation. Legislation enacted on the basis of the Guide would not operate independently from the legal tradition of the State, but would need to be consistent with States' domestic law. General principles of law would apply to fill any gaps.³⁰

(b) Flexibility through freedom of contract

20. As noted above (see paras. 2 and 3), the main focus of many legislative reforms to assist the creation of businesses that are not publicly traded to date has been on the creation of flexible legal business forms that permit the separation of the business assets of an entity from the personal assets of its members without resort to legal personality. This allows asset partitioning for MSMEs and their members by way of a legal structure that stops short of full limited liability and legal personality.³¹

21. The UNLLO is intended to be added to that list of flexible business forms. The flexibility in business form has been achieved in part by allowing the UNLLO to be organized for a wide range of activities (see paras. 24 and 25 and rec. 2 below) and

²⁹ For improved consistency of the text, the Secretariat has reversed the order of paras. 19 and 18 (paras. 17 and 16 of A/CN.9/WG.I/WP.116).

³⁰ The Secretariat has included this last sentence to the paragraph further to deliberations of the Working Group at its thirty-third session (para. 76, A/CN.9/1002).

³¹ At its twenty-seventh session, the Working Group agreed to move the second sentence of para. 37 of A/CN.9/WG.I/WP.99 ("However, it should be noted ... legal personality.") to a more appropriate section of the Guide and to delete the phrase "limited liability" after "without resort to legal personality" (paras. 31 and 32, A/CN.9/895). The Secretariat has relocated that sentence in para. 20 above, with additional editorial adjustments.

by recognizing the importance of freedom of contract for these businesses. In this respect, freedom of contract has been made the guiding principle in establishing the internal organization of the UNLLO (see paras. 54 and 55 below).

22. The Guide permits the members of the business to agree through contractual mechanisms (i.e., organization rules) on the internal governance of the enterprise, to derogate from non-mandatory requirements, and to tailor rights and duties that are more consistent with the needs of smaller businesses (see para. 11 above).³²

23. However, the Guide also includes certain recommendations for mandatory provisions that cannot be excluded by agreement among the members, as well as default provisions to fill any gaps in the organization rules. These default provisions can be particularly important for smaller or less-experienced entrepreneurs who may not foresee every eventuality required for the successful operation of the UNLLO.³³

Recommendation 1: The law should provide that an UNCITRAL Limited Liability Organization (“UNLLO”) is governed by [this law] and by the organization rules.³⁴

24. Recommendation 2 permits an UNLLO to be organized for any lawful business or commercial activity. A very broad approach is taken to the permitted activity of an UNLLO in order to provide maximum flexibility to the MSMEs that are anticipated to use this business form. In keeping with the traditional approach of UNCITRAL texts, the Guide supports the view that States should give the terms “commercial” and “business” broad interpretation to avoid unwarranted narrowing of the permitted scope of the UNLLO.³⁵ Moreover, the Guide follows the approach adopted by several legislative reforms of excluding the use of general purpose clauses so that business entities can engage in all lawful activities under the law of the State. The Guide thus leaves it open to the members of the UNLLO to decide whether or not they wish to include a more restrictive purpose clause in the organization rules. States requiring business entities to list all of their activities may wish to consider removing that requirement for UNLLOs.

25. States wishing to prohibit an UNLLO from engaging in certain regulated industries, such as banking, microcredit and insurance industries, could enumerate the industries and activities in which an UNLLO may not engage. For additional clarity, States may expressly permit participation of the UNLLO in specific activities which might include activities in the agricultural, artisanal and cultural sectors.³⁶

Recommendation 2: The law should provide that an UNLLO may be organized for any lawful business or commercial³⁷ activity.

³² The Secretariat has revised the second part of the paragraph (para. 20 of A/CN.9/WG.I/WP.116) further to a request of the Working Group at its thirty-third session that the paragraph should emphasize the ability of the UNLLO members to contract around non-mandatory clauses (para. 76, A/CN.9/1002).

³³ The Secretariat has deleted para. 22 of A/CN.9/WG.I/WP.116 for improved readability of the text.

³⁴ The Secretariat has placed “this law” in brackets to indicate that this phrase refers to the domestic legislation that will be enacted on the basis of this Legislative Guide (the “Guide”).

³⁵ The Secretariat has redrafted this paragraph (paras. 31 and 32 of A/CN.9/WG.I/WP.99) for consistency with revised rec. 2 and further to a request of the Working Group at its twenty-seventh session that the terms “commercial” and “business” should be given a broad interpretation (para. 30, A/CN.9/895).

³⁶ The Secretariat has revised the drafting of the paragraph (para. 36 of A/CN.9/WG.I/WP.112), including by deleting the phrase “or participation ... funds”, for improved clarity.

³⁷ At its twenty-seventh session, the Working Group agreed to insert the phrase “business or commercial” before “activity” (para. 30, A/CN.9/895).

26. The Guide recommends the granting of legal personality to the UNLLO in order for it to be a legal entity separate from its members.³⁸ Legal personality in this context confers upon the UNLLO the legal rights and duties necessary for it to function within a legal system, including the ability to acquire rights and assume obligations in its own name.

27. Legal personality provides a means through which the UNLLO's assets can be separated from the personal assets of its members, a process which has been referred to as affirmative asset partitioning. A distinct legal personality permits the UNLLO to be shielded from potential claims by the personal creditors of its members. This, in turn, facilitates defensive asset partitioning by an UNLLO that has been granted limited liability, which can then protect the personal assets of the UNLLO members from exposure in the event that the UNLLO is unable to satisfy its debts or meet its obligations or becomes involved in legal disputes.³⁹ Legal personality and limited liability protection (see rec. 4) thus provide a convenient legal mechanism for the UNLLO to separate its assets from the personal assets of its members.⁴⁰

28. It should be noted that domestic taxation policy in respect of the legal form of an UNLLO is not considered in the Guide. Such policy matters are left to States drafting legislation on the basis of the Guide, with the understanding that they might consider their policy options in the broader context of how best to reduce legal obstacles for UNLLOs, and MSMEs more generally.

Recommendation 3: The law should provide that the UNLLO has a legal personality distinct from its members.⁴¹

29. Recommendation 4 states one of the essential consequences of conferring legal personality to a business entity, which is that the members of the UNLLO are not personally liable for the obligations and debts of the UNLLO, except in cases of misuse or fraudulent use by the members of the legal personality of the UNLLO.⁴² As such, recommendation 4 includes a mandatory provision.

30. Limited liability permits entrepreneurs to take business decisions without concern that they may jeopardize their personal assets if the business entity does not perform well or becomes involved in legal disputes.⁴³ This is important both for the protection of the members of the organization and for the promotion of innovation and business creation, as it allows entrepreneurs to take business risks without fear of failure. However, many MSMEs do not currently enjoy the benefits of limited liability protection. In some States, limited liability protection is not offered to MSMEs because of concerns that it would encourage opportunism by entrepreneurs and provide insufficient protection for third parties dealing with the MSME. Other States,

³⁸ The Secretariat has revised the opening sentence of the paragraph for improved clarity (para. 37 of A/CN.9/WG.I/WP.112).

³⁹ The Secretariat has shifted the order of the sentences "Such distinct ... legal disputes" as they appeared in A/CN.9/WG.I/WP.99 for improved consistency of the paragraph.

⁴⁰ In keeping with deliberations of the Working Group at its twenty-seventh session, the Secretariat has included here (para. 36 of A/CN.9/WG.I/WP.99) the opening sentence of para. 37 of A/CN.9/WG.I/WP.99. See also *supra*, footnote 31.

⁴¹ At its twenty-seventh session, the Working Group agreed to insert the phrase "distinct ... members" at the end of the recommendation (para. 33, A/CN.9/895).

⁴² Further to changes requested by the Working Group at its twenty-seventh session (para. 34 (b), A/CN.9/895), and modifications suggested by the Secretariat for consistency with revised rec. 4, para. 29 (para. 40, A/CN.9/WG.I/WP.112) previously read as follows: "Draft recommendation 4 establishes the default provision that members of the UNLLO will enjoy limited liability for the obligations of the UNLLO". The Secretariat, however, suggests a further revision of this paragraph for improved clarity of the concept of limited liability and its relation to legal personality. Moreover, it is suggested that the provision in rec. 4 be defined as a mandatory and not a default provision. The Secretariat has included the concept of how members can apportion liability among themselves (see para. 36, A/CN.9/895) in para. 89. See also *infra* footnote 134.

⁴³ The Secretariat has replaced the phrase "in case ... failure" after "jeopardize" with the current drafting to better clarify the scope of "limited liability".

however, grant members of MSMEs access to limited liability protection, since this is considered to promote entrepreneurship and facilitate capital formation.⁴⁴ As such, and in order to offer this important and attractive feature to such economic actors, the legislative regime establishing the UNLLO offers limited liability protection to UNLLO members.

31. The presence of such a liability shield generally protects the members of an UNLLO from incurring direct or indirect personal liability as a result of the activities of the UNLLO. In effect, the financial liability of a member of the UNLLO is limited to a fixed sum, usually the value of the member's contribution to the UNLLO. As noted above (see paras. 26 and 27), limited liability of members and distinct legal personality of the organization often go hand in hand (see rec. 3 above). Granting both attributes to the UNLLO will assist in promoting the stability of the organization and access by it to lower cost credit.

32. The UNLLO itself is liable to its general creditors and all of the assets of the UNLLO are available to satisfy those claims. In addition, it is important to note that the limitation on the liability of a member for the obligations of the UNLLO refers to liability that results solely from that person's status as a member of the UNLLO. Members of the UNLLO may still have personal liability for personal tort⁴⁵ or for example, a member may be liable for a personal guarantee given in respect of the obligations of the UNLLO. Moreover, a contract entered into with a third party before the formation of the UNLLO may give rise to personal liability of the members or managers of the UNLLO who entered into that contract. Members should include in the organization rules a provision on how such instances should be addressed, for example whether the UNLLO would assume the rights and obligations negotiated on its behalf.⁴⁶

33. Of course, it will remain open for courts to lift the limited liability protection and impose personal liability on members and managers in cases of fraud or other wrongful acts committed in the name of the UNLLO ("piercing the corporate veil").⁴⁷ Such abuse of the UNLLO legal form could arise, for example, where a member makes use of UNLLO assets as though they were that member's personal assets.

Recommendation 4: The law should provide that a member is not personally liable for the obligations of the UNLLO solely by reason of being a member of that UNLLO.⁴⁸

34. Some States maintain the view that a minimum capital requirement is a reasonable quid pro quo for members of a business that is not publicly traded to receive the benefit of limited liability. However, many of those States have significantly reduced minimum capital requirements for these businesses to nominal or initially low but progressively increasing amounts. It has been suggested that even in a nominal or progressive form minimum capital requirements can be conducive to business growth, since they function not only to protect third parties, but also to assist in terms of the soundness, effectiveness and productivity of the business and provide

⁴⁴ The Secretariat has added the sentences "In some States ... capital formation" to the paragraph (para. 39 of [A/CN.9/WG.I/WP.99](#)) for improved clarity of the text.

⁴⁵ At its twenty-seventh session, the Working Group agreed to delete the phrase "or liability ... UNLLO", before "or for example", since it concerned liability matters of a different nature from those discussed in this paragraph (para. 34 (a), [A/CN.9/895](#)).

⁴⁶ At its twenty-seventh session, the Working Group agreed to include in the commentary a discussion in respect of contracts entered into prior to the legal formation of the UNLLO (para. 51, [A/CN.9/895](#)). The Secretariat has redrafted the last sentence ("Members should ... on its behalf") of the paragraph (para. 35 of [A/CN.9/WG.I/WP.114](#)) for improved consistency with the deliberations of the Working Group at that session.

⁴⁷ See also para. 35 (e) in relation to rec. 5, as well as recs. 19, 22 and 23.

⁴⁸ At its twenty-seventh session, the Working Group agreed to retain the text of rec. 4.1 and to delete rec. 4.2 as they appeared in footnote 37 of [A/CN.9/WG.I/WP.99](#), but to reflect the content of proposed rec. 4.2 elsewhere in the text possibly in relation to the organization rules (para. 37, [A/CN.9/895](#)). The Secretariat has implemented that suggestion in para. 89 of the current revision.

information in respect of financial and decision-making rights. On the other hand, concerns have been raised that capital requirements, including progressive capital requirements, could have a negative impact upon small start-up enterprises. The first three years of an enterprise's life cycle are the most critical and yet it would be required to progressively build up its reserves during that period in spite of possible financial fragility.⁴⁹ Moreover, since the minimum capital required to create a business, along with the accounting rules of the required capitalization, is often one of the most important considerations for new businesses, its elimination may be a factor that can positively affect the rate of establishment of business entities. Further, as a matter of State policy, one particular problem related to establishing minimum capital requirements is the difficulty of quantifying an appropriate amount, and the rigidity inherent in making such a choice.⁵⁰

35. The issue of minimum capital requirements should be dealt with in the context of general mechanisms for the protection of creditors and other third parties dealing with the UNLLO.⁵¹ The more important of such mechanisms are included in the Guide as mandatory provisions, while others may be found elsewhere in a State's legislative framework. These mechanisms include:

(a) Making members of the UNLLO liable for improper distributions and obligating them to repay the UNLLO for any such distributions (see recs. 22 and 23, which include mandatory provisions);

(b) Prescribing standards of conduct, including good faith and fiduciary responsibilities (see rec. 19, which includes a mandatory provision);

(c) Requiring transparency and accessibility in the keeping and sharing of UNLLO records and information (see recs. 29 and 30, which include mandatory provisions);

(d) Requiring that the entity's business name contain an indicator of its limited liability status (for example, "UNLLO") and that its name be set out in contracts, invoices and other dealings with third parties (see rec. 6, which includes a mandatory provision);

(e) Permitting exceptions to the limited liability protection of members of the UNLLO in certain circumstances (a rule on "piercing the corporate veil" is a judicial remedy in respect of corporations and other limited liability entities that is available in some States but that might⁵² not necessarily be imported as a matter of statute in respect of the UNLLO, where it might better be characterized in terms of mandatory provisions prohibiting a member's abuse of the UNLLO legal form; such mandatory provisions are found in recs. 19, 22 and 23);⁵³

⁴⁹ The Secretariat has redrafted this paragraph (para. 44 of [A/CN.9/WG.I/WP.99](#)) further to the request of the Working Group at its twenty-seventh session, that the commentary should reflect the considerations raised by the Working Group at its twenty-seventh and previous sessions in regard to policy choices for and against minimum capital requirements (para. 42, [A/CN.9/895](#)).

⁵⁰ The Secretariat has relocated the sentences "Moreover, since the minimum ... such a choice" of para. 46 of [A/CN.9/WG.I/WP.112](#) here and deleted the rest of that paragraph for improved consistency of the text.

