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Report of Working Group I (MSMEs) on the work of its thirty-third session (Vienna, 7–11 October 2019)

Contents

	<i>Page</i>
I. Introduction	2
II. Organization of the session	4
III. Deliberations and decisions	5
IV. Preparation of legal standards in respect of micro, small and medium-sized enterprises: draft legislative guide on an UNCITRAL Limited Liability Organization	5
A. Presentation of A/CN.9/WG.I/WP.116	5
B. Membership in an UNLLO	5
C. Distributions	6
D. Restructuring or conversion	7
E. Dissolution and winding-up	8
F. Record-keeping, inspection and disclosure	9
G. Members' share of and contributions to the UNLLO	10
H. Transfer of rights	12
I. Dissociation or withdrawal	12
J. Dispute resolution	14
K. General provisions and organization of the UNLLO	14
V. Future work	16



I. Introduction

(a) Preparation of legal standards in respect of micro, small and medium-sized enterprises

1. At its forty-sixth session, in 2013, the Commission requested that a working group should commence work aimed at reducing the legal obstacles encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle.¹ At that same session, the Commission agreed that consideration of the issues pertaining to the creation of an enabling legal environment for MSMEs should begin with a focus on the legal questions surrounding the simplification of incorporation.² The Commission reaffirmed the mandate of the Working Group at its forty-seventh to fifty-second sessions, from 2014 to 2019, commending the Working Group for the progress made.³

2. At its twenty-second session (New York, 10 to 14 February 2014), Working Group I (MSMEs) commenced its work according to the mandate received from the Commission. The Working Group engaged in preliminary discussion in respect of a number of broad issues relating to the development of a legal text on simplified incorporation⁴ as well as on what form that text might take,⁵ and business registration was said to be of particular relevance in the future deliberations of the Working Group.⁶

3. From its twenty-third session (Vienna, 17 to 21 November 2014) to its thirtieth session (New York, 12 to 16 March 2018), the Working Group proceeded to consider two main topics aimed at the creation of an enabling legal environment for MSMEs: the legal issues surrounding the simplification of incorporation and good practices in business registration.⁷ At its twenty-third session, the Working Group commenced its deliberations on the legal issues surrounding the simplification of incorporation by considering the questions outlined in the framework set out in working paper [A/CN.9/WG.I/WP.86](#), and agreed that it would continue its consideration of the working paper at its twenty-fourth session beginning with paragraph 34 of that document.

4. At its twenty-fourth session (New York, 13 to 17 April 2015), after initial consideration of the issues as set out in working paper [A/CN.9/WG.I/WP.86](#), the Working Group decided that it should continue its work by considering the first six articles of the draft model law and commentary thereon contained in working paper [A/CN.9/WG.I/WP.89](#), without prejudice to the final form of the legislative text, which had not yet been decided. Further to a proposal from several delegations, the Working Group agreed to continue its discussion of [A/CN.9/WG.I/WP.89](#), bearing in mind the general principles outlined in the proposal, including the “think small first” approach, and to prioritize those aspects of the draft text in [A/CN.9/WG.I/WP.89](#) that were the most relevant for simplified business entities. The Working Group also agreed that it

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

² For a history of the evolution of this topic on the UNCITRAL agenda, see [A/CN.9/WG.I/WP.97](#), paras. 5 to 20.

³ *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 134; *ibid.*, *Seventieth Session, Supplement No. 17 (A/70/17)*, paras. 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; and *ibid.*, *Seventy-fourth Session, Supplement No. 17 (A/74/17)*, para. 155.

⁴ See Report of Working Group I (MSMEs) on the work of its twenty-second session [A/CN.9/800](#), paras. 22 to 31, 39 to 46 and 51 to 64.

⁵ *Ibid.*, paras. 32 to 38.

⁶ *Ibid.*, paras. 47 to 50.

⁷ Since the Commission adopted the Legislative Guide on Key Principles of a Business Registry at its fifty-first session, in 2018, paras. 4 to 11 only outline the history of the Working Group’s discussion on simplification of incorporation.

would discuss the alternative legislative models for MSMEs introduced in [A/CN.9/WG.I/WP.87](#) at a later stage.

5. At its twenty-fifth session (Vienna, 19 to 23 October 2015), the Working Group resumed its consideration of the draft model law on a simplified business entity as contained in working paper [A/CN.9/WG.I/WP.89](#), starting with Chapter VI on organization of the simplified business entity, and continuing on with Chapter VIII on dissolution and winding-up, Chapter VII on restructuring, and draft article 35 on financial statements (contained in Chapter IX on miscellaneous matters).⁸

6. At its twenty-sixth session (New York, 4 to 8 April 2016), the Working Group reviewed Chapters III and V of working paper [A/CN.9/WG.I/WP.89](#). Following its discussion of the issues in those chapters,⁹ the Working Group decided that the text being prepared on a simplified business entity should be in the form of a legislative guide, and requested the Secretariat to prepare for discussion at a future session a draft legislative guide that reflected its policy discussions to date (see [A/CN.9/WG.I/WP.99](#) and Add.1).¹⁰

7. At its twenty-seventh session (Vienna, 3 to 7 October 2016), the Working Group considered the issues outlined in working papers [A/CN.9/WG.I/WP.99](#) and Add.1 on an UNCITRAL limited liability organization (UNLLO), beginning with section A on general provisions (draft recommendations 1 to 6), section B on the formation of an UNLLO (draft recommendations 7 to 10), and section C on the organization of an UNLLO (draft recommendations 11 to 13). The Working Group also heard a short presentation of working paper [A/CN.9/WG.I/WP.94](#) of the French legislative approach known as an “Entrepreneur with Limited Liability” (or EIRL), which represented a possible alternative legislative model applicable to micro and small businesses.

