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Micro, small and medium-sized enterprises

Features of simplified business incorporation regimes

Note by the Secretariat

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Introduction

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. The Commission agreed that consideration of the issues pertaining to the creation of an enabling legal environment for MSMEs should initially focus on legal questions surrounding the simplification of business incorporation and registration. It was further agreed that other topics to be considered in the context of MSMEs at a later date included: (a) a system for resolving disputes between borrowers and lenders; (b) effective access to financial services; (c) guidance on ensuring access to credit; and (d) insolvency.[1]

2. As noted in the materials before the Commission and during its deliberations in 2013, in addition to reducing barriers to MSMEs entering the formal economy and thus, inter alia, helping them to maximize their economic potential, work on the simplification of business incorporation and registration could have additional salutary international effects. In particular, it was noted that an internationally recognized form of business registration could be expected to facilitate cross-border trade for MSMEs operating in regional markets, since it would provide a recognizable international basis for transactions and avoid problems that may arise because of a lack of recognition of the business form of the enterprise.[2]

3. This paper[3] is intended to provide preparatory materials to the Working Group so that it may commence its consideration of the initial focus of its MSME mandate from the Commission: the simplification of business incorporation and registration. The focus of this note is to provide an overview of selected legal regimes that have provided for simplified corporate forms for closely held corporations, and to provide a general comparison of the components of those regimes. It should be noted that some simplified non-corporate forms, based more on a partnership model than a corporate model, have been included in the discussion for comparison purposes.[4]

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[1] For a history of the evolution of this topic on the UNCITRAL agenda, see A/CN.9/WG.I/WP.80, paras. 5-12. The topic of MSMEs and insolvency is on the agenda of Working Group V for its Colloquium on 16-18 December 2013, and will be on the agenda of Working Group V at its 45th session from 20-25 April 2014.

[2] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 316-319; Note by the UNCITRAL Secretariat, Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises, A/CN.9/780, para. 10.

[3] This paper relies substantially on a paper prepared for the colloquium held by UNCITRAL on 16-18 January 2013 (Creating an Enabling Legal Environment for Microbusinesses) by Joseph A. McCahery, Erik P. M. Vermeulen and Priyanka Priydershini, “A Primer on the Uncorporation”, later published by the European Corporate Governance Institute as Law Working Paper No. 198/2013 (March 2013) (available at http://ssrn.com/abstract_id=2200783).

[4] Only a selection of the simplified corporate forms adopted by States and in force are included in this paper in order to illustrate the relevant differences in approach, to provide examples from different legal systems and to provide for geographic diversity: the Colombian Ley sobre sociedades por acciones simplificadas, Ley Número 1258 de 2008 (“Colombia SAS”); the French Société par actions simplifiée, as modified by Law No. 2008-776, La Loi de mordernisation de l’économie, 4 August 2008 (“France SAS”); the German GmbHG German Limited Liability Act (“GmbHG/UG”); the German Handelgesetzbuch (HGB) Commercial Code (“GmbH & Co./KG”); the Indian Companies Act, 2013 – Private and Public Limited Companies

I. Simplified corporate forms

4. Simplified corporate forms are a relatively new type of business association that aims to combine the most favourable aspects of more traditional partnership and corporate law in order to provide a more flexible and accessible business form for enterprises of all sizes. The increase in interest in many States in these new, more efficient business forms in the past two decades has been substantial; a number of States or regional groups have either adopted or are considering the adoption of legislation establishing simplified corporate forms in the expectation that these new regimes will enhance the health of their economy by creating investment opportunities, increased employment and higher economic growth rates. In some States, this movement has been aimed in particular at meeting the needs of MSMEs,[5] entrepreneurs and professionals, while in others it has formed part of a more general reform of their company law framework.

A. Approaches to legislative reform

5. There appear to be three main approaches that States may take to legislative reform of their company law regimes.[6] The first approach that may be taken is to update the existing company law statute, but to leave the core of the company law system untouched. One advantage of this approach is that preservation of the existing core system provides an easy to use vehicle that provides lawyers and stakeholders familiar provisions with which to work. In addition, this approach takes into account a network effect resulting from the use of a dominant corporate form by existing firms in a jurisdiction, and a learning effect, where only limited additional learning is required to use the regime.