⁵¹ The Working Group may wish to consider including this paragraph under a separate section relating to the protection of creditors and other third parties. The Working Group may wish to consider the following aspects for future discussion: (a) whether the UNLLO members should be liable to creditors or just to the UNLLO (in case of an abuse of the UNLLO form by the members); and (b) whether creditors can force the UNLLO to act against its members.

⁵² The Secretariat suggests changing "should" (see para. 38 (e) in [A/CN.9/WG.I/WP.114](#)) with "might" to eliminate possible inconsistency with para. 33.

⁵³ The Working Group may wish to recall that it has previously considered the issue of "piercing the corporate veil", reaching general agreement that "rules on piercing the corporate veil were quite detailed and could vary widely from State to State, such that it might not be productive to attempt to establish such standards in the text of the Guide, outside of noting the potential importance of such a remedy in the commentary and leaving the establishment of standards on it to enacting States." (paras. 56 and 58, [A/CN.9/831](#)). In any event, courts may still "pierce the corporate veil" under State law if the UNLLO legal form is abused by its members, and such a

(f) Establishing requirements in respect of the transparency, quality and public availability of registered information on the UNLLO and its managers (this could be expected to be a function of the business registry law of a State);⁵⁴

(g) Establishing a supervisory role for commercial registries or specialized agencies (this could also be expected to be a function of the business registry law of the State);

(h) Establishing credit bureaux (this would be a policy decision of the State); and

(i) Requiring corporate governance oversight (this would be a policy decision of the State).

36. In keeping with the nature of the UNLLO as a mechanism to assist MSMEs, as well as several legislative reforms that have replaced the minimal capital requirement with other mechanisms to protect third parties dealing with the MSME, the Guide does not recommend a minimum capital requirement for the establishment of an UNLLO. As noted above, the main mechanisms included in the Guide to protect third parties dealing with the UNLLO are the mandatory provisions in recommendations 6, 19, 22, 23, 29 and 30, as outlined in subparagraphs 35 (a) to (e) above.

37. Even where a State has policy reasons to require a minimum capital, the Guide recommends against imposing such a requirement on the UNLLO, even if the amount is nominal or progressively increasing.⁵⁵ Instead, other mechanisms may be considered, such as the establishment of a maximum size (for example, based upon the number of employees) or level of profitability of the UNLLO, which could then be required to convert to another legal form (for which the State might require minimum capital) upon exceeding that maximum. It should be noted, however, that these other mechanisms could unnecessarily restrict the growth of UNLLOs.

Recommendation 5: The law should not require a minimum capital for the formation of an UNLLO.

38. In order to signal to third parties that they may be dealing with an UNLLO, the law should require the name of the UNLLO to include a phrase or abbreviation (such as “UNLLO”)⁵⁶ that would enable it to be distinguished from other types of business entities.⁵⁷ The use of the same or a similar phrase or abbreviation in different States would assist UNLLOs engaging in cross-border trade as the defining characteristics of the entity would be immediately ascertainable upon recognition of the phrase or abbreviation, even in the cross-border context. Since the UNLLO is proposed as a legal form specifically tailored to MSMEs in addition to existing models, it is best identified by a phrase or abbreviation that is independent from the local legal context.⁵⁸

39. Some States may wish to require the UNLLO to use its distinctive phrase or abbreviation in all correspondence with third parties in order to signal its legal personality.⁵⁹ The appropriate sanction for failure to do so should be considered

tool need not be specifically inserted into the text of the Guide (in this regard see also para. 35, [A/CN.9/895](#)).

⁵⁴ See the UNCITRAL Business Registry Guide for relevant recommendations.

⁵⁵ The Secretariat has revised the opening sentence of the paragraph (para. 49 of [A/CN.9/WG.I/WP.112](#)) for improved clarity.

⁵⁶ In keeping with footnotes 18 and 28, *supra*, the term (“UNLLO”) is used here by way of example.

⁵⁷ The Working Group agreed on this approach at its twenty-seventh (para. 43, [A/CN.9/895](#)), twenty-third and twenty-fourth sessions (see para. 69, [A/CN.9/825](#) and paras. 61 to 63, [A/CN.9/831](#)).

⁵⁸ In light of the discussion in the commentary to rec. 6, the Working Group may wish to agree on a suggested unified phrase or abbreviation to be used for the identification of the UNLLO.

⁵⁹ The Secretariat has replaced “limited liability” in para. 39 above (para. 51 of [A/CN.9/WG.I/WP.112](#)) with “legal personality” to emphasize this distinctive feature of the UNLLO.

carefully. Denial of the benefit of limited liability protection for an UNLLO may be too severe. Instead, while encouraging UNLLOs to use this distinctive phrase or abbreviation in all correspondence in order to enhance legal certainty, States may decide not to make it mandatory so as to avoid creating an additional burden on the UNLLO by potentially increasing its administrative costs of compliance and verification. Practically speaking, since the distinctive phrase or abbreviation forms part of the name of the UNLLO, it would likely be included in all correspondence involving the UNLLO, in any event.

40. In terms of the name chosen for the UNLLO, all mandatory requirements concerning registration (and approval) of company names in the jurisdiction in which the UNLLO is doing business will have to be satisfied.^{60,61}

Recommendation 6: The law should provide that the name of the UNLLO must include a phrase or abbreviation that identifies it as an UNLLO.

B. Formation of the UNLLO

41. The Guide recommends to permit the establishment and operation of an UNLLO by a sole member or multiple members. This accommodates the creation of an UNLLO by a sole member, including an individual entrepreneur engaged in relatively simple business activities, and permits the UNLLO to evolve from a single-member entity to a more complex multi-member one. In order to protect creditors and third parties dealing with the UNLLO and to provide legal certainty, recommendation 7 establishes that an UNLLO should have at least one member at all times. In the case of a single-member UNLLO, States should consider establishing a reasonable time period for the replacement of the member, if the organization rules do not contain appropriate provisions in this regard, so as to avoid an automatic dissolution of the UNLLO.⁶² As an additional feature to enhance the flexibility of the UNLLO, recommendation 7 does not specify a maximum number of members for the UNLLO.⁶³

42. An important issue for States to consider in the legislation establishing the UNLLO is whether a member of an UNLLO may be a legal person or whether only natural persons are permitted membership in an UNLLO. When a legal person is permitted to be a member of the UNLLO, it is desirable that States ensure a wide understanding of the concept of “legal person”, which should include any entity that has been granted a legal personality.⁶⁴ Permitting a legal person to be a member of an UNLLO may facilitate the transition of the UNLLO to a more sophisticated type of business. Moreover, membership of a legal person in an UNLLO may help the UNLLO access greater resources (monetary, technological, and skill sets) and new markets, as well as build credibility. This will be valuable not only for UNLLOs operating in States with lower levels of infrastructure, but also for UNLLOs aiming to expand their activities in the domestic market and abroad.

⁶⁰ Further to a request of the Working Group at its twenty-seventh session, the Secretariat has deleted paras. 50 to 52 of [A/CN.9/WG.I/WP.99](#) (para. 46, [A/CN.9/895](#)).

⁶¹ The UNCITRAL Business Registry Guide discusses registration and prior reservation of business names, the importance of such names being unique, State’s criteria on business names requirements and the role of the business registry in assisting entrepreneurs choosing a name for their business.

⁶² The Working Group may wish to note that at its thirty-first session consideration of a proposal to delete the sentence “In the case of ... the UNLLO” was postponed until after the Working Group had considered section H and rec. 24 on transfer of rights (para. 29, [A/CN.9/963](#)).

⁶³ For improved consistency of the text, the Secretariat has moved the last sentence of para. 54 of [A/CN.9/WG.I/WP.112](#) to the end of this paragraph.

⁶⁴ At its thirty-first session, the Working Group agreed to replace the phrase “any legal entity capable of making an investment” with the current drafting (“any entity ... legal personality”). The Secretariat has implemented that decision with a minor editorial adjustment for improved clarity (para. 30, [A/CN.9/963](#)).

43. However, States may wish to limit membership in an UNLLO to natural persons only, particularly in the case of a single-member UNLLO. Permitting a legal person to be a single-member of an UNLLO⁶⁵ might give rise to concerns about the possible misuse of the UNLLO (see also para. 73 below), for risk of money-laundering, fraud or other illicit behaviour.⁶⁶ If legal persons are permitted to be members of UNLLOs, States should introduce appropriate safeguards to prevent those illicit activities. For example, they could establish that only natural persons can be appointed as managers of an UNLLO, or that the UNLLO be required to maintain information on the identity of the members and managers of the legal person and any changes thereof or a legal person might be granted membership only in a multi-member UNLLO where the other members are natural persons. All those measures may help prevent the creation of an UNLLO without active business operations (a “shell organization”).

44. In order to preserve the simplicity of the UNLLO, however, the Guide leaves States the option to permit only natural persons to become members of an UNLLO.⁶⁷

Recommendation 7:⁶⁸ The law should:

(a) Provide that an UNLLO must have at least one member from the time of its formation [until its dissolution]; and

(b) Specify whether only natural persons or also legal persons are permitted to be members of an UNLLO.

45. In order to provide legal certainty as to when the UNLLO comes into existence, the Guide recommends that an UNLLO should be formed once it is registered with the business registry. Through formation,⁶⁹ the UNLLO acquires its essential attributes, including its legal personality, and limited liability for its members. In the interest of predictability and transparency of registration, it is highly desirable that States specify the moment at which the registration of the business is effective.⁷⁰ In keeping with international best practices, as outlined in the UNCITRAL Legislative Guide on Key Principles of a Business Registry (the “UNCITRAL Business Registry Guide”), the State may wish to specify that legal existence is conferred upon the UNLLO either at the time of the entry of the information on business registration into the registry record or when the application for registration is received by the registry.⁷¹

46. Regardless of the system used to register an UNLLO (electronic, paper-based or a mixed business registry), upon fulfilling the applicable requirements, the UNLLO should receive a notice of registration from the designated State authority. In keeping with the recommendations of the UNCITRAL Business Registry Guide and in order

⁶⁵ The Secretariat has split in two the opening sentence of the paragraph (para. 46 of [A/CN.9/WG.I/WP.114](#)) and replaced the phrase “which might raise concerns” with the current “Permitting ... of an UNLLO” for improved clarity of the text.

⁶⁶ The Secretariat has revised this sentence (para. 42 of [A/CN.9/WG.I/WP.116](#)) for improved clarity of the text”.

⁶⁷ At its thirty-first session, the Working Group agreed to include in para. 55 of [A/CN.9/WG.I/WP.112](#) a discussion on the advantages and drawbacks of an UNLLO membership granted to a legal person. The Secretariat has implemented that decision in paras. 42 and 43 of the current text (para. 28, [A/CN.9/963](#)). Moreover, para. 44 (para. 55 of [A/CN.9/WG.I/WP.112](#)) has been redrafted for consistency with revised rec. 7 (b).

⁶⁸ At its thirty-first session the Working Group agreed to redraft rec. 7 to better address States’ concerns of legal persons being members of an UNLLO and to divide the recommendation into two (para. 27, [A/CN.9/963](#)). The Working Group may wish to note that it agreed to postpone consideration of a proposal to remove the phrase “until its dissolution” in rec. 7 (a) to a later stage (para. 29, [A/CN.9/963](#)). The Working Group may also wish to consider whether rec. 7 (a) could be redrafted along the lines of: “Provide that an UNLLO must have at all times at least one member” to better clarify the requirements for the continuity of existence of the UNLLO.

⁶⁹ The Secretariat has revised the opening sentences of this paragraph (para. 56 of [A/CN.9/WG.I/WP.112](#)) for consistency with the revised rec. 8 (para. 31, [A/CN.9/963](#)).

⁷⁰ See the UNCITRAL Business Registry Guide, paras. 142 ff.

⁷¹ The Secretariat has modified this paragraph (para. 56 of [A/CN.9/WG.I/WP.112](#)) for consistency with redrafted rec. 8 and the UNCITRAL Business Registry Guide (para. 31, [A/CN.9/963](#)).

to accommodate the simple nature of the UNLLO, issuance of the notice of registration should be as fast and as streamlined as possible.⁷²

Recommendation 8: The law should provide that the UNLLO is formed once it is registered.⁷³

47. Depending on the type of business entity being created, States typically require different types and a varying level of detail for business formation according to the type of legal entity being created. Consistent with the intended simplicity of the UNLLO, the information required for the formation of the UNLLO should be limited to the minimum necessary for its establishment and operation, as well as for the protection of third parties. In addition, recommendation 9 respects the principle that it should be as simple as possible for an MSME to provide the required information to the business registry so as to avoid creating unnecessary burdens and to encourage compliance with the law.

48. The minimum information necessary for the formation of the UNLLO pursuant to recommendation 9 includes the name of the UNLLO as well as the address at which the business is to be deemed to receive correspondence.⁷⁴ Where the business does not have a standard form address, a precise description of its geographic location should be provided instead of the business address.⁷⁵ The business address or geographic location of the UNLLO would be used for service or mailing purposes.⁷⁶

49. This Guide does not require evidence of a member's identity for the formation of the UNLLO, but requires evidence of the identity of each person who manages the business. If the business is exclusively managed by all of its members (see paras. 74 to 77), the effect of recommendation 9 (c) will be that the information on the identity of each member must be included, since each member would be a manager of the UNLLO. If the business is managed by one or more designated managers, only information on the identity of each designated manager must be included, whether or not the managers are members of the UNLLO. Requiring the UNLLO to disclose the identity of each person managing the business provides greater transparency to State authorities and third parties dealing with the UNLLO. Information on the residential address of each of those persons is, however, not required for the formation of the UNLLO since this information is not essential for the protection of third parties. For that purpose, as well as for State monitoring of the UNLLO management, the business address of the UNLLO should be sufficient. Moreover, the business address of the UNLLO can also function as the official correspondence address of the persons managing the UNLLO.⁷⁷

50. Depending on the domestic context and legal tradition, States might require other information in addition to that listed in recommendation 9. For example, information on the identity of the founding members of the UNLLO, the members' share of the UNLLO, the authority to represent it and any limitations on the power of managers to bind the UNLLO might be considered of particular relevance by some

⁷² The Secretariat has deleted para. 58 of [A/CN.9/WG.I/WP.112](#) for consistency with redrafted rec. 8 and in keeping with the decision of the Working Group at its thirty-first session that the discussion on the registration of the UNLLO should not focus on the different methods to administer business registration but rather include references to the UNCITRAL Business Registry Guide (para. 32, [A/CN.9/963](#)).

⁷³ The Secretariat has revised the text of the recommendation as requested by the Working Group at its thirty-first session (para. 31, [A/CN.9/963](#)).

⁷⁴ The Secretariat has rephrased the final clause of this sentence for improved consistency with the UNCITRAL Business Registry Guide.

⁷⁵ See also rec. 21 of the UNCITRAL Business Registry Guide.

⁷⁶ The Secretariat has deleted the final sentence of this paragraph (para. 60 of [A/CN.9/WG.I/WP.112](#)) for consistency with the new draft of rec. 9.