8. At its twenty-eighth session (New York, 1 to 9 May 2017), the Working Group continued the work begun at its twenty-seventh session, and considered the recommendations (and related commentary) of the draft legislative guide on an UNLLO in sections D, E and F of documents [A/CN.9/WG.I/WP.99](#) and Add.1.

9. 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 registry.

10. Following the adoption of the UNCITRAL Legislative guide on Key Principles of a Business Registry by the Commission in July 2018, the Working Group resumed its discussion on the draft legislative guide on an 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 (contained in [A/CN.9/WG.I/WP.112](#)) including changes arising from its deliberations at its twenty-seventh and twenty-eighth sessions. The following selected recommendations, and relevant commentary, were discussed: recommendations 7 to 12 (sections B on formation and C on organization), save for recommendation 10 and relevant commentary; recommendation 15 (section D on management) and recommendations 16 and 17 (section E on ownership of the UNLLO and contributions by members).

11. At its thirty-second session (New York, 25 to 29 March 2019),¹¹ the Working Group continued its discussion on the draft legislative guide on an UNLLO considering the issues included in working paper [A/CN.9/WG.I/WP.114](#). The Working Group first discussed several definitions included in the Terminology section, then proceeded to consider other aspects of the draft guide and to provide additional clarity

⁸ [A/CN.9/860](#), paras. 76 to 96.

⁹ See Report of Working Group I (MSMEs) on the work of its twenty-sixth session, [A/CN.9/866](#), paras. 23 to 47.

¹⁰ *Ibid.*, paras. 48 to 50.

¹¹ The first two days (25 and 26 March) of the thirty-second session were devoted to a colloquium on contractual networks and other forms of inter-firm cooperation (see [A/CN.9/991](#)). The Working Group convened from 27 to 29 March.

on certain recommendations discussed at its previous session. The following recommendations and relevant commentary were discussed: recommendation 9 (Section B on formation), recommendation 10 (Section C on organization), 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).

II. Organization of the session

12. Working Group I, which was composed of all States Members of the Commission, held its thirty-third session in Vienna from 7 to 11 October 2019. The session was attended by representatives of the following States Members of the Working Group: Algeria, Argentina, Austria, Belarus, Belgium, Brazil, Burundi, Canada, Chile, China, Colombia, Croatia, Czechia, Dominican Republic, Finland, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kenya, Malaysia, Mexico, Nigeria, Peru, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Switzerland, Thailand, Uganda, Ukraine, United States of America, Venezuela (Bolivarian Republic of) and Viet Nam.

13. The session was attended by observers from the following States: Bolivia (Plurinational State of), Brunei Darussalam, Bulgaria, Kuwait, Myanmar, Netherlands, Saudi Arabia, Uruguay and Yemen.

14. The session was also attended by observers from the European Investment Bank (EIB).

15. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: United Nations Industrial Development Organization (UNIDO), World Bank Group (WB);

(b) *Intergovernmental organizations*: Permanent Observer Mission of the Gulf Cooperation Council (GCC);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Conseils des Notariats de l'Union Européenne (CNUE), Inter-American Bar Association (IABA), International Bar Association (IBA), International Union of Notaries (UINL), Latin American Group of Lawyers for International Trade Law (GRULACI), Law Association for Asia and the Pacific (LAWASIA) and National Law Center for Inter-American Free Trade (NLCIFT).

16. The Working Group elected the following officers:

Chair: Ms. Maria Chiara Malaguti (Italy)

Rapporteur: Ms. Beulah Li (Singapore)

17. In addition to documents presented at its previous sessions, the Working Group had before it the following documents:

(a) Annotated provisional agenda ([A/CN.9/WG.I/WP.115](#));

(b) Note by the Secretariat on a draft legislative guide on an UNCITRAL Limited Liability Organization ([A/CN.9/WG.I/WP.116](#)).

18. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of legal standards in respect of micro, small and medium-sized enterprises.

5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

19. The Working Group engaged in discussions in respect of the preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, in particular, on a draft legislative guide on an UNCITRAL Limited Liability Organization ([A/CN.9/WG.I/WP.116](#)). The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Preparation of legal standards in respect of micro, small and medium-sized enterprises: draft legislative guide on an UNCITRAL Limited Liability Organization¹²

A. Presentation of [A/CN.9/WG.I/WP.116](#)

20. The Working Group heard a short introduction on working paper [A/CN.9/WG.I/WP.116](#) that outlined the main changes of the document arising from the deliberations of the Working Group at its thirty-second session (New York, 25 to 29 March 2019). The Working Group was also reminded of two issues on which it had deferred consideration to a later stage: recommendation 1¹³ of the draft legislative guide and a name for the UNLLO as the term UNLLO was used on an interim basis. Finally, the Secretariat informed the Working Group that the Secretariat would draft model organization rules for the UNLLO members to use if they so wished (see para. 33, [A/CN.9/968](#)), once a first reading of the draft legislative guide had been completed. Those forms would be annexed to the guide.