6. The second approach that may be taken to the reform of a State's company law regime is to introduce a new business form but to link it explicitly to the traditional company law framework. This second approach may also have the advantage of the network and learning effects insofar as it links to the traditional regime, with the added benefit that it can provide a new but complementary regime more tailored for

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("India LLC"); the Indian Limited Liability Partnership Act, 2008 ("India LLP"); the Japanese Companies Act (Part V, Part VI, Part VII and Part VIII), Act No. 86 of July 26, 2005 ("Japan LLC"); the New Zealand Limited Partnership Act 2008 (NZLPA); the New Zealand Companies Act 1993 ("NZ Co"); New Zealand Companies Act 1993 New Zealand Companies Act 1993 ("NZ Co"); the Singapore Limited Liability Partnerships Act, Chapter 163A (Original Enactment: 42 of 2005) Revised Edition 2006 (31st December 2006) ("Singapore LLP"); the South African Companies Act 2008 ("S Africa Co"); the United Arab Emirates (UAE) Commercial Companies Law, as amended 2013 ("UAE LLC", "UAE Public and Private Joint Stock Co"); the United Kingdom of Great Britain and Northern Ireland Limited Liability Partnerships Act, 2000, c. 12 ("UK LLP"); and the United States (Delaware) Limited Liability Company Act, Chapter 18, Delaware Code ("US LLC Delaware").

[5] Another paper prepared by the Secretariat for the twenty-second session of the Working Group (A/CN.9/WG.1/WP.81) explores the importance of MSMEs in the global economy and looks at specific barriers that they face in their operations.

[6] See, generally, Joseph A. McCahery, Erik P. M. Vermeulen, Masato Hisatake and Jun Saito (2007), "Traditional and Innovative Approaches to Legal Reform: The 'New Company Law'", European Business Organization Law Review, 8, pp. 7-57.

specific enterprises. In addition, any gaps in the new regime can be filled through resort to the traditional company law framework.

7. The third approach that may be taken to company law reform is to adopt a completely new and innovative legal statute. This approach may have the greatest innovative effect, but it also carries with it the greatest potential costs as users must change to the new system which initially has no established network and requires a significant investment in learning by stakeholders. In addition, the traditional company law framework cannot be used to fill any gaps in the new law, and there will be no established set of precedents to provide certainty in filling those gaps.

B. Enterprises that may benefit from simplified corporate forms

8. The main focus of simplified corporate forms has been on creating flexible business forms that can be tailored to the specific needs of certain types of closely held corporations. As the average size of firms is decreasing,[7] more focus is being placed on the importance of MSMEs to the economy of States and on creating policies and the legal framework appropriate for the success of such enterprises. The adoption of simplified corporate forms has enabled SMEs, in particular, to become more competitive with larger businesses by offering partnership-type ease of operation and flexibility (as compared with the potentially burdensome and complex mandatory rules often required in more traditional incorporation regimes), limited liability for the partners in the business, and relative ease and simplicity of formation and registration. This maximization of the benefits of partnership and corporate structures offers to MSMEs wishing to formalize their business a flexible way to organize their enterprise and an affordable way to separate personal assets from those of the business venture.[8] In addition to offering broad flexibility and freedom of contract in establishing the internal governance of the enterprise, simplified corporate forms usually provide default provisions to fill any gaps that might exist in the rules established by the founders of the enterprise. These default rules can be particularly important for smaller or less-experienced business persons.

9. Other types of enterprises that can benefit from simplified corporate forms include family firms, which play an important economic role in many States, and particularly in emerging markets. The informal structure of family firms can provide timely and effective decision-making, a deep understanding of the local market, close ties with regulators and government officials and strong horizontal and vertical relations in the market. But these strengths may weaken over time, as the firm develops and grows. Difficult governance and reorganization issues may arise as changes occur in both the family and in the business life cycle. Family firms with attributes including clear governance rules and guidelines are more likely to thrive, and the flexibility of simplified corporate forms and the freedom of contract they afford businesses in establishing those rules and guidelines often provide solutions for problems that may develop.

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[7] OECD, Small and Medium Enterprise Outlook, Enterprise, Industry and Services, 2000. See, also, Secretariat Note, A.CN.9/WG.I/WP.81.

[8] It should be noted that while many of these simplified corporate forms limit the purpose of the entity to any legal commercial purpose, it is also possible for these entities to have a social, rather than a commercial, aim.

10. Joint ventures may also benefit from simplified corporate forms. Unsuitable and rigid legal regimes have also presented problems for joint ventures and strategic alliances, which often require highly detailed and creative agreements. The flexibility offered by simplified corporate forms could greatly enhance the ability of such businesses to succeed. Moreover, the default provisions that often feature in simplified corporate forms may also offer some assistance in terms of filling the gaps that may exist in the special context of joint venture agreements.