⁷⁷ The Secretariat has revised this paragraph (para. 61 of [A/CN.9/WG.I/WP.112](#)) for greater clarity further to the changes in the terminology agreed by the Working Group at its previous sessions and for improved consistency with the terms used in the UNCITRAL Legislative Guide on a Business Registry.

States for the valid formation of an UNLLO.⁷⁸ In the case of an MSME, as most UNLLOs would be, States, however, should remain mindful that requesting complex and extensive information may discourage a business from registering.⁷⁹ States may also leave it open to the UNLLO to include any additional information deemed appropriate, in particular if such information can assist it in accessing credit or attracting investors.⁸⁰

51. The limited scope of information requirements under the Guide should be sufficient to meet international standards on disclosure of beneficial ownership.⁸¹ These information requirements⁸² should thus assuage any concerns that the UNLLO legal form could be misused for illicit purposes, including money-laundering and terrorist financing. Such an approach also strikes an appropriate regulatory balance, since it provides sufficient legal and commercial certainty for the State and for the protection of third parties dealing with the UNLLO.⁸³

52. Regardless of the different types and amounts of information to be submitted for formation, States may wish to ensure that their business registration law requires any changes to information initially required pursuant to recommendation 9 to be updated with the business registry. Recommended methods for keeping information current are set forth in the UNCITRAL Business Registry Guide.⁸⁴

53. For transparency and the protection of third parties, most States provide that all registered information should be publicly available unless it is protected by the State's domestic law.⁸⁵ Consistent with this approach, the Guide thus takes the view that the information required for the formation of the UNLLO should be publicly available. That information would at least include the requirements listed in recommendation 9

⁷⁸ The Secretariat has added this discussion on additional information the States might consider requiring for the valid formation of an UNLLO, as agreed by the Working Group at its thirty-first session (para. 41, [A/CN.9/963](#)).

⁷⁹ The Secretariat has added this sentence ("In the case of ... from registering") to stress the importance of a simple and straightforward registration process addressing the needs of MSMEs. See also the UNCITRAL Business Registry Guide on this.

⁸⁰ The Secretariat has moved the final sentence of para. 49 (para. 50 of [A/CN.9/WG.I/WP.114](#)) here for consistency.

⁸¹ Financial Action Task Force (FATF) Recommendation 24 in respect of transparency and beneficial ownership of legal persons encourages States to conduct comprehensive risk assessments of legal persons and to ensure that all companies are registered in a publicly available company registry. The basic information required is: (a) the company name; (b) proof of incorporation; (c) legal form and status; (d) the address of the registered office; (e) its basic regulating powers; and (f) a list of directors. In addition, companies are required to keep a record of their shareholders or members. See International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, Part E on Transparency and Beneficial Ownership of Legal Persons and Arrangements (<http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>). In addition, it should be recalled that business entities, in order to conduct activities, usually must open bank accounts that require the submission of taxation and other identification numbers, and financial institutions may remain the most suitable parties to prevent and combat money-laundering and other illicit activities. For consideration of these issues by the Working Group, see paras. 27 and 41 of [A/CN.9/800](#), and paras. 47 to 55 of [A/CN.9/825](#), as well as information contained in paras. 26 to 32 of [A/CN.9/WG.I/WP.82](#) and paras. 21 and 26 of [A/CN.9/WG.I/WP.89](#).

⁸² See also recs. 29 and 30 on record-keeping, inspection and disclosure of UNLLO information to its members.

⁸³ Further to the request of the Working Group at its thirty-first session, the Secretariat has deleted para. 63 of [A/CN.9/WG.I/WP.112](#) (para. 41, [A/CN.9/963](#)).

⁸⁴ The Secretariat has added this paragraph to fill a gap in the Guide as to the importance of maintaining current the information required for the existence of the UNLLO and to ensure consistency with other parts of the Guide (see para. 79 below) where reference is made to the need to update that information. No separate recommendation has been drafted as such recommendations appear in chapter V of the UNCITRAL Business Registry Guide.

⁸⁵ See recommendation 35 of the UNCITRAL Business Registry Guide and its attendant commentary (paras. 176 to 183).

below. Since the UNLLO must be registered in order to be formed, that information will be disclosed through publication on the business registry.⁸⁶

Recommendation 9: The law should keep the information required for the formation of the UNLLO to a minimum. Such information should include:⁸⁷

- (a) The name of the UNLLO;**
- (b) The business address or, when the business does not have a standard form address,⁸⁸ precise geographical location of the UNLLO; and**
- (c) The identity of each person who manages the UNLLO.⁸⁹**

C. Organization of the UNLLO

54. As noted above in respect of recommendation 1 (see paras. 21 and 22), freedom of contract should be the guiding principle in establishing the internal organization of the UNLLO. As a consequence of that principle, the operation of the UNLLO is governed by the agreement of its members, except for those cases in which the law is mandatory and cannot be modified. The provisions that are mandatory are those that establish the necessary legal framework of the UNLLO and provide legal certainty, or those that are necessary to protect the rights of the UNLLO and of third parties dealing with it. When the organization rules are silent on a non-mandatory issue, the default provisions in the Guide are intended to fill any gap.

55. In order to help members manage the UNLLO fairly, effectively and transparently, States may wish to provide model rules that members may use, where appropriate, on the following issues:⁹⁰

- (a) Maintenance of timely records of the members' decisions as well as the form in which those records should be maintained;
- (b) Any requirement in respect of members' meetings, including:
 - (i) Their frequency and location, as well as any limitation thereon;
 - (ii) Any requirement regarding who can call a meeting;
 - (iii) The means by which a meeting may be held, including whether it may be held by technological means or by written consent;
 - (iv) Any notice period required prior to the holding of a meeting;

⁸⁶ Mindful of its previous deliberations that the question of what information should be required for the valid formation of the UNLLO should be considered separately from the question of what information should be made public (para. 52, [A/CN.9/895](#); and para. 40, [A/CN.9/963](#)), at its thirty-second session the Working Group supported a proposal to create a new section on information of the UNLLO that is to be made public for the benefit of third parties (para. 42, [A/CN.9/968](#)). Given that such a recommendation would be more applicable to business registration law, and given the commentary to rec. 35 on public availability of information in the UNCITRAL Business Registry Guide, the Secretariat did not create a separate recommendation for inclusion in the Guide.

⁸⁷ The Secretariat has amended the chapeau of rec. 9, further to a decision of the Working Group at its thirty-first session (paras. 33 and 37, [A/CN.9/963](#)).

⁸⁸ The Secretariat has added the phrase "when ... form address" for greater clarity of rec. 9 (b) and consistency with the UNCITRAL Business Registry Guide.

⁸⁹ The Secretariat has deleted rec. 9 (c) in [A/CN.9/WG.I/WP.112](#) and replaced "name" with "identity" in new rec. 9 (c) (former rec. 9 (d)) as agreed by the Working Group at its thirty-first session (para. 41, [A/CN.9/963](#)). Further, the Secretariat has replaced the term "manager" with "person ... UNLLO" for improved clarity.

⁹⁰ At its thirty-third session, the Working Group agreed to insert the phrase "States may ... following issues" in the chapeau of para. 55 (para. 54, [A/CN.9/WG.I/WP.116](#)). The Secretariat has edited the opening of the chapeau for consistency (para. 80 of [A/CN.9/1002](#)).

(v) The form of any notice required for a meeting (for example, whether it must be in writing), and the information (if any) that should be attached to the notice (for example, the UNLLO's financial information); and

(vi) Whether waiver of any required notice is permitted and the form that waiver may take;

(c) Any deviations from the default decision-making⁹¹ requirements in recommendations 12 and 15; and

(d) Criteria to resolve situations in which a decision cannot be reached, whether the decision falls within the purview of the managers or the members.

56. The organization rules should be agreed upon by all members of the UNLLO (see para. 65 (a) below) and may not contradict the mandatory provisions of the State's legislation enacted on the basis of the Guide or other domestic laws that apply to the UNLLO. Further, the organization rules should be consistent and coherent in order to ensure the smooth management of the UNLLO.⁹²

57. The Guide leaves States the option to permit the members of the UNLLO to establish some or all⁹³ organization rules orally or through a course of conduct, or to require the members to record their organization rules, whether in writing or in electronic form or by any other appropriate technological means. 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.

58. It may be in the best interests of members to record the organization rules of the UNLLO, since oral agreements and agreements implied by conduct are more difficult to prove in the event of a dispute. In addition, when amendments by conduct to recorded organization rules occur in practice, States would need to rely on other laws for resolution of the evidentiary disputes which may arise.⁹⁴

59. A requirement for an UNLLO to document its rules would assist in record-keeping, and provide evidence of the internal governance for creditors and other interested third parties to make informed decisions about who they wish to do business with. These advantages would apply equally to single-member and multi-member UNLLOs.⁹⁵ Recorded organization rules would further mitigate the risk that the UNLLO be misused for illicit purposes, such as money-laundering.

60. However, States that consider requiring recorded organization rules should balance the need for transparency and traceability of UNLLO's operations against the cost imposed on the members, and should take into account factors such as technological and financial capabilities, literacy rates, and model forms.

61. The Guide does not require that an UNLLO's organization rules be made public. This approach protects the privacy of members and adds to the ease of the UNLLO's operations by avoiding the need to file amendments with the business registry or other public authority each time a change is made to the organization rules (see para. 52 above). States may, however, decide to require the UNLLO to disclose its organization rules to increase accountability and transparency of the UNLLO, or the UNLLO itself might decide to make them available to the public in order to strengthen

⁹¹ The Secretariat has replaced "voting" with "decision-making" for consistency with the rest of the Guide.

⁹² At its thirty-third session, the Working Group agreed that the paragraph (para. 55 of [A/CN.9/WG.I/WP.116](#)) should note the importance for the organization rules to be consistent and coherent (para. 80, [A/CN.9/1002](#)).

⁹³ The Secretariat has included "some or all" further to a request of the Working Group at its thirty-third session (para. 80 of [A/CN.9/1002](#)) and adjusted the rest of the paragraph for clarity.

⁹⁴ The Secretariat has edited the final sentence for clarity as suggested by the Working Group at its thirty-third session (para. 80, [A/CN.9/1002](#)).

⁹⁵ The Secretariat has included this sentence to reflect advantages for requiring a single-member UNLLO to document its organization rules.

its reputation on the market.⁹⁶ When an UNLLO's organization rules include provisions that modify the default provisions applicable to the UNLLO, notice of such changes to third parties is required in order to be effective against them (see para. 84 and rec. 18 below). To accommodate the different legal tradition and practices of the States, the Guide leaves States the option to decide how that information should be disclosed to the third parties.

Recommendation 10: The law should:⁹⁷

- (a) Indicate what form the organization rules may take; and**
- (b) Provide that the organization rules may address any matters relating to the UNLLO insofar as they do not contradict the mandatory provisions of the law enacted on the basis of the Guide.**

D. Membership rights and decision-making in the UNLLO⁹⁸

62. In keeping with the intended simplicity of the UNLLO form, the Guide leaves to members how to establish membership in an UNLLO and it sets out a default provision in recommendation 11 that the members have equal rights in the UNLLO irrespective of their contribution (see also paras. 94 to 98 below). Members may vary this default provision, but they should record their agreement in the organization rules, as the change will affect core aspects of the structure and governance of the UNLLO.⁹⁹

63. Membership in an UNLLO entitles a member to exercise certain rights regardless of whether or not the member is a manager of the UNLLO. Those rights include: rights to make decisions on certain aspects of the UNLLO and financial rights¹⁰⁰ 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. In addition, members are entitled to receive information on the operation of the UNLLO and its financial status and to inspect the UNLLO records (see paras. 129 and 130 and recs. 29 and 30). Members may also bring derivative actions on behalf of the UNLLO (see para. 87) to protect it against illicit behaviour of the managers or members.

64. UNLLO members must also comply with certain obligations. They must make the agreed contributions to the UNLLO, if any, partake in its losses and reimburse any undue distribution made to them by the UNLLO (recs. 21 to 23). As noted above (see para. 33), members should also refrain from any abuse of the UNLLO legal form and any other rights granted to them. These are the minimum obligations required of members, in order to ensure the regular operations of the UNLLO. Members are, however, free to establish additional obligations in their organization rules consistent with the features of the business.¹⁰¹

⁹⁶ At its thirty-third session, the Working Group agreed that the paragraph (para. 59 of [A/CN.9/WG.I/WP.116](#)) should also elaborate on the advantages of public disclosure of the organization rules. The Secretariat has implemented that decision by adding the sentence "To increase ... on the market" (para. 80 (d), [A/CN.9/1002](#)).

⁹⁷ The Secretariat has revised the recommendation as agreed by the Working Group at its thirty-third session (paras. 79 and 85, [A/CN.9/1002](#)). In addition, the Working Group may wish to include "other applicable law" in rec. 10 (b) to specify that members may not contract around other State laws that are applicable to the UNLLO.

⁹⁸ At its thirty-third session, the Working Group agreed to replace the title of this section with the current drafting (para. 22 of [A/CN.9/1002](#)).

⁹⁹ The Secretariat has added this opening paragraph to the section ("In keeping with ... of the UNLLO") as a commentary to the new rec. 11 (see *infra* footnote 102).

¹⁰⁰ The Secretariat has removed the sentence beginning with "Moreover, a member can transfer its financial rights ..." given the Working Group's decision to amend rec. 24 (rec. 22 in [A/CN.9/WG.I/WP.116](#)) (see *infra* footnote 146).

¹⁰¹ The Secretariat has relocated here paras. 63 to 65 of [A/CN.9/WG.I/WP.116](#) for improved clarity of the commentary. The Working Group may wish to consider including the words "and obligations" in the text of rec. 11.

Recommendation 11: The law should establish that unless otherwise agreed in the organization rules, members have equal rights in the UNLLO irrespective of their contributions, if any.¹⁰²

65. With regard to decision-making rights, the Guide recommends that, at a minimum, the members retain authority on the following matters that affect the structure or existence of the UNLLO:

- (a) Adoption and any amendment of the organization rules (rec. 12);¹⁰³
- (b) The management structure of the UNLLO and any modifications thereof (recs. 14 and 16);
- (c) Determination of the member's contribution to the UNLLO, if any (rec. 20);
- (d) [Determination of the member's share of the UNLLO];¹⁰⁴
- (e) Conversion or restructuring of the UNLLO (rec. 26); and
- (f) Dissolution of the UNLLO (rec. 27 (a) and (b)).

66. When an UNLLO is managed by all of its members exclusively (see rec. 15), it would be necessary to differentiate the decision-making rights as a member from those as a manager.

67. The list of matters in paragraph 65 above is not exhaustive and the Guide leaves States the option to include additional matters to better accommodate their domestic policies and legal tradition. Consistent with the principle of freedom of contract that is at the basis of the UNLLO, the Guide also permits the members to include in the organization rules additional matters over which they would retain decision-making authority (see rec. 13 below).