B. Membership in an UNLLO

Paragraphs 60 to 65 and recommendation 11

21. The Working Group was reminded of the “think small first” approach that was the guiding approach of the draft legislative guide. As agreed at its thirty-second session, the Working Group commenced its deliberations discussing the new section D on Membership of the UNLLO (see para. 38, [A/CN.9/968](#)) that had been drafted further to the deliberations of the Working Group at that session.

22. It was first observed that the title of the section could better represent the commentary and recommendation and support was expressed in favour of rephrasing it along the lines of “membership rights and decision-making in the UNLLO”. It was further proposed that the phrase “to be taken by” in the first part of recommendation 11(a) should be replaced with “reserved to”. While some concern was expressed as to the implication such change might have for the concept of delegated versus retained authority with regard to managerial decision-making, there was support for the modification.

23. Further, the Working Group noted that the matters that affect the structure or existence of an UNLLO enumerated in paragraph 60 were not fully reflected in recommendation 11(a), as it did not incorporate subparagraphs (b) and (c) of paragraph 60. There was general agreement in the Working Group that the recommendation should be revised so as to also include the matters listed in those

¹² Subsections A to K reflect the order in which topics were discussed by the Working Group.

¹³ For improved readability of Sections IV and V of the report (para. 20 ff.), the Secretariat has not included “draft” before the terms “recommendation(s)”, “paragraph(s)” and “commentary” on the general understanding that they are still in a draft form.

subparagraphs. To improve clarity of that recommendation, the Working Group also agreed that it would be desirable to keep separate the issue of decisions reserved to the UNLLO members and that of the quantum required for decision-making (unanimity or qualified majority) and it requested the Secretariat to delete any reference to the quantum in recommendation 11(a). It was further suggested that “winding-up” in recommendation 11(a)(ii) could be removed since such occurrence would merely be consequent upon the dissolution of the UNLLO. There was support for that suggestion.

24. In keeping with the discussion on the quantum for decision-making, different views were expressed as to whether decisions reserved to the members of the UNLLO in their capacity as members should require unanimity or qualified majority. Concerns were raised that decisions by qualified majority could result in minority oppression. For this reason, there was wide support for a proposal that, as a default provision, all matters indicated in recommendation 11(a) and in paragraph 60 of the commentary be decided by unanimity as this approach was considered to be fair, straightforward and particularly suitable for members of micro and small-sized enterprises.

25. A question was raised as to the need for recommendation 11(b), as it was said that recommendation 13 should be sufficient in this regard when an UNLLO is managed by all of its members exclusively and it was suggested that recommendation 11(b) could be included in recommendation 15 which deals with UNLLOs managed by designated managers. There was support in favour of the removal of recommendation 11(b).

26. Concerns were expressed about the ambiguity of the term “equal rights” in recommendation 11(c). While there was strong support in favour of the concept of “per capita”, it was proposed that it could be expressed in plain language without necessarily referring to the word “vote”. A view was expressed that all rights of members should be equal unless otherwise agreed in the organization rules. It was said that this approach should be reflected in a recommendation which would also include the issue of distributions, since recommendation 19 stipulated that distributions by the UNLLO were to be made equally among its members. However, it was felt that the topic of distributions could be of different legal nature and better be discussed separately.

27. After discussion, the Working Group agreed to revise recommendation 11 along the following lines: “The law should specify the decisions reserved to the members. At a minimum, such decisions should include decisions on (i) amendment of the organization rules, (ii) management structure and its modification, (iii) member’s share and contribution, (iv) restructuring or conversion and (v) dissolution”.

28. Further, the Secretariat was requested to draft a new recommendation on quantum providing that, unless otherwise agreed in the organization rules, the decisions listed in paragraph 60 of the legislative guide should be taken by unanimity. Decisions requiring a different quantum than unanimity should be resolved by a majority of members by number. It was also noted that the terminology in the recommendations would need to be harmonized with regards to the words “unless otherwise agreed in the organization rules”. In addition, the Working Group agreed that the commentary to the new recommendation should discuss the pros and cons of a decision-making approach based on unanimity or on qualified majority and should highlight that States may opt for either option pursuant to their domestic legislative systems.

C. Distributions

Paragraphs 94 to 101 and recommendations 19 to 21

29. The Working Group agreed to replace the text of recommendation 19 as follows: “The law should provide that distributions are made to members in proportion to their respective share of the UNLLO”.

30. A suggestion was made to delete the words “in the ordinary course of business” from recommendation 20(a) or to provide greater clarity as to their meaning in the commentary. It was explained that the term attempted to differentiate between current and anticipated business debts and debts that would result from an unexpected event such as a fire. The Working Group stressed the importance of legal certainty as regards the obligation of members who had received distributions made at a time when the debts of the UNLLO were expected to be able to be paid as they came due.

31. It was explained that the language of recommendation 20(a) was taken from the cessation of payments test that appeared in the UNCITRAL Legislative Guide on Insolvency Law. While there was wide agreement that such Guide and the draft legislative guide on an UNLLO should be harmonized to the extent possible, it was also noted that the cessation of payments test as presented in the Insolvency Guide was used in the context of a commencement standard for insolvency proceedings, whereas recommendations 20 and 21 pertained to the establishment of a clawback regime for improperly made distributions. After discussion and the presentation of various suggestions, it was agreed that in the context of distributions, the element of foreseeability should replace “in the ordinary course of business” and that the commentary should be modified accordingly, taking due care to avoid the creation of a subjective standard.