11. Professional service firms are also likely to benefit from access to simplified corporate forms, particularly from limited liability partnerships. Rather than entering into a typical partnership structure where individual partners have unlimited liability for the debts of the entire partnership, professional service firms are increasingly relying upon limited liability vehicles to protect themselves. This is especially the case when partnerships grow and internationalize, such that partners have become virtual strangers, yet may still have unlimited liability in respect of each other.

C. Limited liability and other aspects of formation

12. Limited liability protection, in which the financial liability of a partner or investor is limited to a fixed sum, usually the value of a person's investment in a company or partnership, is a standard feature of simplified corporate forms. Limited liability can play a crucial role for MSMEs in that it provides them with a means to separate personal assets from those owned by the business, thus protecting personal assets from exposure in the event that the business does not do well or becomes involved in legal disputes.

13. Another standard feature of simplified business forms is the creation of a legal entity, thus providing a legal existence for the organization, regardless of whether it is of the corporate or partnership variety. This status confers upon the entity the legal rights and duties it requires so as to function within a legal system, including the ability to acquire and hold property, to enter into contracts, to sue or be sued, and to act through agents.

14. An important feature of simplified corporate forms is that they can usually be created by a very small number of founders, and can thus be particularly appropriate for MSMEs. Business forms of the partnership type, including the limited liability partnership (LLP) in India, New Zealand, Singapore and the United Kingdom, usually require two or more partners to establish the business. In contrast, simplified forms of the corporate type, including the SAS in France and Colombia, as well as the limited liability corporation (LLC) in Japan, the UAE and the United States, and other company law regimes, will accommodate sole ownership structures.

15. In addition, formation of each type of simplified corporate form is quite easily accomplished, through registration of simplified documentation with the relevant authority — including, in some cases, easy online registration. Moreover, the cost of incorporation or registration of such businesses is generally quite low.

16. For example, the India LLP[9] and Colombia SAS may both be established easily via internet. Under the new SAS regime in Colombia, business parties can

[9] Under the Indian LLP, the designated partners must apply for both a Designated Partner Identification Number and a Digital Signature Certificate. After registration, a trade name check

establish a SAS by filing a registration form with the Chamber of Commerce, as compared with the complicated and time-consuming incorporation requirements that apply to traditional business forms (including a minimum number of shareholders and the appointment of fiscal auditors). The simplified legislation allowed the Chamber of Commerce to design an online system to facilitate the online filing of new SAS registrations. The SAS online incorporation process can take less than two hours.[10]

17. Importantly, simplified corporate forms do not typically include a minimum capital requirement, or require only a nominal amount, thus allowing greater access to formalization for much smaller entrepreneurs and enterprises.

18. In terms of financial disclosure rules for simplified corporate forms, as illustrated in the tables below, there is some variation in terms of the requirements of the selected regimes examined in this paper.

Formation aspects

Country	*Colombia*	*France*	*Germany*	*Germany*	*India*	*India*	*Japan*	*NZ*
Type of company	SAS (Sociedades por acciones simplificadas)	SAS (Société par actions simplifiée)	GmbH/UG[11]	GmbH&Co. KG[12]	Pvt Ltd (Private Limited Company) and Ltd Co (Public)	LLP (Limited Liability Partnership)	LLC (Limited Liability Company)	LP (Limited Partnership)
Legislation	Ley Número 1258 de 2008	La Loi de mordernisation de l'économie, 4 August 2008	Mini-GmbHG German Limited Liability Act (Nov 2008)	Handelgesetzbuch (HGB) German Commercial Code	Companies Act, 2013	Limited Liability Partnership Act, 2008	Companies Act (Parts V, VI, VII and VIII), Act No. 86 of July 26, 2005	Limited Partnership Act, 2008

is conducted, and the incorporation process is completed upon payment of the registration fee by credit card. The website also offers assistance in drafting the LLP agreement and registering the LLP.

[10] The Chamber of Commerce of Bogota provides for a simple six-step process: (1) creation of an account, including application for a corporate name and tax identification number; (2) filing of the articles of incorporation (model articles are available to expedite the process); (3) online payment; (4) request to issue a digital signature; (5) digital signature of the incorporation documents; and (6) review of the documents by the Chamber of Commerce.