Recommendation 12: The law should:¹⁰⁵

Specify the decisions on the UNLLO to be reserved to the members, which, at a minimum, should include decisions on:

- (a) Adoption and amendment of the organization rules;**
- (b) Management structure and its modification;**
- (c) [Member's share of the UNLLO, if not equal];**
- (d) Member's contributions;**
- (e) Conversion and restructuring; and**
- (f) Dissolution.**

68. Since the matters indicated in recommendation 12 are essential for the existence and operation of the UNLLO, recommendation 13 (a) provides that decisions on those matters should require the unanimous consent of the members, unless they have

¹⁰² At its thirty-third session, the Working Group agreed to include a new recommendation (rec. 11) to clarify that the rights of the members were equal and not linked to their contributions to the UNLLO (para. 56 of A/CN.9/1002). As per the Note to the Working Group before para. 18, the Working Group may wish to clarify whether "equal rights" should also mean that the UNLLO members have an equal share of the UNLLO.

¹⁰³ For further clarity, the Secretariat has added adoption of the organization rules as one of the decisions reserved to the UNLLO members.

¹⁰⁴ The Secretariat has placed this subparagraph in brackets in the commentary and rec. 12 pending deliberations by the Working Group on the meaning of "equal rights" (see the Note to the Working Group before para. 18).

¹⁰⁵ The Secretariat has redrafted the recommendation, pursuant to deliberations of the Working Group at its thirty-third session (paras. 22 and 27 of A/CN.9/1002). As with the previous recommendation, the Secretariat has placed subparagraph (c) in brackets pending deliberations by the Working Group with regard to the Note to the Working Group before para. 18.

agreed otherwise in the organization rules. This decision-making system may be particularly suitable for an UNLLO as it is fair, straightforward, gives equal weight to all members and encourages the members to find a compromise when disagreement arises. In practice, however, requiring unanimity gives dissenting members the power to veto any decision, thus affecting the ability of the UNLLO to operate effectively and efficiently. For this reason, recommendation 13 (b) suggests that decisions on matters that are not essential for the existence of the UNLLO should be taken by a majority of members by number. This system will also allow the members to resolve their differences on the daily operations of the UNLLO more expeditiously.

69. Although the Guide has taken the approach that unanimity should be required for decisions that affect the existence and operation of an UNLLO, the legal tradition in some States may not require unanimous consent on such matters. Furthermore, as noted above (para. 68), the dissatisfaction of one UNLLO member may present challenges for the effective governance of the business operations. States may therefore decide to deviate from recommendation 13 and create a standard that only requires a qualified majority to take the decisions listed in the recommendation. Legislation prepared on the basis of the Guide should clearly indicate the quantum necessary for any decisions that depart from those listed in recommendation 13.¹⁰⁶

Recommendation 13: The law should specify that unless otherwise agreed in the organization rules:¹⁰⁷

- (a) Decisions on the following matters are to be taken by unanimity:**
 - (i) Adoption and amendment of the organization rules;**
 - (ii) Management structure and its modification;**
 - (iii) [A member's share of the UNLLO, if not equal];¹⁰⁸**
 - (iv) Member's contributions, if any;**
 - (v) Conversion and restructuring; and**
 - (vi) Dissolution; and**
- (b) Any other decisions are to be taken by a majority of members by number.**

E. Management of the UNLLO

70. The UNLLO will likely have a relatively small number of members, and those members will be interested in substantial participation in the management and operation of the business.¹⁰⁹ Appointing an external manager (which is common in publicly-traded companies) to administer the UNLLO may not fit the governance needs of the members, particularly when the UNLLO is a micro or small business. Recommendation 14 thus makes an UNLLO exclusively managed by all of its members the default approach.

71. However, the default provision may not be suitable for every UNLLO. For example, there may be instances where a member is not willing or eligible to serve as

¹⁰⁶ At its thirty-third session the Working Group agreed that default rec. 13 would provide for unanimity as this method was said to be more suitable for MSMEs, but the Secretariat was requested to draft commentary highlighting that States may opt for a different standard. (para. 28 of A/CN.9/1002). The Working Group may wish to consider whether the recommendation should be modified accordingly.

¹⁰⁷ At its thirty-third session, the Working Group agreed to add a separate recommendation on the quantum required for decision-making. The Secretariat has implemented the change following the guidance received from the Working Group, including its attendant commentary (para. 28 of A/CN.9/1002).

¹⁰⁸ See supra footnote 104.

¹⁰⁹ The Secretariat has slightly adjusted the opening sentence of the paragraph (para. 59 of A/CN.9/WG.I/WP.114) for improved readability.

a manager (see para. 73 below).¹¹⁰ Therefore recommendation 14 permits members of an UNLLO to agree to a management structure where not all members act as managers. In such instances, the UNLLO will be managed by a designated manager. Alternative management structures may involve management by: (i) only some of the UNLLO members; (ii) only non-member managers; (iii) a combination of some of the UNLLO members and non-member(s); or (iv) all of the UNLLO members and non-member(s). Designated managers will manage the ordinary course of business of the UNLLO pursuant to recommendation 17.

72. Where there is only one member of an UNLLO, that member will be the manager, unless the member appoints a manager.

73. Managers of an UNLLO, regardless of whether the UNLLO is managed by all of its members exclusively or by one or more designated managers, must meet the legal requirements (e.g., minimum age, absence of disqualification) established under the domestic law of the State for those in a management role. In this respect, the law should also specify whether a legal person that has been granted membership in an UNLLO can be appointed as a manager (see para. 42 above). In addition to the requirements of the applicable law, the organization rules may prescribe other qualifications a manager of the UNLLO must meet.¹¹¹

Recommendation 14: The law should provide that the UNLLO is managed by all of its members exclusively, unless it is indicated in the organization rules that the UNLLO shall appoint one or more designated managers.¹¹²

1. When the UNLLO is managed by all of its members exclusively

74. When the UNLLO is managed by all of its members exclusively, the members will have joint and equal management powers and decision-making rights on matters concerning day-to-day operations of the UNLLO, unless they agree otherwise in the organization rules.¹¹³

75. Furthermore, unless there is agreement to the contrary, differences that arise between members as to managerial decisions would be resolved by a majority of its members. Such decisions would likely include: opening and closing bank accounts, disposing of assets owned by the UNLLO, accessing credit for the UNLLO, buying and selling equipment and hiring employees. As noted above (see paras. 65 and 67), decisions that affect the UNLLO existence or structure would not be considered managerial in nature, and would therefore require the approval by the members in their capacity as members, and not in their capacity as managers.

76. In this regard, it should be noted that the removal of management duties of one member in an UNLLO managed by all of its members exclusively is a non-managerial decision, as it would affect the management structure of the UNLLO. Such a decision would thus be taken by the members in their capacity as members (see paras. 65 above

¹¹⁰ The Working Group may wish to provide an additional default approach for instances in which not all members are legally eligible to serve as managers, as rec. 14 (rec. 12 in [A/CN.9/WG.I/WP.116](#)) currently only applies to deviations from the default approach by members' agreement.

¹¹¹ The Secretariat has modified the commentary to rec. 14 (rec. 12 in [A/CN.9/WG.I/WP.116](#)) to make it align with the changes in the recommendation. Further, in keeping with a decision of the Working Group at its thirty-first session, the Secretariat has added para. 73 (para. 62 in [A/CN.9/WG.I/WP.114](#)), on the approach to follow in establishing the requirements to be met in order to be a manager (para. 47, [A/CN.9/963](#)).

¹¹² The Secretariat has redrafted the recommendation pursuant to a decision taken by the Working Group at its thirty-second session (para. 34, [A/CN.9/968](#)).

¹¹³ The Secretariat has added the phrase "on matters ... operations of the UNLLO" in keeping with a decision of the Working Group at its thirty-second session that it should be clarified in the commentary that the focus is on internal management decisions and not on the external representation of the UNLLO (para. 36, [A/CN.9/968](#)).

and 77 below). The member whose management duties have been removed would retain the right to participate in decision-making as a member (see rec. 12).

77. As a practical matter, in an UNLLO managed by all of its members exclusively it might be difficult to differentiate between decisions made as members or as managers (see also para. 66 above). Recommendation 12 therefore presents a list of decisions that require member action, whereas recommendation 15 reflects the default approach to decision-making of the members as managers in an UNLLO managed by all of its members exclusively.¹¹⁴

Recommendation 15: The law should provide that when the UNLLO is managed by all of its members exclusively and unless otherwise agreed in the organization rules:

(a) Differences among members on matters concerning day-to-day operations of the UNLLO should be resolved by a majority decision of the members;^{115,116} and

(b) The members of the UNLLO have joint and equal rights to decide on matters concerning the regular operations of the UNLLO.¹¹⁷

2. When the UNLLO is managed by one or more designated managers

78. As noted above (see para. 71), members of an UNLLO may agree on a management structure that differs from the default provision in recommendation 14. When members agree on an alternative management structure, the organization rules should include rules for the appointment and removal of a designated manager. In the absence of such rules,¹¹⁸ recommendation 16 provides that such decisions should be made by a majority of the members. A designated manager could be a member of the UNLLO, provided that the management structure is not one in which all members serve as managers exclusively.

79. Should a designated manager become unavailable (through death or otherwise), the members could¹¹⁹ be required to appoint another manager under the terms of the organization rules, and to list the identity of the manager pursuant to recommendation 9 (c) (see para. 52 above). Appointing another manager could be important to ensure continuity of the regular operations of the UNLLO.¹²⁰

¹¹⁴ The Secretariat has modified paras. 75 to 77 above (para. 64 of [A/CN.9/WG.I/WP.114](#)) for consistency with the approach taken in the new Section D on membership in an UNLLO.

¹¹⁵ At its thirty-second session the Working Group agreed that differences in ordinary management decisions should be resolved by a majority of members by number (para. 37, [A/CN.9/968](#)).

¹¹⁶ In keeping with deliberations of the Working Group at its thirty-second session, the Secretariat has removed the phrase “ordinary course of business” from the recommendation (para. 39, [A/CN.9/968](#)). In addition, it has deleted rec. 15 (c) (rec. 12 (c) in [A/CN.9/WG.I/WP.114](#)), since decisions on matters outside the day-to-day operations of the UNLLO require members’ action and are addressed in rec. 12.

¹¹⁷ The Secretariat has reversed the order of this recommendation to mirror the structure of rec. 12.

¹¹⁸ The Secretariat has replaced “agreement” with “rules” in keeping with a suggestion of the Working Group at its thirty-first session (para. 75, [A/CN.9/963](#)).

¹¹⁹ The Secretariat has replaced “would” with “could” in keeping with a suggestion of the Working Group at its thirty-first session (para. 75, [A/CN.9/963](#)).

¹²⁰ The Secretariat has replaced the phrase “amendments ... be made” in the paragraph (para. 83 of [A/CN.9/WG.I/WP.112](#)) with the current drafting, further to a decision of the Working Group at its thirty-first session that discussions on managers’ rights to amend the formation document should not be included in the commentary (paras. 34 and 41, [A/CN.9/963](#)).

Recommendation 16: The law should provide that, unless otherwise agreed in the organization rules, one or more designated manager(s) may be appointed¹²¹ and removed by a majority decision of the members.

80. As noted above (see paras. 63 and 65), even when members of the UNLLO appoint one or more designated manager(s) to manage the business, members will still retain the authority to decide on certain matters that are outside the daily operation of the business and may affect its existence, structure or the membership itself. The Guide enumerates certain matters that should be decided by the members. To facilitate the operation of the UNLLO, it would be desirable for the organization rules to specify all other matters that are retained for decision-making by members (see para. 67 above). Typical managerial decisions are described in paragraph 75 above, but the Guide takes the view that when the organization rules are silent, the default provision of recommendation 17 (a) will apply, which provides managers with the authority to make decisions independent of involvement of the members.¹²²

81. The organization rules should also determine how disputes among managers on matters within their authority should be resolved. In the absence of such rules, recommendation 17 (b) provides that disputes should be decided by a majority of the managers. The recommendation, however, does not address any deadlock that might occur when an equal number of managers fail to reach a decision. As noted above (see para. 55 (d)), it is desirable that criteria to resolve situations in which a decision cannot be made should be included in the organization rules.¹²³

Recommendation 17: The law should provide that when the UNLLO is managed by one or more designated manager(s):

(a) Managers are responsible for all matters that are not reserved to the members of the UNLLO pursuant to [this law] or the organization rules; and

(b) Disputes among managers should be resolved by a [majority] decision of the managers, unless otherwise agreed in the organization rules.¹²⁴

3. Provisions applicable to all managers regardless of the management structure of the UNLLO

82. Regardless of whether an UNLLO is managed by all of its members exclusively or by one or more designated managers, the Guide applies certain provisions, such as the power to act on behalf of the UNLLO and fiduciary duties, to all managers. This approach is reflected in recommendations 18 and 19.

83. Each manager of the UNLLO has the authority to act on behalf of the UNLLO and legally bind it. Restrictions may be agreed upon in the organization rules in

¹²¹ The Secretariat has replaced “elected” with “appointed” further to a suggestion of the Working Group at its thirty-first session (para. 75, [A/CN.9/963](#)).

¹²² At its thirty-second session, the Working Group agreed to include a list in the section on designated managers similar to the one that was included in the new recommendation on the rights of members (para. 41, [A/CN.9/968](#)). Given that it would be unlikely to subject managerial decisions to heightened voting standards, the Secretariat has suggested including the list only in rec. 12.

¹²³ At its thirty-second session, a suggestion was made to provide guidance on instances in which the disagreement between managers was equal in rec. 17 (b) (rec. 14 (b) in [A/CN.9/WG.I/WP.114](#)) (para. 41, [A/CN.9/968](#)). The Secretariat suggests that this matter should be dealt with in the organization rules of the UNLLO and has thus included it in subpara. 55 (d) (Section C Organization) to account for such instances. In addition, the Secretariat has added the sentences “The recommendation ... organization rules” in para. 81.

¹²⁴ The Secretariat drafted rec. 17 (rec. 14 in [A/CN.9/WG.I/WP.114](#)) and its attendant commentary pursuant to deliberations of the Working Group at its thirty-first session in order to consider instances where the UNLLO would be managed by designated managers (paras. 62 to 64, [A/CN.9/963](#)). The Working Group may wish to note that for the reasons identified supra, in footnote 34, “this law” has been placed in brackets.

respect of the extent of each manager's authority¹²⁵ to bind the UNLLO (for example, only up to a certain monetary threshold), or to vary the default provision that each manager has the authority to legally bind the UNLLO. Such modifications of the default provisions will be effective between the members of the UNLLO.