32. It was noted that clawbacks would often occur within the context of debtor liquidation, and that reference should be made to the ability of creditors to bring a derivative claim against the members who received distributions in violation of recommendation 20, as they would also be harmed by an improper distribution. It was further agreed that the commentary could indicate that States may wish to establish possible defences against such claims, which may include a lack of knowledge of impropriety.

33. A question was raised as to whether recommendation 21 should contain an element of bad faith or knowledge of an improper distribution before requiring reimbursement of distributions made in violation of recommendation 20. It was suggested that liability could attach to the member or manager making the improper distribution, rather than, or in addition to, the recipient.

34. After discussion, it was felt that the repayment of distributions should be dealt with in the guide separately from the issue of liability and that other domestic law could address additional issues, such as laws pertaining to unjust enrichment. The Working Group agreed to retain recommendation 21 as drafted but to include a discussion in the commentary on the issue of the member’s knowledge of the irregular nature of the distribution and knowledge and personal liability of those who took the decision to pay distributions and to include a reference to the section on liabilities of managers.

D. Restructuring or conversion

Paragraphs 106 to 108 and recommendation 23

35. The Working Group discussed recommendation 23 and related commentary on restructuring and conversion of the UNLLO. It was noted that since the Working Group had agreed on a new recommendation on quantum for decision-making which also included the quantum required for decisions on restructuring or conversion (see para. 28 above), reference to “[qualified majority]” could be deleted from the current text of the recommendation. It was stated that without reference to the quantum, recommendation 23 read as a duplicate of revised recommendation 11 (see para. 27 above), but it was highlighted that it would be important to keep the recommendation as it could be read as an incentive for the UNLLO to grow. In keeping with this approach, the Working Group agreed to give more prominence to the concept of “conversion” of the UNLLO by changing “restructuring or conversion” into “conversion or restructuring” both in the title of the section and in the text of the recommendation.

36. Further, the Working Group agreed to clarify in the commentary, or define in the Terminology section, the term “restructuring” which was said to include merger, split-ups and other fundamental changes established in the domestic legislation. It was, however, noted that “restructuring” should not be extended to indicate the action of “scaling-up” the business as it was said that “scaling-up” was mainly used in the context of conversion to a larger business form and would be addressed by the discussion of conversion.

37. It was agreed that the commentary should reference that conversion of a legal form would ordinarily require the entity to reregister with the business registry, and it would be necessary for States to provide mechanisms for the universal succession of assets and liabilities of the UNLLO, and also for the protection of third parties. It was also felt that the UNLLO did not necessarily need to convert into another business form in order to grow as the UNLLO form was flexible enough to accommodate its evolution from a very small entity to a more complex one and could address issues of branches and representative offices of the UNLLO. There was strong support for the view that the commentary could emphasize such concept. It was also agreed that the establishment and operation of branches could be discussed in another part of the guide, possibly in section E on management of the UNLLO.

38. After discussion, the Working Group agreed to revise the text of the recommendation along the lines of: “The law should facilitate the UNLLO to convert into another legal form or to restructure by providing the necessary legal mechanisms, including those that would ensure protection of third parties”.

E. Dissolution and winding-up

Paragraphs 109 to 111 and recommendation 24

39. The Working Group considered the Secretariat’s suggestion in the *Note to the Working Group* placed before paragraph 106 of the draft legislative guide and agreed that it was not necessary to have a separate section on dissolution and winding-up for single-member UNLLOs and more sophisticated forms of an UNLLO. It was said that if the cause of the dissolution was death or incapacitation of the single member, those instances would be taken care of by the laws of the State and the transfer of rights further to the single-member’s death was already discussed in recommendation 22. The Working Group, however, agreed that the commentary to recommendation 24 should discuss the consequences of the dissolution of an UNLLO with a possible differentiation of whether it was a single-member UNLLO or a multi-member one. In this regard, an example was provided that if an UNLLO has a single member that is a legal person, the effect of the dissolution (when this is not due to insolvency) may not be a wind-up, but a universal transfer of assets and liabilities.

40. The Working Group also agreed to include in the commentary the causes of dissolution listed in the recommendation and to clarify that States were left the option to include additional causes of dissolution in an exhaustive list in light of their legal traditions. A suggestion that this latter clause be also inserted in the recommendation was supported. Further, the Working Group took up the suggestion that recommendation 24 should be redrafted to use language similar to that agreed by the Working Group in revised recommendation 23 (see para. 38 above) which emphasized the need for States to establish relevant rules and procedures for obtaining a dissolution and to protect third parties from the consequences of conversion or restructuring of the UNLLO.

41. A concern was expressed that recommendation 24(a) may link dissolution of the UNLLO to the occurrence of events that might not be easily proved and could result in the UNLLO being automatically dissolved. It was suggested that the events indicated in the recommendation should be easy to verify, such as specific dates. In light of the new recommendation on quantum for members’ decisions (see para. 28 above), a proposal to delete reference to “[qualified majority]” in recommendation 24(b) received general support. Concerns were however expressed

that a default provision requiring unanimity for decisions affecting the structure and existence of the UNLLO, such as that of the new recommendation, could result in an abuse of veto power by the UNLLO members which could heavily affect the life of very small businesses like many UNLLOs would probably be. With regard to recommendation 24(c), it was noted that in certain States dissolution can only occur upon the rendering of a judicial decision. The Working Group requested the Secretariat to clarify in the commentary that the recommendation was not intended to impose an administrative or judicial system when the laws of the State establish how such decisions are rendered.