[11] A GmbH may also be incorporated with a minimum capital of less than €25,000, in which case a company will determine its own amount of minimum capital (€1-24999). Such a company cannot use the suffix GmbH, but must use the suffix UG (Unternehmergesselschaft/Entrepreneurial Company), which makes it transparent that this company has been established without the minimum capital requirement stipulated for a GmbH. The declared minimum capital must be paid in full prior to registration and contributions in kind are not allowed. Moreover, a UG is required to accumulate 25 per cent of its annual earnings as a legal reserve until it reaches the minimum capital requirement of a GmbH (€25,000). Although it is possible for a company to remain a UG, it is not the purpose of such regulation; therefore, a UG is not considered a separate type of business form, but only a temporary and transitional sub-form of a GmbH.

[12] The limited partnership with a private limited company as a general partner (GP) is a German law and tax construct. It combines the advantages of a partnership and the exclusion of liability of a private limited company. There are different reasons why the stakeholders want to limit the liability of the partnership, but the main focus of the construct is the limitation of liability of partners.

Country	*Colombia*	*France*	*Germany*	*Germany*	*India*	*India*	*Japan*	*NZ*
Legal personality	Yes	Yes	Yes	No, but it has characteristics of legal capacity[13]	Yes	Yes	Yes	Yes
Limited liability	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes, except for General Partner (GP)
Financial statements	Shareholders must approve financial statements and annual accounts (art. 37)	Parties must disclose annual accounts	Annual financial statements are mandatory	Annual financial statements are mandatory (§238)[14]	Annual financial statements are mandatory (s. 129(1))[15]	An annual return must be filed (s. 34)	Members have access	Annual financial statements mandatory, GP responsible for their preparation
Formation	Incorporation document filed at the Mercantile Registry (online registration) (art. 5)	Registration at the Commercial Court	Upon registration in Commercial Register, company must pay up 25% of minimum capital, submit Articles of Association, list of shareholders and verified valuation of in-kind contributions (§7-8)	GmbH&Co KG is formed upon conclusion of partnership agreement Registration in Commercial register is mandatory, however does not constitute the partnership	Registration with Memorandum of Incorporation and complying with the requirements of the Act in respect of registration	Online registration	Registration at the Legal Affairs Bureau	Registration at Registrar upon filing of Partnership Agreement (Part 2, ss. 9 and 52)
Number of founders	1 or more (art. 1)	1 or more (art. L227-1)	1 or more persons	At least one limited partner (GmbH is the GP) who can be at the same time the only shareholder of GmbH/GP	One or more person, One Person Company (s. 3(1))[16]	2 or more, but possible to have one partner for 6 months (s. 6)	1 or more	At least one general and one limited partner (Part 2, s. 8)

[13] A limited partnership can acquire rights and incur liabilities in its own name and may acquire property and other rights in rem in immovable properties and sue and be sued.

[14] Because the GP is not a natural person, the partnership must comply with higher demands on financial reporting (§264a) in addition to publication of financial statements in the Federal Gazette.

[15] In the case of a one person company, the financial statement should be signed by the company secretary or the director of the company (s. 134(1)).

[16] The New Companies Act 2013 provides a new form of private company, i.e., a one person company is introduced that may have only one director and one shareholder. The old Company Act 1956 had the requirement of a minimum of two shareholders and two directors in the case of a private company.

Country	*NZ*	*Singapore*	*South Africa*	*UAE*	*UAE*	*UAE*	*UK*	*US*
Type of company	Company (Private)	LLP	Pty Ltd (Proprietary Company)	LLC	Company (Public Joint Stock)[17]	Company (Private Joint Stock)	LLP	LLC (Delaware)
Legislation	Companies Act, 1993	Limited Liability Partnerships Act, 2006	Companies Act, 2008 (implemented May 2011)	UAE Company Law No. 8 of 1984[18] (amended multiple times from 1984 to 2000 by Federal Law)			Limited Liability Partnerships Act, 2000	United States (Delaware) Limited Liability Company Act
Legal personality	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Limited liability	Yes	Yes, but claw-back provision before insolvency	Yes	Yes	Yes	Yes	Yes	Yes
Financial statements	Obligation to prepare annual reports except for non-active companies Part 2, ss. 208-211)	Accounts and other records must be kept for five years (s. 25)	Annual financial statements mandatory, no audit required	Companies are required to prepare financial statements and annual reports[19]	Three months from the expiry date of the financial year (art. 238)	Except for provisions regarding the public subscription of shares and debentures, the provisions governing public joint stock companies are applicable to a private joint stock company	An annual return and annual statutory accounts must be filed (Regulations, s. 7)	Members have access No public disclosure (§18-305)
Formation	After registrar registers application, no need for constituting document (Articles of Association) (Part 2, ss. 11-13)	Online registration with Registry of Limited Liability Partnerships (s. 42)	Registration with Memorandum of Incorporation and Notice of Incorporation	By the Company's contract of establishment (COE), a separate agreement (equivalent to Memorandum and Articles of Association)	Memorandum and Articles of Association (arts. 64-94)		Registration at Companies House (ss. 2-3)	Simple certificate of formation filed at Secretary of State (§18-201)

[17] Other commercial structures regulated by UAE company law are: General Partnerships, Simple Limited Partnerships, Joint Participation, Public Joint Stock Company, Private Joint Stock Company and Partnerships Limited with Shares. With the exception of the Private and Public Joint Stock Companies, most of them are not commonly used.