84. However, such restrictions or variations will not be effective against third parties dealing with the UNLLO unless those third parties have notice of that restriction or variation of the manager's authority. If third parties dealing with the UNLLO do not have notice of any limitation that the organization rules have placed on the authority of a manager, the UNLLO will nonetheless be bound by a decision of that manager, regardless of whether that decision exceeds the manager's authority as limited by the organization rules. The Guide leaves to State law to determine how notice to third parties should be provided (in this regard, see also para. 61 above).¹²⁶

Recommendation 18: The law should provide that each manager individually has the authority to bind the UNLLO unless otherwise agreed. Restrictions upon that authority will not be effective against third parties dealing with the UNLLO¹²⁷ without proper notice.

85. The authority of any manager¹²⁸ to represent and bind the UNLLO must be contained in a manner that reduces the risk of managers acting opportunistically and encourage them to promote the welfare of the UNLLO and, indirectly, its members. Fiduciary duties offer protection against a manager's pursuit of personal interest and any grossly negligent behaviour on its part.¹²⁹ Such duties may be separated into a duty of care and a duty of loyalty, including a duty to refrain from self-dealing transactions, personal use of business assets, usurpation of business opportunities, and competition with the UNLLO. The inclusion of such duties tends to be a standard feature of business associations law; for example, fiduciary duties are found in many of the simplified corporate forms resulting from States' reforms in this domain. The Guide notes that States may have an understanding of fiduciary duties that range beyond the duties listed in recommendation 19. It would be up for the State to decide to include additional mandatory duties, including creating fiduciary duties to the UNLLO of members who are not managers.¹³⁰

86. A claim of fiduciary duty is a serious matter and should not be too easily available as means to challenge ordinary business decisions. Managers who, in the performance of their official duties, make a good faith decision they believe to be in the best interest of the UNLLO should not be exposed to liability for breach of fiduciary duties merely due to disagreement with their business judgment.¹³¹

87. Legal claims against managers in breach of their fiduciary duties may be brought directly before a court or by way of an alternative dispute settlement mechanism (see

¹²⁵ The Secretariat has replaced "to which ... the UNLLO" in para. 80 of A/CN.9/WG.I/WP.112 with "each manager's authority" for improved clarity of the text.

¹²⁶ At its thirty-second session, the Working Group agreed to retain the term "proper notice" in rec. 18 (rec. 15 in A/CN.9/WG.I/WP.114), but that it would be for States to define how to provide "proper notice" (para. 43, A/CN.9/968), see also para. 61. Given that the commentary to rec. 18 permits members of the UNLLO to deviate from the default provision, the Secretariat has added the phrase "unless otherwise agreed." in the text of the recommendation.

¹²⁷ In keeping with proposals made at the thirty-first session of the Working Group, the Secretariat has deleted the phrase "in the ... business" between "UNLLO" and "without" (see annex to A/CN.9/963) as well as in the attendant commentary.

¹²⁸ The Secretariat is using the phrase "any manager" to clarify that "manager" as used in rec. 19 would apply to all managers, regardless of the managerial structure of the UNLLO.

¹²⁹ The Secretariat has relocated this sentence ("Fiduciary duties ... its part") here from para. 81 (para. 75 of A/CN.9/WG.I/WP.112).

¹³⁰ At its thirty-second session the Working Group agreed to list a duty of care and duty of loyalty to the UNLLO in rec. 19 (rec. 16 in A/CN.9/WG.I/WP.114), leaving the possibility open for States to include additional mandatory duties (para. 44, A/CN.9/968). Rec. 19 and its attendant commentary have been adjusted accordingly.

¹³¹ The Secretariat has reversed the clauses of this paragraph (para. 73 of A/CN.9/WG.I/WP.114) for improved clarity.

rec. 31). Generally, it will be the UNLLO itself, rather than an individual member, that would have a cause of action for a breach of a fiduciary duty by a member or manager. Ordinarily, the manager would be responsible for bringing an action on behalf of the UNLLO. However, in instances in which the manager has breached its own fiduciary duty, a member should have the right to bring a derivative claim on behalf of the UNLLO. In doing so, the member must fairly and adequately represent the other similarly situated members.¹³²

88. The provision establishing a manager's duties to the UNLLO in recommendation 19 is mandatory and cannot be varied or eliminated by agreement. No internal agreement could eliminate or limit the liability of a manager: (a) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or (b) for any transaction from which the manager derived an improper personal benefit.

89. Members could agree to include in their organization rules a provision that they owe fiduciary duties to each other.¹³³ Similarly, they could agree among themselves how to apportion liability or whether to forego limited liability protection.¹³⁴ Members can also agree that a manager must adhere to a standard that is higher than that established in recommendation 19.

90. Finally, members may specify in their organization rules that certain activities are permitted for managers which do not constitute a breach of the duties established in recommendation 19.¹³⁵ Permitting freedom of contract of the members to this extent could be useful in the context of UNLLOs, since it would allow members to derogate from a prescriptive corporate legal framework which may not be necessary, while still requiring appropriate protection for the UNLLO, its members and third parties dealing with it.

Recommendation 19: The law should provide that any manager of the UNLLO owes a duty of care and a duty of loyalty to the UNLLO.¹³⁶

¹³² At its twenty-eighth session, the Working Group agreed to add in the commentary a paragraph on the enforcement of fiduciary duties that should include how legal claims can be brought individually and collectively against managers in breach, regardless of whether the claims were brought before a court or by way of alternative dispute resolution mechanism (para. 149, A/CN.9/900). For consistency, the Secretariat has moved this paragraph (para. 77 in A/CN.9/WG.I/WP.114) to follow the discussion on claims of breach of fiduciary duties. See also Section M on Conflict resolution.

¹³³ At its thirty-second session, the Working Group reversed its previous deliberation (para. 147, A/CN.9/900) that the approach in the Guide should be one in which members owed each other fiduciary duties unless otherwise agreed in the organization rules (para. 44, A/CN.9/968). The Secretariat has implemented that deliberation.

¹³⁴ At its twenty-seventh session, the Working Group agreed to include reference to proportional liability and to consider adding reference to foregoing limited liability protection entirely (para. 36, A/CN.9/895). See also, *supra*, footnote 42.

¹³⁵ Similar approaches may be found in various legislative enactments in respect of fiduciary duties. For example, the United States Revised Uniform Limited Liability Company Act of 2006 clarifies the ability of members to define and limit the duties of loyalty and care that members owe to each other and to the business entity. See also, the Delaware General Corporation Law, Section 102(b) (7), which allows the members to limit the duty of care by agreeing to eliminate or limit the personal liability of a manager to the business entity or its members in such cases.

¹³⁶ At its thirty-second session the Working Group agreed to: (a) only list a duty of care and duty of loyalty to the UNLLO in rec. 19 (rec. 16 in A/CN.9/WG.I/WP.114), leaving the possibility open for States to include additional mandatory duties, including fiduciary duties of members who were not managers (para. 44, A/CN.9/968); and (b) delete rec. 19 (b) in light of the Working Group decision that members did not owe fiduciary duties to each other (see also, *supra*, footnote 133). The Secretariat has implemented those deliberations accordingly.

F. Members' contributions to the UNLLO

91. The UNLLO is not required to have legal capital upon registration, so it is not necessary for members to make contributions to it in order for it to exist. Members may choose to require contributions in their organization rules and to establish what each member will provide to the UNLLO by way of contribution. In this respect, the law should permit members maximum flexibility to decide upon the value, type and timing of their agreed contributions to the UNLLO, including the flexibility to determine that members are not required to make contributions in order to be members of the UNLLO (see also rec. 11 above).

92. In specifying in the organization rules the types of contributions that members of the UNLLO may make, members may wish to consider tangible and intangible property as well as other benefits to the UNLLO, including money, services performed, promissory notes, other binding agreements to contribute money or property and contracts for services to be performed. Although maximum flexibility with respect to contributions to the UNLLO is encouraged, in some cases, other laws of the enacting State may restrict the types of contribution that may be made. For example, in some States, the provision of services is not permitted as a contribution to the establishment of a business entity. In such cases, those restrictions should be specified in the law prepared on the basis of the Legislative Guide.

93. The determination of the value of each non-monetary contribution should be left to the members of the UNLLO, as they are in the best position to determine that value. In this regard, it would be desirable for members of the UNLLO to provide the criteria on how to value non-monetary contributions in the organization rules. Members wishing to set forth obligations concerning the accurate value of their respective contributions may include them in the organization rules. Any other mechanism, such as requiring an audit or other external valuation method, is likely to be too burdensome for MSMEs. It is recommended that the UNLLO maintain a record (see also recs. 29 and 30 below) of the amount, type and timing of contribution of each member to ensure that the rights of the members are respected.

94. Recommendation 20 does not provide any default provision for instances where members agree to make contributions to the UNLLO, but do not agree upon the value of the contributions. The recommendation, however, highlights the importance of members to agree on the value of their contributions to ensure transparency and facilitate the operation of the business. Such an agreement may also help prevent disputes among the members, as it provides certainty and may limit the potential for distrust. It would be equally desirable that members reach an agreement on the value of their contributions when a new member joins the UNLLO after its formation.

95. As noted above (see para. 62), the value of a member's contribution will not determine the member's share of the UNLLO, which should be deemed equal if members have not agreed otherwise in their organization rules.¹³⁷ Given the "freedom of contract" principle that governs the Guide, members should also be permitted to agree on more complex ownership structures in their organization rules.

Recommendation 20: The law should establish that members may agree [in the organization rules] on the type, timing and value of their contributions.¹³⁸

¹³⁷ For consistency with the redrafted rec. 20 (rec. 18 in A/CN.9/WG.I/WP.116), the Secretariat has revised this part of the commentary by: (a) deleting para. 90 of A/CN.9/WG.I/WP.116; and (b) clarifying in para. 95 (paras. 91 and 92 of A/CN.9/WG.I/WP.116) that contributions and share are not interlinked by default (para. 56, A/CN.9/1002). The Secretariat has accordingly removed the words "share of and" from the title of the section.

¹³⁸ The Secretariat has redrafted the text of the recommendation as agreed by the Working Group at its thirty-third session (para. 57 of A/CN.9/1002) but suggests deleting the words "in the organization rules" as any subsequent agreement would require their amendment.

G. Distributions

96. The Guide applies the principle that distributions should be made in proportion to a member's share of the UNLLO. This recognizes that when the members have an equal share in the UNLLO, distributions will also be made evenly. However, when members have decided to deviate from the default rule of having an equal share in the UNLLO (see rec. 13 above), recommendation 21 provides that distributions should be equally adjusted. Members may deviate from this default provision and opt for a different distribution method that better suits their needs or the structure of the UNLLO. For example, they might decide that members who have contributed money to the UNLLO should receive a higher percentage of the distribution.¹³⁹

97. The members of the UNLLO may also agree on the type of distribution (for example, including cash or property of the UNLLO) as well as the timing of such distributions. It is advisable for States that do not permit non-monetary distributions to specify those restrictions in the UNLLO law.

Recommendation 21: The law should provide that distributions are made to members in proportion to their respective share of the UNLLO unless otherwise agreed in the organization rules.¹⁴⁰

98. Although the amount, type and timing of distributions may be subject to the members' decision, the Guide includes mandatory provisions (set out in recs. 22 and 23) aimed at protecting third parties dealing with the UNLLO from any dissipation of the UNLLO's assets through improper distributions to its members. Accordingly, recommendation 22 provides that distributions may be permissible only if the UNLLO's remaining assets exceed its total liabilities.

99. Distributions would also be prohibited if they would cause the UNLLO to be unable to pay its debts as they fall due or should become due in the course of ordinary business operations, provided that at the time of the distribution the debts are known to the UNLLO or the UNLLO can anticipate they would become due. If, following the distribution, an unanticipated debt arises, this recommendation provides protection and legal certainty to the members who received the distribution, and prevents the application of the clawback provision found in recommendation 23, provided that the new debt was unforeseeable at the time the distributions were made.¹⁴¹

Recommendation 22: The law should prohibit distributions from being made to any member if upon giving effect to such distribution:

(a) The UNLLO's total assets would be less than the sum of its total liabilities; and

(b) The UNLLO would not be able to pay its foreseeable debts as they become due.¹⁴²

¹³⁹ As requested by the Working Group at its thirty-third session, the Secretariat has revised the paragraph (para. 94 of [A/CN.9/WG.I/WP.116](#)) for consistency with the revised rec. 21 (rec. 19 of [A/CN.9/WG.I/WP.116](#)).

¹⁴⁰ At its thirty-third session, the Working Group agreed to replace the text of the recommendation with the current drafting. The Secretariat suggests including the clause "unless otherwise agreed" since the recommendation is not mandatory (para. 29 of [A/CN.9/1002](#)).

¹⁴¹ In keeping with deliberations of the Working Group at its thirty-third session, the Secretariat has revised the commentary to rec. 22 as follows: (a) deleting reference to the "cessation of payments" test and the "balance sheet test"; and (b) including a discussion on "foreseeability" as an objective standard to protect legal certainty of members who received distributions (para. 31 [A/CN.9/1002](#)).

¹⁴² The Secretariat has replaced "ordinary course of business" with the element of "foreseeability" pursuant to the agreement by the Working Group at its thirty-third session (para. 31, [A/CN.9/1002](#)) and has also reversed the order of rec. 22 (a) and (b) (rec. 20 (a) and (b) in [A/CN.9/WG.I/WP.116](#)) to reflect the changes to the commentary.

100. In keeping with the rule on improper distributions established in recommendation 22, recommendation 23 permits the amount of any such distribution to be clawed back from each member who received that distribution, or any improper portion of a distribution. Such a rule is intended both to protect third parties dealing with the UNLLO and to disincentivize members from accepting improper distributions, which may leave the UNLLO insolvent. To assist the UNLLO in recovering the improper distributions and minimize any disruption in its operations, States may consider setting a deadline by which the member should repay the amount received in violation of recommendation 22, or may already have in place such a deadline on the basis of other State laws, e.g., laws on unjust enrichment.¹⁴³

101. To protect third parties harmed by an improper distribution, recommendation 23 provides that a member of the UNLLO is required to reimburse the UNLLO even if the member did not have actual knowledge that the distribution received was in violation of recommendation 22. States may decide to deviate from the default rule, but should do so in a manner that protects the rights of third parties. For example, States may establish that creditors and other third parties harmed by the improper distribution may bring a derivative claim against the UNLLO's member(s) who received the distribution or any member or manager liable for the improper distribution. States should also consider any possible defences to such actions, such as lack of knowledge of the impropriety.

102. Regardless of whether the UNLLO is managed by all of its members exclusively or by one or more designated managers, the duties set out in recommendation 19, with recommendations 22 and 23, should provide an adequate basis on which to find those who took the decision to pay distributions liable for any improper distributions they made. A determination of impropriety of a distribution could be made on the basis of the UNLLO's available records concerning its activities, operations and finances or its financial statements, if any (see rec. 29). Personal liability will not be affected by the removal of the management duties of the manager after the time the improper distribution was made (see rec.19).¹⁴⁴

103. It should be noted that payments of reasonable compensation for services rendered and for bona fide debts owed by the UNLLO to a member should not be considered distributions, and would thus not be subject to the clawback provision in recommendation 23.