42. Finally, the Working Group heard a suggestion that the draft legislative guide should include a provision on winding-up, as recommendation 24 was silent on this matter. There was support for that suggestion and it was agreed that the text of the provision could read along the lines of: “The law should provide that a dissolved UNLLO shall wind up its activities and the UNLLO continue after dissolution only for the purpose of winding up for the protection of third parties”. The Working Group agreed that it would be for the Secretariat to decide whether the new provision would be included in recommendation 24 or in a new recommendation.

F. Record-keeping, inspection and disclosure

Paragraphs 119 to 123 and recommendations 26 to 27

43. With regard to recommendation 26, the following was approved by the Working Group:

(a) Subparagraph (b) should read: “The organization rules, if and where such rules have been adopted in writing or otherwise recorded”;

(b) Subparagraph (c) should read: “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”; and

(c) Subparagraph (f) should read: “Records concerning the activities, operations and finances of the UNLLO”.

The Working Group agreed to reconsider at its next session the wording “beneficial interest owners of legal entities”.

44. The Working Group further agreed to clarify in the commentary that “financial statements, if any” in subparagraph (d) of recommendation 26 referred to statements such as of profit and loss and cash flow that UNLLOs may not be required to keep. It was also agreed to remove the word “reasonable” from the chapeau of recommendation 26, although the importance of encouraging States from not imposing overly burdensome record-keeping requirements or for too long of a period was to be maintained. It was further noted that there would likely be mandatory rules in place to oblige anyone keeping fiscal information to retain records for a certain period of time.

45. It was agreed that the commentary should be drafted in a more neutral fashion as paragraph 121 emphasized that the information to be retained by the UNLLO need not be publicly disclosed. It was further agreed that paragraph 121 in particular should identify advantages (such as transparency and protection of third parties) of requiring certain categories of information to be made public.

46. While it was noted that recommendation 27 focused on the rights of inspection by UNLLO members and did not preclude information from being made public, it was agreed to indicate that nothing in the recommendation would preclude the ability of public authorities to inspect an UNLLO’s records. It was further agreed to include a reference in paragraph 121 to recommendation 9 for States to consider making public in the registry certain records required to be maintained by the UNLLO for the protection of third parties.

47. It was suggested that recommendation 27(b) was superfluous as recommendation 27(a) provided members with the right to inspect information that was required to be kept under recommendation 26. It was explained that recommendation 27(b) went further by providing a right to request information about such records and to request additional information kept voluntarily by the UNLLO.

48. A concern was raised about providing members with a right of inspection that was greater than the corresponding obligation of an UNLLO to keep records. A concern was also raised about the issue of cost in providing access to any available information. It was agreed that, to prevent abuse, the commentary should provide some general understanding that the request for information would have to be reasonably related to the interest of a member in its capacity as a member. It was also agreed that safeguards for the UNLLO and its other members would need to be in place, so that certain types of information (e.g., confidential) could be protected.

49. On the other hand, the importance of access to information was widely stressed and it was noted that abuse could occur in the opposite direction. It was noted that recommendation 27(b) provided no enforcement mechanism if access to information was impeded, although it was suggested that providing such access may fall within the fiduciary duties of a manager.

50. While there was some support for the use of the word “reasonable” to try to balance the risk of abuse on both sides, the Working Group agreed to remove it from recommendation 27(b), as it was felt that the recommendation should avoid the use of a subjective term that would be difficult to prove. It was further stated that the word was unnecessary as good faith would be presumed.

51. After discussion, the Working Group agreed to modify the commentary to reflect its deliberations and to consolidate recommendation 27(a) and (b) along the following lines: “The law should provide that each member has the right to inspect and copy UNLLO records and to obtain available information concerning its activities, finances and operations”.

G. Members’ share of and contributions to the UNLLO

Paragraphs 87 to 93 and recommendation 18

52. The Working Group discussed proposals to revise recommendation 18. In response to a proposal to amend recommendation 18(a) to read that members are not required to make contributions unless otherwise agreed in the organization rules, it was generally felt that this would be an exceptional reality and that undue prominence should not be given to such a possibility at the outset of the recommendation, particularly in light of concerns regarding transparency and fraud. It was also noted that the default provisions in recommendation 18 would provide a zero-share to a member who did not make a contribution. It was further expressed that in most cases members would make a contribution and that exceptional circumstances could be addressed in the commentary, if necessary.

53. It was observed that in a multi-member UNLLO, the lack of agreement on the value of just one contribution would trigger the default provision to deem all contributions equal. A view was expressed that members should be required to agree upon the value of the contributions, although it was also stated that the provisions in the guide had been drafted to permit party autonomy but provided default provisions in the cases where no agreement was reached. Another view was that the guide did not need to link shares and contributions and a suggestion was made to focus the recommendation on a default provision governing shares instead of contributions along the lines of “Members of the UNLLO have an equal share, unless otherwise agreed in the organization rules”. A suggestion was made to reconsider the definition of the word “member”.

54. Two additional proposals for revising recommendation 18 were made, which were based on similar underlying principles. The first proposal read along the lines

of: “[The law should establish that:] (a) Members of the UNLLO have equal share, unless otherwise stated in the organizational rules; (b) Share of the UNLLO can be obtained either by contributing to the UNLLO or by being transferred from an existing member of the UNLLO his/her/its share or a part thereof; and (c) Members of the UNLLO are permitted to agree upon contributions they make to the UNLLO, including their value, type and timing, in the organizational rules”. The second proposal read along the lines of: “[The law should establish that:] (a) Members may in the organization rules agree on type, timing and value of the contributions; and (b) Unless otherwise agreed upon in the organization rules, members’ contributions to the UNLLO shall be equal (in equal value)”.