[18] The UAE Commercial Companies Law (CCL) is the main legislation governing the setting up of companies and carrying on of business in the UAE. LLCs are currently the most common form of corporate entity used by foreign investors in the UAE. The CCL governs the requirements and procedures for establishing a LLC. A copy of the Act was not available; all information is based on publicly available reports published after the reform of existing Companies Law in May 2013.

[19] See, generally, www.tamimi.com/en/magazine/law-update/section-5/july-august-2/the-new-uae-commercial-companies-law-a-comparative-view.html.

Country	*NZ*	*Singapore*	*South Africa*	*UAE*	*UAE*	*UAE*	*UK*	*US*
Number of founders	1 or more persons	2 or more, but possible to have one partner for two years (s. 22)	1 or more persons	Old CCL - no less than two and no more than 50 shareholders (arts. 4 and 218) New CCL - one or more persons[20] (art. 71)	Old CCL - at least 10 founders New CCL - minimum five or more persons (art. 107)[21]	Old CCL - minimum of three New CCL - one or more persons (arts. 255/256)[22]	2 or more (s. 2)	1 or more (§18-101(6))

D. Internal governance

19. Partnership-type simplified business forms confer the status of legal entity on the business relationship and offer a clear and simple framework to economic actors who decide to enter into a joint ownership structure. It is also clear that, unless otherwise provided in the operating agreement among the partners in the business, the enterprise itself owns the firm-specific assets. In addition, the partners have joint control over firm-specific capital and, by default, share equally in the firm's profits and losses.

20. In contrast, the "equal-sharing rule" for losses and profits is not well-suited for enterprises in which business partners are not relatives or long-standing acquaintances. Nor may this approach be appropriate in instances where the founders of the business contribute unequal sums of capital, when they differ in levels and types of skills and when they are not in receipt of symmetrical information. As will be noted from the tables below, corporate-type simplified business forms usually provide for a default rule different from the "equal-sharing rule" in order to accommodate this different context.

21. In each of the partnership-type contexts examined in the table below, there is broad freedom of contract to establish the operating agreement, although some jurisdictions require certain mandatory rules to be included in the agreement. Generally, the partnership-type hybrid business form creates an ownership structure that gives owners joint management and control rights. Unless there is agreement to the contrary, important decisions, such as amendments to the partnership agreement, usually require the approval of all partners. However, matters arising in the ordinary course of business are commonly decided by a majority of the partners, and each partner, as an agent of the firm, is by default empowered to bind the partnership entity in dealings with third parties.

22. However, in the case of the corporate-type simplified business form, these issues may be treated somewhat differently. While broad freedom of contract with some mandatory rules also exists in this context, the management structure of an

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[20] The new CCL provides for the first time the concept of a one person or sole founder company. This applies to private joint stock companies and Limited Liability Companies.

[21] A Public Joint Stock Company can be established by a minimum of five founders, however under the old law the requirement was a minimum of 10 founders.

[22] Under the new law, the number of founding members has been reduced from three to two, as well as providing that private joint stock company may also be incorporated by a sole founder.

enterprise tends to require greater separation of ownership and control of the business than is the case in the partnership-type context. This differentiated management and control structure is one in which members elect directors and participate in certain basic decisions, while directors establish policy, select managers, perform monitoring functions and act as the firm's agents.

23. This different approach to the management structure in the case of the corporate-type form may require more detailed internal governance rules. Since the majority shareholders elect the directors and can thus control management, the minority shareholders in this situation may be particularly vulnerable to abuse and rules may be required to ensure that minority interests are protected. This may be accomplished by using different classes of shares that have identical voting rights but that may vote separately as classes for the election of specified numbers of board members. An alternative approach could be cumulative voting, where the minority may cast all of its board of director votes for a single candidate. However, the best mechanism to deter opportunistic behaviour may be through the establishment of fiduciary duties, which is examined in greater detail below.