Recommendation 23: The law should provide that each member who received a distribution, or any portion thereof, made in violation of recommendation 22 is liable to reimburse the UNLLO for this distribution or portion thereof.

H. Transfer of rights¹⁴⁵

104. As noted above (see para. 63), membership in an UNLLO entitles a member to exercise financial rights to partake in the profits and losses of the UNLLO and to

¹⁴³ The Secretariat has added this sentence to address a suggestion of the Working Group at its thirty-third session (para. 34, [A/CN.9/1002](#)).

¹⁴⁴ In keeping with deliberations of the Working Group at its thirty-third session, the Secretariat drafted paras. 101 and 102 to clarify issues of the member's knowledge of the improper distribution, derivative claims, protection of members unaware of the impropriety from creditors' as well as personal liability of the managers who made the distribution (paras. 32 to 34, [A/CN.9/1002](#)).

¹⁴⁵ At its thirty-third session, the Working Group agreed to revise the commentary to rec. 24 (rec. 22 in [A/CN.9/WG.I/WP.116](#)) in the following way: (a) stressing that financial and decision-making rights cannot be transferred separately under the laws of certain States; (b) discussing reference to the time of the transfer for consideration of the States; (c) broadening the discussion on inheritance of a membership, in a single-member UNLLO and in a multi-member UNLLO; and (d) discussing issues of incapacitation of a member. The Secretariat has implemented those comments accordingly (paras. 60 to 63, [A/CN.9/1002](#)).

receive distributions. Membership also provides decision-making rights to participate in the management and control of the UNLLO.

105. Because the UNLLO legal form will mainly be used by micro and small businesses, its members are likely to attach great importance to interpersonal relationships with other members. Further, in an UNLLO managed by all of its members exclusively, members might not easily consent to modifying the existing management structure. For these reasons, members may resist transfers of membership of the UNLLO without the approval of other members.

106. Accordingly, the default provision set out in the Guide permits members of the UNLLO to transfer their membership, subject to the agreement of the other members. Members may also transfer a percentage of their membership of the UNLLO, subject to the agreement of the other members, but it should be noted that such a transfer would result in adding a new member to the business and may modify the ownership structure of the UNLLO. The transferee will enjoy the financial and decision-making rights resulting from its status as a member of the UNLLO (see rec. 11 above). The laws of some States may permit the transfer of certain rights with the retention of others, while laws of other States require all rights attached to the membership to be transferred. Even in that latter instance, members are generally able to make use of their financial rights in the UNLLO without being required to transfer their membership. For instance, they can enter into a derivative contract with another party over their financial rights or use their share of an UNLLO as collateral for other obligations or business opportunities. The Guide recognizes that pursuant to domestic legislative systems, specific principles of implementation of recommendation 24 may differ by State.

107. As a transfer of membership may affect the operations of the UNLLO and its relationship with creditors and other third parties, it is important to determine the time at which it takes effect. States might have different policy needs in this respect, and the Guide thus leaves them to establish the criteria to apply in order to determine when a transfer is effective.

108. In the situation of the death of an UNLLO member, organization rules should specify whether the rights of the deceased member can be transferred and what criteria should apply. Inheritance laws of the State may also affect the transfer of rights. In a multi-member UNLLO, this may result in the remaining members of the business being forced to accept the successor(s) of the deceased member as a new member. In order to avoid any potential conflict between the current and the new members, States may adopt appropriate mechanisms to protect the operations of the UNLLO. For example, State law may require the consent of the current members for the successor(s) to join the UNLLO or permit a buyout of the successor's membership. In the situation of the death of a single member of the UNLLO, complications could arise in that the law of the State might establish the automatic dissolution of the UNLLO. The Guide, however, considers it important to ensure the continuity of the business and takes the view that States should allow a transfer of membership to any successor of the single member, who may then decide whether the UNLLO should continue or be dissolved.

109. A transfer of rights would not occur in the situation in which members are no longer able to exercise their rights because of permanent incapacitation or disability. It would be desirable for the organization rules to specify what represents incapacitation or disability and how the UNLLO should deal with those circumstances. In the absence of any rules, the law of the State would apply, which may require appointing a legal representative to exercise the rights of the incapacitated member.

Recommendation 24: The law should provide that unless otherwise agreed in the organization rules:

(a) A member of an UNLLO may transfer its [membership] or a part thereof, when the other members, if any, agree to the transfer; and

(b) The death of a member shall not cause the dissolution of the UNLLO. 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. In the case of a single-member UNLLO, [the membership] may be transferred to any successor.¹⁴⁶

I. Dissociation or withdrawal¹⁴⁷

110. The default approach throughout the Guide is that members of an UNLLO will have equal financial and decision-making rights unless otherwise agreed in the organization rules (see rec. 11). This approach is supported by default provisions for decisions retained by the members as a result of their status as members to require either the unanimous consent of the members or a majority of members by number. Furthermore, in an UNLLO managed by all of its members exclusively, the default provision for resolving differences among members on matters concerning day-to-day operations of the UNLLO is that they may be decided by a majority of members by number, thus providing a convenient way to resolve more routine differences of view among the members in their capacity as managers. These two default provisions provide a reasonable and coherent decision-making system to resolve basic disputes in the UNLLO and to continue to conduct the affairs of the UNLLO, while at the same time allowing for members to dissent.

111. However, members of the UNLLO may not find these default decision-making mechanisms adequate once dissatisfaction or distrust disrupts their relationship. Members may not have foreseen the possibility of intractable disputes and may be unable to settle them internally. Although recommendation 24 permits members to transfer their rights upon agreement of other members, there may be difficulty in reaching such an agreement, and there might not be a ready market for the transfer. As such, the Guide includes a default provision providing an exit right for members involved in such disputes.

112. A default provision that permits one or more dissatisfied members to compel the dissolution of the UNLLO and the liquidation of its assets could create uncertainty and instability for the members and the UNLLO. It would also not permit the continuation of the UNLLO and would thus result in a net loss in economic value. On the other hand, a provision that requires unanimous consent of all the members could prolong an intractable dispute and result in increased inefficiencies in the operation of the UNLLO.

113. The Guide therefore shows a preference for facilitating the continued existence of the business, thus preserving its economic stability and value, by permitting a

¹⁴⁶ The Secretariat has redrafted rec. 24 (a) (rec. 22 in [A/CN.9/WG.I/WP.116](#)) pursuant to the deliberations of the Working Group at its thirty-third session, and has included a new subparagraph (b) (paras. 60 and 63 of [A/CN.9/1002](#)).

¹⁴⁷ The Secretariat has relocated this section of the Guide (Section K in [A/CN.9/WG.I/WP.116](#)) here further to the request of the Working Group at its thirty-third session (para. 65 [A/CN.9/1002](#)). In keeping with the deliberations of the Working Group at its thirty-third session, the Secretariat has revised the commentary to rec. 25 (rec. 25 in [A/CN.9/WG.I/WP.116](#)). Among the editorial adjustments, the Secretariat has: (a) included a discussion on procedural costs of withdrawing at the end of para. 116 (para. 72, [A/CN.9/1002](#)); (b) clarified that the dissociated member would cease to have any decision-making rights at the end of para. 113 (para. 72, [A/CN.9/1002](#)); (c) added a discussion of “reasonable cause”, and relevant examples in para. 114 (para. 69, [A/CN.9/1002](#)); (d) added a discussion of “fair value” to para. 116; and (e) added a discussion to para. 115 on what constitutes “reasonable period of time” (para. 71, [A/CN.9/1002](#)).

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 (such as when it would be unlawful to carry on business activities with the person as a member). At the moment of dissociation, the decision-making rights of that member should cease.¹⁴⁸

114. The Guide does not provide a definition of reasonable cause and leaves it to State law to specify which events could cause a member's withdrawal. States could indicate instances of minority oppression, for example denying minority members the right to inspect the UNLLO records or failure of the majority to follow the organization rules; or the members' failure to reach a decision which would cause a deadlock to the UNLLO (see also para. 81 above); or the denial of transfer of a member's rights in the UNLLO by the remaining members. To help the UNLLO manage instances of withdrawal in the most effective way, States could encourage the members to include this issue in the organization rules.

115. The default provision in recommendation 25 permits the payment of the fair value of a withdrawing member's share of the UNLLO over time, which avoids a situation where the withdrawing member may hold the UNLLO and its remaining members to ransom by demanding immediate payment of the entire amount. Complying with a demand of that sort might not be possible for the UNLLO or its remaining members and might effectively force its dissolution if it is rendered insolvent. The Guide leaves to States to determine what constitutes a reasonable period of time for payment. In setting this period, States should balance the ability of the UNLLO to satisfy its debts with the right of the member to receive payment without undue delay after withdrawal. For example, States could set a period of time after the member's withdrawal over which the payment should be made and allow the UNLLO members to shorten or lengthen it and to specify the terms of payment.

116. The default provision may present challenges in terms of assessing the fair value of the dissociated member's share of the UNLLO, which is necessary to protect a member against abuse by other members. In the scenario in which a conflict among members could result in a majority of members expelling a minority, or in the scenario in which a transfer of a member's rights is denied by the remaining members, the minority could be left to sell its share for whatever price the majority was willing to offer. The starting point for a fair valuation should be that the withdrawing members would receive the same amount in a buyout as that member would receive if the UNLLO were dissolved. However, the value of the UNLLO's goodwill should also be included in the calculation, and the buyout price for the dissociated members should thus be that member's share of the liquidation value of the UNLLO, or a value based on the sale of the entire UNLLO as a going concern, if permissible under the laws of the State. While it will be the UNLLO itself and not its members to bear the burden of the withdrawal payment, the payment of any procedural cost should be apportioned pursuant to the domestic law of the State.

117. It would also be prudent for members to decide in their organization rules to use alternative dispute resolution mechanisms (see rec. 31) for matters that cannot be resolved through the application of the organization rules or the default provisions. Determining the fair valuation of a withdrawing member's share, or its terms of payment, could be one of the issues that might be resolved through alternative dispute resolution, such as mediation, expedited arbitration or a request for redress by a referee or other neutral third party.¹⁴⁹

¹⁴⁸ The Working Group may wish to consider whether the rights that cease are limited to decision-making rights.

¹⁴⁹ See Section M on "Dispute resolution", *infra*.

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.¹⁵⁰

J. Conversion or restructuring¹⁵¹

118. As noted above (para. 42) in respect of recommendation 7, the Guide envisages legislation that permits the UNLLO to evolve from a very small enterprise to a more complex multi-member entity. Therefore, UNLLOs seeking to expand their activities can accommodate their growing needs, including through the establishment of branches and representative offices without having to modify their legal form. In certain circumstances, however, regardless of this flexibility the UNLLO form may no longer meet the needs of its members, who may find a different legal form more appropriate for their business activities. Recommendation 26 thus permits the members of the UNLLO to agree to convert the UNLLO into a different legal form or to restructure it.¹⁵² The Guide takes the view that members should also be permitted to agree on mergers, split-ups and any other types of restructuring.

119. Furthermore, as noted above in paragraph 65 in connection with recommendation 12, a decision on the conversion or restructuring of the UNLLO would be a decision retained by the members, and would require unanimity¹⁵³ unless otherwise indicated in the organization rules.

120. Conversion of the UNLLO into another legal form would require the new entity to re-register with the business registry or other designated State's authority. States should also provide adequate mechanisms to ensure the universal transfer of all assets and liabilities of the UNLLO to the new entity.¹⁵⁴ Moreover, the State in which the UNLLO would convert to another legal form or restructure may wish to ensure that adequate safeguards are in place to protect third parties dealing with the UNLLO from any adverse effects on their rights that could arise from such a restructuring or conversion of the UNLLO. Such safeguards may already exist in legislation providing for conversion into other legal business forms, and could consist, for example, of notice periods, publication requirements or rules on the transfer of third-party rights to the new legal form.

¹⁵⁰ As agreed by the Working Group at its thirty-third session, the Secretariat has: (a) added "upon ... cause" between "that" and "members"; and (b) moved "unless ... agreed" at the end of the recommendation (para. 70 of [A/CN.9/1002](#)). The Working Group may wish to specify that deviations from the default rule must be agreed upon in the organization rules.

¹⁵¹ Further to a request of the Working Group at its thirty-third session, the Secretariat has changed "restructuring or conversion" into "conversion or restructuring" in the title, the commentary and the text of the recommendation to give more prominence to the concept of "conversion" (para. 35 of [A/CN.9/1002](#)).

¹⁵² The Secretariat has added the sentences "Therefore, UNLLOs ... restructure it" further to deliberations of the Working Group at its thirty-third session that the commentary should emphasize the flexibility of the UNLLO to evolve from a simple to a complex entity (para. 37, [A/CN.9/1002](#)).

¹⁵³ At its thirty-third session, the Working Group agreed that matters affecting the structure or the existence of the UNLLO should be decided by unanimity (para. 28, [A/CN.9/1002](#)). The Secretariat has thus replaced "[qualified majority]" (para. 107 of [A/CN.9/WG.I/WP.116](#)) with "unanimity".

¹⁵⁴ The Secretariat has added the sentence "Conversion of the UNLLO ... entity," in keeping with deliberations of the Working Group at its thirty-third session that the commentary to rec. 26 (rec. 23 in [A/CN.9/WG.I/WP.116](#)) should highlight the need to re-register the new business entity and that conversion would not affect existing rights and liabilities of the UNLLO (para. 37, [A/CN.9/1002](#)).

Recommendation 26: The law should provide the necessary legal mechanisms to:

- (a) Facilitate members of the UNLLO to convert it into another legal form or to restructure it; and
- (b) Ensure protection of third parties dealing with the consequences of a conversion or restructuring.¹⁵⁵

K. Dissolution and winding-up

121. Recommendation 27 (a) (i) provides that the members of the UNLLO may decide in their organization rules that the UNLLO will be dissolved on the occurrence of an event specified in the organization rules. In order to limit the risk of an automatic dissolution, UNLLOs should be encouraged to indicate in the rules events that can be easily verified such as specific dates or the resignation of a certain number of members.¹⁵⁶ Should the members of the UNLLO not have established terms under which the UNLLO would be dissolved, they may decide by unanimity to dissolve the entity as indicated in recommendation 27 (a)(ii). This level of required consent is commensurate with that required in respect of a decision by members on restructuring the UNLLO or converting it into another legal form (see rec. 13 above), as well as reflecting the default approach for decisions retained by the members on matters that are outside of the day-to-day operation of the business as indicated in recommendation 12.¹⁵⁷

122. Recommendation 27 (a) (iii) includes a mandatory provision that members may not vary by agreement. An administrative or judicial decision (for example, a decision by an insolvency court) made pursuant to the law of the State ordering the liquidation of the UNLLO must be respected by its members. State law will vary as to the mechanisms by which such decisions are rendered.¹⁵⁸

123. Finally, recommendation 27 (a) (iv) recognizes that in light of a State's legal tradition other events may trigger the dissolution of an MSME. It thus leaves States the option to indicate additional causes of dissolution, provided that such causes be included in the legislation in an exhaustive manner.¹⁵⁹

124. An UNLLO will not immediately cease its operations upon a decision to dissolve, but it will continue to exist in order to wind-up its affairs, such as settling its activities and discharging its debts and other liabilities vis-à-vis third parties, before its existence is formally terminated. Members may wish to consider including provisions in the organization rules on how the UNLLO should wind-up when such a decision is made voluntarily by its members, otherwise the domestic law of the State will apply. Moreover, certain State's mandatory procedures for winding-up, which the members cannot derogate from by agreement, might also apply to the UNLLO, such as the obligation to file a statement with the relevant authority once the winding-up is completed, or the universal transfer of assets and liabilities.¹⁶⁰

¹⁵⁵ At its thirty-third session, the Working Group agreed to revise the recommendation to stress the importance of protecting third parties (para. 38 of A/CN.9/1002). The Secretariat has implemented that deliberation with minor editorial adjustments.