55. The Working Group returned to its consideration of whether contributions should be required in order to become a member of an UNLLO and it was noted that the divergent opinions on this matter resulted from different approaches in various legal traditions and the silence of the draft legislative guide on how membership in an UNLLO could be acquired. It was stated that in certain jurisdictions, membership in a legal entity could only happen by way of making contributions to that entity. It was thus noted that if making contributions was a requirement for membership in an UNLLO, it could also occur by way of transferring share in the UNLLO by an existing member as indicated in subparagraph (b) of the first proposal (see para. 54 above). It was stated that if future members of the UNLLO were required to sign the organization rules, this would replace the need for members to make contributions as it would establish their membership in the UNLLO. As an alternative, it was suggested that the list of members that an UNLLO is required to keep pursuant to recommendation 26(c) could be used to establish membership in the UNLLO.

56. The prevailing view was that that no contribution was needed in order to become a member of an UNLLO and that there was no need to link the rights of a member to the contributions made. The Working Group thus agreed to include a new recommendation before recommendation 11 that could read along the following lines: “Unless otherwise agreed in the organization rules, membership rights shall be equal, irrespective of their contributions, if any”. There was support for the suggestion that any deviations from the default provision expressed in the proposed recommendation should be recorded in the organization rules.

57. After discussion, the Working Group agreed to revise recommendation 18 along the following lines: “The law should establish that members may agree [in the organization rules] on the type, timing and value of the contributions”. The importance of the proposed recommendation was stressed as guidance to the UNLLO members on how they could address matters relating to their contributions. Concerns were expressed that requiring agreement on contributions in the organization rules would require the organization rules to be a formal document, which would considerably affect the flexibility of the UNLLO. It was stated that members could reach an agreement on contributions without any need to include such agreement in the organization rules. Noting that a decision on this point would require a shared understanding of the Working Group on the definition of organization rules, the Working Group agreed to insert “in the organization rules” in brackets in the proposed recommendation until it had agreed on a clearer definition of “organization rules”.

58. A concern was expressed by some that the structure of the UNLLO agreed by the Working Group in these and other parts of the guide (such as the absence of a minimum capital requirement or of members’ contributions; the possibility of a legal person becoming a member of an UNLLO; the fact that names of the UNLLO members do not need to be published in the business registry) would result in lack of transparency of the UNLLO and could militate against legal certainty in general, the operation of the UNLLO and its credibility. In response, it was said that the UNLLO regime as drafted in the guide would actually remove barriers to entry into the formal system as it would allow to create a simplified entity, allowing for asset separation, that would cater for the needs of very simple businesses. The Working Group agreed to address these considerations in the introductory part of the guide that would

emphasize that the regime recommended by the guide aimed at striking a balance between the flexibility and simplicity of the UNLLO and the need for legal certainty.

H. Transfer of rights

Paragraphs 102 to 105 and recommendation 22

59. It was recalled that concerns had been raised about the ability of a member of an UNLLO to transfer its membership rights without the approval of the other members, given the assumption that in many cases an UNLLO would be comprised of closely connected individuals and the transfer may be resisted by other members. Consequently, recommendation 22 provided that a member only had the right to transfer its financial rights, and not its decision-making rights.

60. It was stated that recommendation 22 as drafted was not in line with what the agreement reached on recommendation 18 (see para. 57 above) and that decision-making rights and financial rights should remain together as a default provision. It was further stated that other mechanisms could exist that would address the concern of resistance to transfer that would not need to separate financial rights from decision-making rights. The following proposal was made to allow the transfer of a membership: “The law should provide that, unless otherwise agreed [in the organization rules], a member of an UNLLO may transfer its [membership] or a part thereof when the other members, if any, agree to the transfer.” It was stated that “a part thereof” would refer to a proportion of a member’s share rather than the ability to transfer certain rights while retaining others. It was further stated that a member may privately enter into a derivative contract with another party over its financial rights, but the membership would remain with the member. It was stressed that a member would have no right to transfer membership without the approval of the other members. The Secretariat was also requested to clarify in the commentary that under this model, financial rights can still be utilized by the member for purposes of, for example, obtaining credit.

61. There was wide support for the proposal to keep decision-making rights and financial rights linked, although some concerns were raised regarding the timing of the transfer and the transfer of rights which may include obligations. It was agreed that all rights and obligations would be transferred, and that the commentary should discuss reference to the time of the transfer for consideration of States.

62. With regards to inheritance of a membership, while there was some support for a proposal to leave the issue entirely to domestic law, it was agreed to include a default provision in the recommendation. In the case of a single-member UNLLO, it was stated that upon death, successors, if any, could receive full membership due to the applicable inheritance law of the State, which would be a preferable consequence to automatic dissolution. In the case of a multi-member UNLLO, it was noted that laws of succession may force the other members of the UNLLO to accept the successor(s) as a full member, which raised again the concern of resistance. It was agreed that without the agreement of the other members to accept the successor(s), the regime would need to have a mechanism by which the successor(s) could be bought out. It was also agreed that issues regarding the incapacitation of a member should be discussed in the commentary, which would involve the participation of a guardian.

63. After discussion, it was agreed to modify the recommendation based on the deliberations of the Working Group and to add to the commentary that specific principles of implementation may differ depending on State law.