Internal governance

Country	*Colombia*	*France*	*Germany*	*Germany*	*India*	*India*	*Japan*	*NZ*
Type of company	SAS	SAS	GmbH/UG	GmbH&Co.KG	Pvt Ltd and Ltd Co (Public)	LLP	LLC	LP
Governance	Flexible; Shareholders may manage the company directly (art. 17)	Parties are free to decide on the management structure Compulsory to have a 'President' (arts. L227-6 and -9)	At least one director If there are more directors, they must act collectively unless Articles of Association state otherwise (§35) A company with 500 or more employees must have a supervisory board (§52)	Management is conducted solely by GmbH-GP (§164)	Appointment of independent directors by minority shareholders	Member-managers, unless otherwise provided in the agreement (s. 23 and First Schedule)	Flexible	Management is conferred upon GP(s). Limited partner must not take part in the management
Financial rights	In absence of agreement (special classes of shares), sharing in proportion to shareholding (art. 10)	In absence of agreement, sharing in proportion to members' contributions (art. L227-9)	Distribution of profit to shareholder is proportional to their shareholdings unless stated otherwise in Articles of Association (§29)	If not stipulated otherwise by partnership agreement, profit shall be distributed proportionately	Memorandum of Incorporation shall regulate distribution of profit among shareholders	In absence of agreement, equal sharing rights (s. 23 and First Schedule)	In absence of agreement, sharing in proportion to the equity participation	The entitlement of partners to distribution of profit must be stipulated in Partnership Agreement.
Freedom of contract	Yes, but some mandatory rules	Yes, but some mandatory rules	Yes, but many mandatory rules.	The relations among partners stipulated in §161 et seq. are largely dispositive	Yes, but there are mandatory rules	Yes, but some mandatory rules (s. 23)	Yes, but some mandatory rules	Yes, with some mandatory provisions. (Part 2, s. 9)
Transferable interest	Yes, restrictions could be contractually	Restricted transferability	Interest in GmbH is transferable unless stated otherwise in Articles of	Transfer of interest is possible upon modification of	Freely transferable Any arrangement between 2 or	LLP agreement – default rule: assignment of	Members' unanimous approval required	Freely transferable to another partner Transferable to

Country	*Colombia*	*France*	*Germany*	*Germany*	*India*	*India*	*Japan*	*NZ*
	imposed (arts. 13 and 14)		Association (§15).	partnership agreement Must registered with Commercial Register	more persons in respect of transfer shall be enforceable as a contract	financial rights (s. 42)		any other person upon approval by resolution of partnership (Part 2, s. 38)

Country	*NZ*	*Singapore*	*South Africa*	*UAE*	*UAE*	*UAE*	*UK*	*US*
Type of company	Company (Private)	LLP	Pty Ltd	LLC	Company (Public Joint Stock)	Company (Private Joint Stock)	LLP	LLC (Delaware)
Governance	Flexible, governance power may be conferred directly on shareholders (Part 8, s. 126)	Member-managers, unless otherwise provided in the agreement (s. 10 and First Schedule)	Flexible; Shareholders may manage company directly (Ch.2 Part F, s. 57)	By Managers[23]	By a Board of Director structure	By Managers Subject to corporate governance rules	Member-managed, unless otherwise provided Mandatory designated members (Regulations, s. 7)	Member-managed, unless otherwise provided in the agreement (§18-402)
Financial rights	Proportional share of dividends per share (Part 6, s. 53)	If no agreement, sharing in proportion to the equity participation (First Schedule)	Memorandum of Incorporation shall regulate distribution of profit among shareholders, otherwise the distribution is proportional to their contribution	Memorandum of Incorporation shall regulate distribution of profit among shareholders, otherwise the distribution is proportional to their contribution (Art 19 and 227)	Memorandum of Incorporation shall regulate distribution of profit among shareholders	Memorandum of Incorporation shall regulate distribution of profit among shareholders	In absence of agreement, equal sharing rights (Regulations, s. 7)	In absence of agreement, profits and losses allocated on the basis of the agreed value of the contribution (§18-503)
Freedom of contract	Yes, however many mandatory rules. (Part 5, s. 31)	Yes	Yes, but many unalterable provisions	Yes, but there are mandatory rules	Yes, but bound by Federal law	Yes, but bound by Federal law	Yes, but some mandatory rules	Yes, complete freedom (§18-1101)
Transferable interest	Shares are transferable unless stated otherwise in the constitution of the company (Part 6, s. 39)	LLP agreement – default rule: assignment of financial rights (s. 13)	Memorandum of Incorporation must restrict transferability and must prohibit an offer of its securities to public	Without restriction (except as noted in arts. 4 and 218)	Without restriction (except in case of lock-up period as noted in CCL)	Without restriction between founders (in other cases follow arts. 216 and 217)	Restricted transferability	Yes, restrictions could be imposed by the agreement (§18-702)

[23] Under the New CCL, companies may appoint one or more managers without setting out a maximum number of managers (art. 83). However, under the old law, the maximum number of managers was five.