¹⁵⁶ The Secretariat has added this sentence to respond to a concern of the Working Group that the dissolution could be caused by events that cannot easily be proved (para. 41, A/CN.9/1002).

¹⁵⁷ The Secretariat has added the phrase "retained by ... recommendation 12" to emphasize that decisions on dissolution are of extraordinary nature.

¹⁵⁸ The Secretariat has added this final sentence further to a request of the Working Group at its thirty-third session to clarify that the recommendation was not intended to impose a new administrative or judicial system (para. 41, A/CN.9/1002).

¹⁵⁹ In keeping with deliberations of the Working Group at its thirty-third session, the Secretariat has added this new paragraph to clarify that additional causes of dissolution that States may wish to add to those included in the recommendation should not be open-ended (para. 40, A/CN.9/1002).

¹⁶⁰ The Secretariat has drafted this paragraph on winding-up as a commentary to the new rec. 28 that the Working Group agreed to include in the Guide at its thirty-third session. See also *infra*,

125. Again, the State in which the UNLLO would be dissolved and wound up may wish to ensure that adequate safeguards are in place to protect third parties from any adverse effects that could arise from the UNLLO's dissolution or winding-up. Such safeguards may already exist in other legislation providing for dissolution or winding-up of legal business forms.

Recommendation 27: The law should:¹⁶¹

(a) Provide that the UNLLO shall be dissolved in the following circumstances:

- (i) The occurrence of any event that is specified in the organization rules as causing the dissolution of the UNLLO;**
- (ii) A unanimous decision by the members;**
- (iii) The rendering of a judicial or administrative decision that the UNLLO is dissolved; and**
- (iv) Any other event specified in the law; and**

(b) Establish the necessary provisions and procedures for the 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.¹⁶²

L. Record-keeping, inspection and disclosure

126. Open communication and transparency are important issues for any business entity, but they are arguably of even greater importance in respect of the UNLLO. Members of the UNLLO are likely to have an equal share of the UNLLO, and establishing and maintaining trust among them is of great importance. Access to and proper dissemination of information to all members will further enhance trust among members and will permit them to be meaningfully involved in decision-making processes, thus providing a strong basis for the positive performance of the UNLLO.

127. The importance of sharing and disseminating information on the UNLLO among its members is emphasized by the mandatory provisions set out in recommendations 29 and 30. Recommendation 29 requires the UNLLO to keep certain records and members can agree that the UNLLO should retain additional information. Recommendation 30 ensures that each member has the right to inspect this information, as well as the right to access any other information regarding the UNLLO that would be reasonable for the member to access, which may include information on the activities, operations and financial situation of the business.

128. While some States apply broad disclosure requirements to businesses that are not publicly traded, others limit mandatory disclosure to publicly traded businesses.

footnote 162. With regard to the "universal transfer of assets and liabilities", the Working Group may wish to recall that at its thirty-third session an example of a jurisdiction was provided where the effect of a dissolution of an MSME with a single member that is a legal person (when not due to insolvency) may not be a wind-up but a universal transfer of assets and liabilities (para. 39, [A/CN.9/1002](#)).

¹⁶¹ At its thirty-third session the Working Group agreed to redraft rec. 27 (rec. 24 of [A/CN.9/WG.I/WP.116](#)) to: (a) eliminate "[qualified majority]" in rec. 27 (a) (ii) (rec. 24 (b) in [A/CN.9/WG.I/WP.116](#)); (b) highlight that States can include additional causes of dissolution; and (c) emphasize the importance to protect third parties from the consequences of dissolution. The Secretariat has revised the recommendation accordingly (para. 40, [A/CN.9/1002](#)) and inserted "unanimity" pursuant to rec. 13.

¹⁶² At its thirty-third session, the Working Group agreed on a new provision on winding-up, since rec. 27 (rec. 24 in [A/CN.9/WG.I/WP.116](#)) was said to be silent on this matter. The Secretariat has implemented this decision in new rec. 28 (para. 42 of [A/CN.9/1002](#)).

Disclosure requirements for large corporations could be overly burdensome and impracticable for small businesses. However, requiring an MSME to make certain information public, such as information concerning its working capital and capital needs, would serve to ensure accountability and transparency in their operations, which would also serve to protect the interest of third parties. Micro and small businesses wishing to improve their access to credit or to attract investments may have strong incentives for making such information public, particularly as they develop and progress.¹⁶³ States opting to make public certain records that the UNLLO is required to maintain could require the UNLLO to submit them to the business registry or the designated State authority for business registration (see rec. 9 above). In keeping with the intended simplicity of the UNLLO, however, the Guide takes the view that States should aim at striking a balance between promoting transparency and accountability and hindering the operations of an UNLLO with public disclosure requirements. For this reason, States may wish to permit voluntary submission of records by the UNLLO and allow it to decide on an annual basis whether to opt for disclosure or not. 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.¹⁶⁴

129. As noted above (para. 128), the list of records that must be kept pursuant to recommendation 29 should not be particularly burdensome for UNLLOs, even when they are micro and small businesses, in that it consists of basic information necessary for entrepreneurs of all levels of sophistication to run their businesses. In this respect, the reference to financial statements in recommendation 29 (d) indicates profit and loss or cash flow statements that UNLLOs may not be required to keep.¹⁶⁵ Moreover, the records that must be kept need only be recorded¹⁶⁶ in a timely fashion and in a medium that could be expected of a similar business operating in a comparable context. The recommendation does not specify when or how that information must be kept, and it would be open to the UNLLO to simply rely on electronic or other records that are reasonable for a business of its size and complexity. For example, many MSMEs use various mobile applications that are available on electronic devices to run their commercial enterprises, and they are thus easily able to track and access all types of information relevant to the business, including inventory, simple balance sheets, and even tax returns. An UNLLO operating in that context could then satisfy the requirements of recommendations 29 and 30 by retaining and permitting access to the information electronically available via that mobile application.

130. As noted above (see paras. 127 and 128), members have the right to receive information on how the UNLLO is managed and to inspect and copy the UNLLO records. Managers, as part of their duty to act in the interest of the UNLLO and its members (see para. 85 above), should take the necessary arrangements to facilitate members' access to the information maintained by the business entity. In order to avoid abuse by the members, access to information should be reasonably related to

¹⁶³ Small businesses aiming to grow may wish to signal their accountability by supplying information about: (a) the business' objectives; (b) principal changes; (c) balance sheet and off-balance sheet items; (d) the financial position and capital needs; (e) the composition of any management board and the policy for appointments and remuneration; (f) forward-looking expectations; and (g) profits and dividends.

¹⁶⁴ The Secretariat has revised the paragraph (para. 121 of [A/CN.9/WG.I/WP.116](#)) further to a request of the Working Group at its thirty-third session that the commentary should: (a) be drafted in a more neutral fashion and not over-emphasize that an UNLLO should not be required to publicly disclose its records; and (b) include a reference to rec. 9 for States to consider making public in the registry certain UNLLO records (paras. 45 and 46, [A/CN.9/1002](#)). The Secretariat has added the sentence "In keeping with ... disclosure or not" in accordance with the approach taken in the UNCITRAL Business Registry Guide (see para. 155 of that Guide) and in order to ensure greater consistency between that text and the Guide.

¹⁶⁵ At its thirty-third session the Working Group agreed to clarify in the commentary the meaning of the phrase "financial statements (if any)" (para. 44, [A/CN.9/1002](#)). The Secretariat has thus added the sentence "In this respect ... to keep" in the paragraph.

¹⁶⁶ The Secretariat has deleted reference to "reasonable records" for consistency with the revisions made to rec. 29 (rec. 26 in [A/CN.9/WG.I/WP.116](#)).

the rights and obligations of a member in its capacity as a member. In addition, the UNLLO may impose restrictions and conditions on the access to certain information, such as trade secrets, in order to preserve its confidentiality or prohibit access altogether. Such measures would not apply to public authorities, which can inspect the records of the UNLLO in accordance with their mandate.¹⁶⁷

Recommendation 29: The law should provide that the UNLLO must keep certain records including:

- (a) Information provided to the business registry;**
- (b) The organization rules, if and where such rules have been adopted in writing or otherwise recorded;**
- (c) A list of past and present designated managers, members and beneficial interest owners of legal entities, if any, as well as their last known contact details;**
- (d) Financial statements (if any);**
- (e) Tax returns or reports; and**
- (f) Records concerning the activities, operations and finances of the UNLLO.¹⁶⁸**

Recommendation 30: 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.¹⁶⁹

M. Dispute resolution

131. Members can usually negotiate among themselves to arrive at an efficient and amicable resolution of disputes concerning the governance and operation of the UNLLO. As noted in paragraphs 111 and 117 above, however, they may not be able to settle a dispute once dissatisfaction or distrust disrupts their relationship and resolution may thus require that they engage in potentially long and expensive litigation. Further, paragraphs 82 to 84 above describe fiduciary duties and the role they play in providing important safety mechanisms to protect members against opportunistic actions of a manager or another member. From the perspective of some legal traditions, however, open-ended fiduciary duties may not be easily enforceable unless they are clearly enunciated as formal legal rules. In both instances, alternative dispute resolution (“ADR”) mechanisms, including arbitration, conciliation, mediation and other extrajudicial methods, can assist members of an UNLLO in reaching an outcome consistent with the nature of the UNLLO, where interpersonal relations play an important role in the management of the business.

132. As ADR mechanisms usually require the agreement of the parties, the UNLLO members may consider including a provision in the organization rules that disputes relating to the governance and operation of the UNLLO should be referred to an agreed ADR method, if they cannot be resolved internally. Appendix II provides one such example of a multi-tiered clause. In fact, arbitration may not be the most suitable ADR mechanism for members of an UNLLO as it can be cost-prohibitive and formal, because it is an adversarial proceeding, and resolution of the dispute may not resolve

¹⁶⁷ The Secretariat has added this paragraph in keeping with the deliberations of the Working Group at its thirty-third session that the commentary should clarify: (a) member’s rights to information and their limitations; and (b) rights of public authorities (paras. 46, 48 and 49, [A/CN.9/1002](#)).

¹⁶⁸ The Secretariat has: (a) deleted the term “reasonable” from the chapeau of the recommendation; and (b) redrafted subparas. (b), (c) and (f) as agreed by the Working Group at its thirty-third session (paras. 43 and 44, [A/CN.9/1002](#)). Further, the Secretariat suggests including “certain” in the chapeau of the recommendation, for improved consistency of the text.

¹⁶⁹ The Secretariat has redrafted the recommendation (rec. 27 in [A/CN.9/WG.I/WP.116](#)) as requested by the Working Group at its thirty-third session (para. 51 of [A/CN.9/1002](#)).

distrust between the members. Mediation or conciliation may be preferable to arbitration because they are party-driven processes that aim to reach an amicable solution with the assistance of a mediator or conciliator. Those methods may help preserve the underlying relationships between the members once the dispute is resolved. The service of an ombudsman, who investigates the cause of the disputes and provides recommendations on how to eliminate them, is another alternative to courts or arbitration, and may assist in resolving disputes with third parties (for example, with other businesses or public authorities).¹⁷⁰

133. ADR mechanisms would also benefit the UNLLO in commercial disputes with third parties dealing with the UNLLO, such as creditors, suppliers or clients, where court processes could also be too lengthy and expensive. UNLLOs involved in legal disputes with those third parties would need to weigh the cost of court processes against the costs of unresolved disputes, which may include unpaid accounts, when deciding how to pursue their disputes. Members of the UNLLO may also face geographic, linguistic and cultural barriers within a court system (for example, women may face formal or practical restrictions in accessing the courts or the UNLLO members might not be fluent in the official language of the courts). ADR mechanisms will help reduce these obstacles. Not only are they typically faster, but these mechanisms may also be cheaper and permit a more informal and participatory approach to dispute resolution, as well as facilitate parties in working toward a more collaborative outcome than what may be possible through the judicial settlement of the dispute.

134. While recourse to an ADR mechanism would provide a valuable tool for UNLLOs in legal disputes, there may be restrictions within the State's domestic legal framework on the types of cases which may be subject to ADR, including restrictions on the availability of ADR for criminal matters, labour and competition matters, or insolvency.¹⁷¹

135. Besides ADR mechanisms, States could consider the involvement of specialized or administrative tribunals with jurisdiction over company law and UNLLO-related disputes. Those tribunals would not only deal with disputes concerning the internal organization and governance of the UNLLO, but could also address disputes between the UNLLO and third parties such as creditorships, which play an important role in the management of the business.¹⁷²

Recommendation 31: The law should facilitate the submission to alternative dispute resolution mechanisms of any dispute that arises among members of the UNLLO, members and designated managers or members and the UNLLO.¹⁷³

¹⁷⁰ The Secretariat has added this paragraph in keeping with deliberations of the Working Group at its thirty-third session that the commentary should explain the various types of ADR mechanisms and highlight their contractual nature (para. 75, A/CN.9/1002).

¹⁷¹ The Secretariat has deleted the last sentence of the paragraph (para. 126 of A/CN.9/WG.I/WP.116) for consistency with revised rec. 31.

¹⁷² The Secretariat suggests including this new paragraph to provide an additional option to States of how to address MSME-related disputes. Several States, in various geographic regions, have successfully established specialized judicial or quasi-judicial entities with the aim to streamline the resolution of company law disputes and improve their business environments. See for instance: Wyoming new Chancery Court (<https://www.courts.state.wy.us/chancery-court/>), Colombia's quasi-judicial tribunal with jurisdiction over company law disputes: https://www.supersociedades.gov.co/doctrina-jurisprudencia/Doctrina-Supersociedades/Documents/Guia_de_litigio_societario_con_garantias_mobiliarias.pdf (pp. 10 and 27); Brunei's new judicial tribunal with jurisdiction over company law disputes (<http://www.judiciary.gov.bn/SJD%20Site%20Pages/About%20Commercial%20Court.aspx>); Mexico's new judicial tribunal with jurisdiction over company law disputes (http://www.dof.gob.mx/nota_detalle.php?codigo=5507231&fecha=08/12/2017&print=true).