I. Dissociation or withdrawal

Paragraphs 112 to 118 and recommendation 25

64. The Working Group discussed the section of the draft legislative guide that addressed the issue of members leaving the UNLLO.

65. The Working Group agreed to place this section immediately after the one on transfer of rights as it was said that denial of transfer by the remaining members could trigger the withdrawal of a member. It was however observed that it would be important not to limit withdrawal to a denial of transfer of rights by the remaining members of the UNLLO because of associated costs of identifying a potential buyer. It was also stated that because there were limitations on transferability of membership, the draft guide would need to provide an exit right.

66. Different options on how to deal with withdrawal were discussed: (a) the current text of recommendation 25, which provided at-will withdrawal over a reasonable period of time; (b) the suggestion in footnote 158 of the current draft of the legislative guide which provided for withdrawal upon agreement or reasonable cause; and (c) a suggestion that members could withdraw only upon agreement by the other members.

67. The Working Group discussed the merits and shortcomings of these three options. It was recalled that the target of the recommendation, an UNLLO, was characterized by interpersonal relationships and few formalities. A concern was raised about withdrawal only upon agreement, as the view was expressed that in a closely-held UNLLO, any reason should suffice as a member who could not exit would be locked into a situation that would likely decrease the UNLLO's efficiency. Although it was recognized that a member should not be stuck in an intractable dispute, a concern was also raised about at-will withdrawal, as it was stated that the member will choose the most advantageous time, possibly at the expense of the UNLLO. It was felt that if at-will withdrawal was permitted, that some anticipation period should be built into the recommendation, unless otherwise agreed.

68. It was agreed that withdrawal upon agreement or reasonable cause provided the best balance between protecting the interest of members to leave the UNLLO and the need to protect the UNLLO so that remaining members could continue its activities and enable the UNLLO to satisfy its debts. In this regard, the importance to have mechanisms in place to protect third parties and creditors from the consequences of a member's withdrawal was stressed.

69. It was noted that a "reasonable cause" would be a subjective standard that was not universally understood, that may involve interpretation by a court, and may cause a member to remain locked in the UNLLO during the proceedings. However, it was widely felt that "reasonable cause" was the only concept that allowed a compromise between the right of the member to withdraw and the need to protect the interests of the UNLLO and its remaining members.

70. After discussion the Working Group agreed to revise drafted recommendation 25 along the following lines: "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". It was agreed that the definition of reasonable cause should be left to domestic legislation but that the commentary should also provide that States may wish to consider ways to encourage members to agree in advance on the issue of withdrawal and should also provide examples to assist States which did not use the concept of reasonable cause and to highlight issues of special importance to MSMEs, such as deadlock and minority oppression or exploitation. A suggestion was also made to include additional information in the commentary on expulsion.

71. The Working Group further agreed that the commentary should provide guidance as to what would constitute "a reasonable period of time" but that that matter should also be left to States. A suggestion was made that the period could be set for a certain period upon unilateral withdrawal but could be shortened by agreement. The agreement could also specify payment terms.

72. In addition, it was agreed that the UNLLO would need to bear the burden of withdrawal payment, but any procedural costs would need to be left to State law. It was also stated that the withdrawing member should not be active in decision-making,

as it would for practical purposes be a creditor upon the moment of dissociation. It was felt that payment should be made quickly after withdrawal.

J. Dispute resolution

Paragraphs 124 to 126 and recommendation 28

73. It was felt that recommendation 28 could address disputes between UNLLO members themselves, between members and designated managers, or between members and the UNLLO, but that third parties would not be bound by any recommendation. It was agreed that the guide could nevertheless discuss the use of alternative dispute resolution (“ADR”) for disputes involving third parties in the commentary.

74. Some views were expressed that the recommendation may not be needed. It was noted that the recommendation was merely permissive, and that ADR would require the agreement of the parties. It was further noted that if ADR was presented as a default provision, it could not be made mandatory as parties would retain the right of access to court under many State constitutions. It was suggested that the guide could retain discussion of the value of ADR for parties without presenting a recommendation to States.

75. Some views were expressed that dealing with a recommendation on ADR would be consistent with the mandate of the Working Group and could be highly beneficial for MSMEs wanting to avoid the cost and time of court processes in case of disputes. It was agreed to redraft the recommendation along those lines and to delete the final clause as redundant. It was further agreed to explain in the commentary the various ADR mechanisms as well as the contractual nature of their use and to provide a sample arbitration clause in the model organization rules.

K. General provisions and organization of the UNLLO

Paragraphs 16 to 22 and recommendation 1, and paragraphs 53 to 59 and recommendation 10

76. The Working Group commenced its deliberation on recommendation 1 and its commentary. The Working Group was reminded that the draft legislative guide proposed a distinct business form which was intended to be governed by stand-alone legislation and the organization rules. The Working Group expressed support for that approach, but noted that stand-alone legislation did not imply that it would operate independently from legal traditions of a State that had enacted legislation based on the guide. It was suggested to clarify this point in the commentary. A suggestion was made to include words such as “simple”, “small” and “inclusive” into the commentary to recommendation 1 to highlight inclusion of vulnerable groups as one of the guide’s goals. It was also agreed that the second clause in paragraph 20 should be clarified to focus on the ability of UNLLO members to contract around non-mandatory provisions.