E. Fiduciary duties

24. Fiduciary duties tend to be open-ended standards of performance. They are often separated into: (1) a duty of care and loyalty; (2) a duty to disclose information; (3) a duty to preclude from self-dealing transactions, personal use of business assets, usurpation of enterprise opportunities, and competition with the enterprise; and (4) a duty of good faith and fair dealing.

25. Fiduciary duties offer protection against the managers' pursuit of personal interest and any excessively negligent behaviour on their part. However, fiduciary duties cannot be used to discipline directors in the performance of their official duties, thereby subjecting their business judgement to criticism after the fact. It should also be noted that it is not yet clear in most cases[24] whether members or partners in simplified corporate forms owe a fiduciary duty to each other.

Fiduciary duties

Country	*Colombia*	*France*	*Germany*	*Germany*	*India*	*India*	*Japan*	*NZ*
Type of company	SAS	SAS	GmbH/UG	GmbH&Co.KG	Pvt Ltd and Ltd Co (Public)	LLP	LLC	LP
Fiduciary duties	'Abuse of rights' provision (Article 43)	Good faith – Articles of Association could contain more detailed duties (art. L227-8)	The director has to act with duty of care equal to a prudent businessman (§43)	Disclosure of partnership's financial records to limited partners (§166)	Directors shall act in good faith and in the best interests of the company (s. 166)	Defined by agreement – default provision in First Schedule: disclosure and non-compete	Good faith	Specific fiduciary obligations of GP(s) (Part 2, s. 49)

Country	*NZ*	*Singapore*	*South Africa*	*UAE*	*UAE*	*UAE*	*UK*	*US*
Type of company	Company (Private)	LLP	Pty Ltd	LLC	Company (Public Joint Stock)	Company (Private Joint Stock)	LLP	LLC (Delaware)
Fiduciary duties	Directors must act in best interest of a company	Defined by agreement – default provision in	Directors are required to act in good faith for a proper	Managers shall act in good faith and in the best interests of the	Directors shall act in good faith and in the best interests of	Directors shall act in good faith and in the best interests of	Specific default duties (Regulations,	Access to information and records

[24] The United States Revised Uniform Limited Liability Act of 2006 clarifies the ability of members to define and limit the duties of loyalty and care that members owe each other and the LLC. Likewise, Delaware General Corporation Law, Section 102(b)(7), allows the articles of incorporation to include a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided, inter alia, that such provision shall not eliminate or limit the liability of a director: (i) for any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or (iii) for any transaction from which the director derived an improper personal benefit. These types of provisions may be useful in the context of closely held business entities, since they allow the parties to derogate from a rigid legal framework, which may not be necessary in all business contexts, while still requiring appropriate protection for the business, shareholders and third parties.

Country	*NZ*	*Singapore*	*South Africa*	*UAE*	*UAE*	*UAE*	*UK*	*US*
	(Part 8, s. 126)	First Schedule: disclosure and non-compete	purpose in the best interest of a company	company[25]	the company. (arts. 21-22)	the company (arts. 21-22)	s. 7)	(§18-305)

F. Potential for misuse

1. Disclosure of beneficial ownership

26. It has been noted that the low cost and relative ease of establishing simplified business forms may attract those who wish to establish corporate vehicles in order to avoid detection due to their involvement in criminal activities such as money-laundering and financial crime. These vehicles may include corporations, trusts, foundations, and limited partnerships, as well as simplified business forms, and may involve the creation of a chain of cross-border company law vehicles created in order to conceal their ownership.

27. In order to control this type of misuse, international institutions have taken steps to introduce measures that make information about the beneficial owners that control these chains of companies more readily available. For example, the Organisation for Economic Cooperation and Development (OECD), which is one of the institutions concerned with combating corruption and money-laundering, has set out a number of policy objectives in order to prevent the misuse of corporate vehicles.[26]

2. Financial Action Task Force (FATF)

28. The Financial Action Task Force (FATF) is an intergovernmental body that was established by its constituent members in 1989 to set standards and to promote effective implementation of legal, regulatory and operational measures to combat money-laundering, terrorist financing and other related threats to the integrity of the international financial system. To that end, the FATF has developed a series of recommendations that are recognized as the international standard for combating money-laundering and the financing of terrorism and proliferation of weapons of mass destruction. They form the basis for a coordinated international response to these threats to the integrity of the financial system and help ensure a level playing field. The FATF Recommendations were first issued in 1990 and were most recently revised in 2012.