¹⁷³ The Secretariat has redrafted rec. 31 (rec. 28 in A/CN.9/WG.I/WP.116) in keeping with deliberations of the Working Group at its thirty-third session that the recommendation could address internal disputes of the UNLLO but that third parties could not be bound to use ADR (paras. 73 and 75, A/CN.9/1002)

Appendix I

Recommendations on an UNLLO

A. General provisions

Recommendation 1: The law should provide that an UNCITRAL Limited Liability Organization (“UNLLO”) is governed by [this law] and by the organization rules.

Recommendation 2: The law should provide that an UNLLO may be organized for any lawful business or commercial activity.

Recommendation 3: The law should provide that the UNLLO has a legal personality distinct from its members.

Recommendation 4: The law should provide that a member is not personally liable for the obligations of the UNLLO solely by reason of being a member of that UNLLO.

Recommendation 5: The law should not require a minimum capital for the formation of an UNLLO.

Recommendation 6: The law should provide that the name of the UNLLO must include a phrase or abbreviation that identifies it as an UNLLO.

B. Formation of the UNLLO

Recommendation 7: The law should:

(a) Provide that an UNLLO must have at least one member from the time of its formation [until its dissolution]; and

(b) Specify whether only natural persons or also legal persons are permitted to be members of an UNLLO.

Recommendation 8: The law should provide that the UNLLO is formed once it is registered.

Recommendation 9: The law should keep the information required for the formation of the UNLLO to a minimum. Such information should include:

(a) The name of the UNLLO;

(b) The business address or, when the business does not have a standard form address, precise geographical location of the UNLLO; and

(c) The identity of each person who manages the UNLLO.

C. Organization of the UNLLO

Recommendation 10: The law should:

(a) Indicate what form organization rules may take; and

(b) Provide that the organization rules may address any matters relating to the UNLLO insofar as they do not contradict the mandatory provisions of the law enacted on the basis of the Guide.

D. Membership rights and decision-making in the UNLLO

Recommendation 11: The law should establish that unless otherwise agreed in the organization rules, members have equal rights in the UNLLO irrespective of their contributions, if any.

Recommendation 12: The law should:

Specify the decisions on the UNLLO to be reserved to the members, which, at a minimum, should include decisions on:

- (a) Adoption and amendment of the organization rules;
- (b) Management structure and its modification;
- (c) [Member's share of the UNLLO, if not equal];
- (d) Member's contributions;
- (e) Conversion and restructuring; and
- (f) Dissolution.

Recommendation 13: The law should specify that unless otherwise agreed in the organization rules:

- (a) Decisions on the following matters are to be taken by unanimity:
 - (i) Adoption and amendment of the organization rules;
 - (ii) Management structure and its modification;
 - (iii) [A member's share of the UNLLO, if not equal];
 - (iv) Member's contributions, if any;
 - (v) Conversion and restructuring; and
 - (vi) Dissolution; and
- (b) Any other decisions are to be taken by a majority of members by number.

E. Management of the UNLLO

Recommendation 14: The law should provide that the UNLLO is managed by all of its members exclusively, unless it is indicated in the organization rules that the UNLLO shall appoint one or more designated managers.

Recommendation 15: The law should provide that when the UNLLO is managed by all of its members exclusively and unless otherwise agreed in the organization rules:

- (a) Differences among members on matters concerning day-to-day operations of the UNLLO should be resolved by a majority decision of the members; and
- (b) The members of the UNLLO have joint and equal rights to decide on matters concerning the regular operations of the UNLLO.

Recommendation 16: The law should provide that, unless otherwise agreed in the organization rules, one or more designated manager(s) may be appointed and removed by a majority decision of the members.

Recommendation 17: The law should provide that when the UNLLO is managed by one or more designated manager(s):

- (a) Managers are responsible for all matters that are not reserved to the members of the UNLLO pursuant to [this law] or the organization rules; and

(b) Disputes among managers should be resolved by a [majority] decision of the managers, unless otherwise agreed in the organization rules.

Recommendation 18: The law should provide that each manager individually has the authority to bind the UNLLO unless otherwise agreed. Restrictions upon that authority will not be effective against third parties dealing with the UNLLO without proper notice.

Recommendation 19: The law should provide that any manager of the UNLLO owes a duty of care and a duty of loyalty to the UNLLO.

F. Members' contributions to the UNLLO

Recommendation 20: The law should establish that members may agree [in the organization rules] on the type, timing and value of their contributions.

G. Distributions

Recommendation 21: The law should provide that distributions are made to members in proportion to their respective share of the UNLLO unless otherwise agreed in the organization rules.

Recommendation 22: The law should prohibit distributions from being made to any member if upon giving effect to such distribution:

(a) The UNLLO's total assets would be less than the sum of its total liabilities; and

(b) The UNLLO would not be able to pay its foreseeable debts as they become due.

Recommendation 23: The law should provide that each member who received a distribution, or any portion thereof, made in violation of recommendation 22 is liable to reimburse the UNLLO for this distribution or portion thereof.

H. Transfer of rights

Recommendation 24: The law should provide that unless otherwise agreed in the organization rules:

(a) A member of an UNLLO may transfer its [membership] or a part thereof, when the other members, if any, agree to the transfer; and

(b) The death of a member shall not cause the dissolution of the UNLLO. 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. In the case of a single-member UNLLO, [the membership] may be transferred to any successor.

I. Dissociation or withdrawal

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.

J. Conversion or restructuring

Recommendation 26: The law should provide the necessary legal mechanisms to:

- (a) Facilitate members of the UNLLO to convert it into another legal form or to restructure it; and
- (b) Ensure protection of third parties dealing with the consequences of a conversion or restructuring.

K. Dissolution and winding-up

Recommendation 27: The law should:

- (a) Provide that the UNLLO shall be dissolved in the following circumstances:
 - (i) The occurrence of any event that is specified in the organization rules as causing the dissolution of the UNLLO;
 - (ii) A unanimous decision by the members;
 - (iii) The rendering of a judicial or administrative decision that the UNLLO is dissolved; and
 - (iv) Any other event specified in the law; and
- (b) Establish the necessary provisions and procedures for the 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.

L. Record-keeping, inspection and disclosure

Recommendation 29: The law should provide that the UNLLO must keep certain records including:

- (a) Information provided to the business registry;
- (b) The organization rules, if and where such rules have been adopted in writing or otherwise recorded;
- (c) A list of past and present designated managers, members and beneficial interest owners of legal entities, if any, as well as their last known contact details;
- (d) Financial statements (if any);
- (e) Tax returns or reports; and
- (f) Records concerning the activities, operations and finances of the UNLLO.

Recommendation 30: 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.

M. Dispute resolution

Recommendation 31: The law should facilitate the submission to alternative dispute resolution mechanisms of any dispute that arises among members of the UNLLO, members and designated managers or members and the UNLLO.

Appendix II

Model Organization Rules: multi-member UNLLO managed by all members exclusively¹

1. General Provisions

- a. The name of the Organization is _____ LLO and the business address of the Organization is _____.
- b. [Other matters required under national law].²

2. Membership

- a. Each member has [take one option]:
 - Equal rights.
 - Rights determined in accordance with the value of its contributions.
- b. The value of any contributions [take one option]
 - Shall be deemed equal.
 - Shall be recorded in the following manner [].³
- c. Distributions are made to members [take one option]:
 - In proportion to the value of their [share]⁴ of the Organization.
 - Equally among them.
- d. Each member has one vote. The following matters are decided by [take one option]:
 - A majority of members [recommended].
 - [Another quantum agreed by the members]:
 - i. Distributions; and
 - ii. []
- e. The following matters are decided by:
 - Agreement of all members [recommended]
 - [Another quantum agreed by the members]:
 - i. Modification of the organization rules;
 - ii. Management structure and its modification;
 - iii. Conversion or restructuring of the Organization;
 - iv. Dissolution of the Organization; and
 - v. []
- f. In the event of a deadlock, the following criterion [] will apply to resolve the issue.

¹ The Working Group may wish to consider whether the model organization rules should include different options (as in the current drafting), taking into account that UNLLO members may not be aware of other options if not provided therein.

² The Working Group may wish to consider whether examples of such matters should be provided.

³ In footnote 138 of the Guide, the Secretariat suggests that any agreement on contributions should not be recorded in the organization rules, otherwise subsequent modifications would require an amendment of the rules. The Secretariat thus suggests including a footnote in the final version of these draft model organization rules for the benefit of the UNLLO members that would read something like: "It would be advisable for the UNLLO members to identify an appropriate means to record the value, type and time of their contributions to the UNLLO".

⁴ The Secretariat has put the term "share" in brackets, here and in other clauses of the model organization rules as a Working Group's decision of whether to use such a term is pending.

3. Members' rights and obligations

- a. Members have the right to inspect and copy the records of the Organization and to obtain from the Organization available information on its activities, finances and operations.⁵
- b. Members must comply with the following obligations:
 - i. Make the agreed contributions (if any) to the Organization;
 - ii. Reimburse any undue and improper distribution made to them by the Organization;
 - iii. Refrain from any abuse of the Organization's legal form and any other rights granted to them; and
 - iv. []
- c. Each member may transfer its membership [or a portion of its membership] to any natural persons [and/or legal persons]⁶ with the approval of the other members/[subject to the following criterion:_____].
- d. Each member may withdraw from the Organization with the approval of the other members or upon reasonable cause⁷ and be paid the fair value of their [share] within [*insert a reasonable time period*].
- e. The Organization is not dissolved upon the death of a member. The membership transfers to the successor. The remaining members may purchase the membership of the deceased member from the successor within [*insert a reasonable period of time*].

4. Powers and Duties of Managers

- a. The Organization is managed by all of its members.
- b. All members as managers have the power to decide on matters concerning day-to-day operations of the Organization, [except:]
 - i. [Only ____ can maintain the bank account of the Organization];
 - ii. [____ cannot execute documents on behalf of the Organization]; and
 - iii. [____ cannot borrow money on behalf of the Organization].
- c. The members agree that disputes among them as managers will be resolved by:
 - A majority of members [*recommended*].
 - [*Another quantum agreed by the members*]:
- d. The members as managers owe a duty of care and a duty of loyalty to the Organization. In particular, members will refrain from self-dealing transactions, usurpation of business opportunities, and competition with the UNLLO [and ...].

⁵ The Working Group may wish to consider whether this paragraph should be retained or deleted. On one hand, such rights should already be provided in the law enacted on the basis of the Guide. On the other hand, deleting this paragraph will require UNLLOs to look for relevant provisions in the law which they may not be familiar with.

⁶ The Secretariat has placed "legal persons" in brackets pending deliberations on whether a legal person can serve as a manager. If not, the structure of the UNLLO would be modified from a multi-member UNLLO managed by all members exclusively to an UNLLO managed by designated managers. The Working Group may also wish to note that transfer of a portion of a membership would result in the decision-making structure being converted from one member, one vote to a pro rata structure.

⁷ The Working Group may wish to consider whether the inclusion of the phrase "upon reasonable cause" would cause confusion for UNLLO members, who may not know how reasonable cause is defined under State law.

5. Decision-making

[Take one option]

Members' Meetings

- a. Members' meetings will take place every [insert frequency of the meetings] and at [insert location].
- b. [Take one option]
 - Any member can call a meeting.
 - [Only _____] can call a meeting.
- c. [Take one option]
 - Members' meetings may be held by any means of communication.
 - Members' meetings may be held by the following means of communication: [face-to-face], [technological means], [_____].
- d. A [written] notice of members'⁸ meetings will be provided to all members at least [] days prior to the holding of such meetings. [Any information relevant for the meetings, such as the Organization's financial information, will be sent together with the notice.]
- e. [Take one option]
 - [Recommended] The notice requirement may be waived through the form of _____.
 - A waiver of the notice requirement for convening members' meetings is not permitted.
- f. Decisions taken will be recorded [Take one option]
 - In writing
 - Through the following technological means: [_____]

Written communication where no meeting is required.

6. Record-keeping

- a. The Organization will keep records of:
 - i. Information provided to the business registry;
 - ii. These organization rules;
 - iii. A list of its past and present members and [beneficial interest owners],⁹ including their last known contact details;
 - iv. [Its financial statements];
 - v. Its tax returns or reports; and
 - vi. Its activities, operations and finances.
- b. The records indicated in subparagraph a will be kept in _____ [written/electronic form], at _____ [insert description of the place where records will be kept].

⁸ The Working Group may wish to consider who will be responsible for sending such notices.

⁹ It should be noted that this phrase in the Guide is still subject to reconsideration by the Working Group.

7. Dissolution of the Organization

The Organization will be dissolved:

- a. Upon the occurrence of any of the following events:
 - i. []
 - ii. []
- b. On a decision by the members.

8. Dispute Resolution

Disputes among members or between members and the Organization shall be resolved by good faith negotiation. Disputes that cannot be solved in this manner shall be referred to [*take one or more*]:

- Mediation
 Arbitration
 [_____].

Annex to the organization rules – sample multi-tiered clause^{10,11}

Any dispute, controversy or claim arising out of or relating to the management and operation of the organization shall be submitted to mediation in accordance with the UNCITRAL Mediation Rules [in force at the date of the commencement of mediation].

- (a) The appointing authority shall be (name of institution or person);
- (b) The language of the mediation shall be ...;
- (c) The place of mediation shall be

If the dispute, or any part thereof, is not settled within [(60) days] of the request to mediate under the UNCITRAL Mediation Rules then the parties agree to resolve any remaining matters by arbitration in accordance with the UNCITRAL Arbitration Rules [in force at the date of the commencement of arbitration].

- (a) The appointing authority shall be (name of institution or person);
- (b) The number of arbitrators shall be (one or three);
- (c) The place of arbitration shall be (town and country);
- (d) The language of the arbitration shall be

¹⁰ At its thirty-third session, the Working Group agreed that the model rules would include a sample arbitration clause (para. 75, A/CN.9/1002). The Secretariat has drafted a multi-tiered sample clause that also refers to mediation. The clause is based, with appropriate adjustments, on the multi-tiered clause included in the draft UNCITRAL Mediation Rules (see A/CN.9/986, annex) which should be considered by the Commission at its fifty-second session in 2020 (see *Official Records of the General Assembly, Seventy-fourth session, Supplement No. 17 (A/74/17)*, para. 123). The Working Group may wish to consider whether it is desirable to add such a clause given that the Guide discusses various ADR mechanisms and does not suggest any of them as the most suitable one.

¹¹ The Working Group might wish to note that UNCITRAL Working Group II (Dispute Settlement) is currently discussing provisions on expedited arbitration. Micro, small and medium-sized enterprises may benefit greatly from streamlined and simplified procedures on arbitration. For further information see <https://uncitral.un.org> under the section “Working Documents, Working Groups”.