77. In response to an observation that there might be instances in which the UNLLO has no organization rules, the Working Group decided to first consider whether the organization rules were a mandatory requirement for an UNLLO, their definition and their content before returning to its consideration of the commentary to recommendation 1.

78. A suggestion was made that no organization rules would be necessary unless deviations from the provisions in the guide were agreed upon. A proposal was made to amend recommendation 10(a) to read: “... Indicate, when a member or members of the UNLLO adopt organization rules which differ from the provisions set forth in this law, what form these rules may take”. While there was some support for this proposal, it was suggested that the organization rules may also address any other matter.

79. Recalling previous deliberations on accommodating different legal traditions on how States should determine which information about the UNLLO was to be made public, it was suggested that different States might want the option of requiring or not requiring organization rules. It was suggested that the recommendation and the commentary be drafted along those lines, striking a balance between simplicity, predictability and security and encouraging UNLLO members to think carefully about the way they wanted to organize the UNLLO. It was however emphasized that the rules should be in a form that would be left to the State, taking into consideration the literacy rate and legal traditions within that State. After discussion, the Working Group agreed that recommendation 10(a) could read something along the lines of: “[The law should:] Indicate what form the organization rules may take”. The Working Group also agreed on the text of the recommendation 1 as drafted.

80. In addition, the following amendments to the commentary to recommendation 10 were agreed:

(a) To modify the chapeau of paragraph 54 so that it would read along the following lines: “States may wish to adopt model rules that members may use where appropriate on the following issues”;

(b) Insert the phrase “some or all” between “establish” and “organization rules” in paragraph 55 to clarify that organization rules could be in different forms, although the paragraph should also note the importance for the rules to be consistent and coherent;

(c) Replace “it should be noted, however,” with “for example”, in paragraph 56 for improved clarity; and

(d) To elaborate in paragraph 59 on the advantages of making the organization rules public.

81. The Working Group heard several proposals as regards the definition of organization rules. It was felt that the definition should focus on the relations between the members themselves and between the members and designated managers. It was added that the relations should also be with respect to the UNLLO itself. As a general matter, it was agreed that the organization rules should be agreed by all members of an UNLLO and be a set of governing rules, and that the case of single-member UNLLOs could be addressed in the commentary.

82. The Working Group considered whether the definition should specify the internal functioning of an UNLLO or be broad enough in scope to include any other matters insofar as they relate to the UNLLO. It was agreed that recommendation 10(b) would permit parties to include freely in their organization rules any other matters they would consider pertinent and significant.

83. After discussion, the Secretariat was requested to draft a definition along the following lines: “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”.

84. With regard to recommendation 10(b) a view was expressed that it would not be practical to list the mandatory provisions in full. It was added that even some of those provisions were considered derogable in the commentary. In response, a concern was expressed that certain cardinal principles should not be deviated from, since contractual freedom would call for limits and predictability.

85. It was therefore agreed that recommendation 10(b) should read along the following lines: “The law should 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 this guide.”

86. Since the States, the ultimate user of the guide, could have various views, it was agreed that the commentary in its introductory part should announce that any adaptation of or deviation from the recommendations, should not defeat the purposes

of the guide. Further, it was said that the commentary should clarify that the law created on the basis of the legislative guide should make clear when deviations from its non-mandatory provisions are allowed.

87. With regard to the model forms to be prepared by the Secretariat, it was noted that the Practice Guide to the Model Law on Secured Transactions provided a variety of models and provisions depending on circumstances. It was suggested that different forms could be provided which would provide guidance to: (a) single member UNLLOs; (b) multi-member UNLLOs managed by all members exclusively; and (c) multi-member UNLLOs managed by designated managers. The Secretariat was encouraged to consult with experts and to consider models that already exist across jurisdictions.

V. Future work

88. It was recalled that the Working Group had requested inputs from Working Group V (Insolvency Law) on the issue of separation of assets, particularly for single-member UNLLOs. The Secretariat reported that Working Group V had advised that Working Group I should consider recommending to States that their domestic law should clearly delineate personal and company assets.

89. The Working Group agreed that at its next session, scheduled in New York from 23 to 27 March 2020, it would commence a second review of the draft legislative guide, with the aim to complete such review by the end of the session. It was, however, noted that a fair amount of substantive work was needed in addition to the review, which may necessitate at least one additional session. The discussion in March 2020 would focus in particular on the following issues:

- (a) Provisions in the draft guide to be considered mandatory;
- (b) Whether a definition of share is necessary;
- (c) Separation of assets in a single-member UNLLO;
- (d) The reference to “majority decision” in recommendation 14, that is not consistent with the approach taken in the revised recommendation 11 which indicates “unanimity” as the quantum for decision-making in matters concerning the management structure of the UNLLO;
- (e) Consideration of footnote 83 of [A/CN.9/WG.I/WP.116](#); and
- (f) Whether a legal person that has been granted membership in an UNLLO can be appointed as a manager.

90. The Working Group was informed that further to the Commission’s request at its last session in 2019,¹⁴ the Secretariat had recently commenced preparation of an outline of possible topics to be addressed in materials on access to credit for MSMEs and that it would submit such outline to the Working Group at its next session. In response to a concern that this may take time away from the consideration of the draft legislative guide, it was said that the Working Group could consider the outline at its ninth meeting of that session (i.e., on Friday morning). It was also said that it would be important that the outline be finalized and made available to delegations at the earliest in order to facilitate domestic consultation by the delegations.

¹⁴ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17 (A/74/17)*, para. 192.