29. The 2012 Recommendations encourage States to implement stricter rules and regulations that require companies or company registries to obtain and hold current

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[25] The general obligations placed on managers arise from a number of sources, including the Company's COE, the CCL and UAE Penal Code.

[26] See OECD, Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes, 2001. See, also, the work of the United Nations Office on Drugs and Crime (UNODC), which is responsible for the Global Programme against Money-Laundering, Proceeds of Crime and the Financing of Terrorism, the aim of which is to strengthen the ability of Member States to implement measures in these areas, and to assist them in detecting, seizing and confiscating illicit proceeds (www.unodc.org/unodc/en/money-laundering/index.html?ref=menuside).

information on companies' beneficial ownership and control,[27] or to have other comparable measures to ensure that such information is readily available. Importantly, the FATF acknowledges that the implemented measures should be proportionate to the level of risk and/or complexity related to the use of beneficial ownership structures, which reduces the cost of regulations and increases compliance.

30. Additional protection from the potential misuse of simplified corporate forms may be available through the requirement for all corporate vehicles to open bank accounts in order to conduct their business activities; bank accounts, in turn, usually require the submission of tax and corporate identification numbers. It has been suggested that financial institutions are the most suitable parties to prevent and combat money-laundering, while lawyers and other legal professionals provide an extra layer that serves as a safety net to ensure the financial system is not used for improper purposes. Consequently, it is important to encourage collaboration and information exchange between relevant regulators, supervisory authorities, intermediaries and private companies. The FATF emphasizes both national and international cooperation in relation to combatting fraud and other illicit activities.[28]

3. Intragovernmental collaboration and information sharing

31. Since information in respect of the beneficial ownership of corporate vehicles is increasingly important to combat illicit activities, such information must be accessible to regulators, supervisory authorities and similar government officials. Reforms in respect of the improvement of intragovernmental collaboration have been aimed at collectively detecting and deterring money-laundering and tax evasion, in addition to obtaining information about the beneficial ownership of corporate vehicles.[29]

32. Despite the effectiveness of domestic information sharing among government agencies, there is a need for information exchange on an international scale. The globalization of, and innovations in, financial markets require a commensurate

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[27] 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, in particular, Recommendation 24 (www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf).

[28] Ibid., Part G on International Cooperation, in particular, Recommendations 36 and 40.

[29] See OECD, Effective Inter-Agency Co-Operation in Fighting Tax Crimes and Other Financial Crimes, 2nd ed., 2013. For example, Singapore has streamlined its company registration system and created a one-stop business services portal that allows government agencies to access secure information, including tailor-made information packages. Similarly, Australia formed a multi-agency task force in 2006 to protect the integrity of the financial and regulatory systems. The task force combines the powers of several government agencies and authorities to conduct investigations, audits and prosecutions, and while not the main goal, it has provided transparency in respect of beneficial ownership arrangements. See, also, the amendments that New Zealand is proposing for its Companies Act and its Limited Partnerships Act in order to address the potential misuse of its corporate forms by, inter alia, providing the Companies Office Registrar the power to inquire into the identity of the beneficial ownership and control of these companies (see Companies and Limited Partnerships Amendment Bill, NZ House of Representatives Supplementary Order Paper No. 403, 19 Nov. 2013).

intensification of the international collaboration among regulators and other enforcement bodies.[30]

G. Conflict resolution

1. Derivative suits

33. One important aspect of simplified corporate forms is that their members or partners must usually rely more heavily on judicial gap-filling to ensure that their rights are protected. Some jurisdictions provide for derivative suits, imported from more traditional business association regimes,[31] which allow one or more members or partners to initiate a derivative suit in the name of the enterprise and for the benefit of the enterprise as a whole. Derivative suits constitute an exception to the usual rule that a company's board of directors manages company affairs.

34. However, derivative suits can generate high litigation costs and great uncertainty, and some jurisdictions have placed restrictions on them in order to prevent a disgruntled minority member or partner from acting in their own interest and using such suits to interfere with the successful operation of the enterprise.[32]

35. For simplified corporate forms, the question of how to resolve disputes among members of the firm may have several possible answers. One solution may be to provide for appropriate exit rules so as to lower costs for stakeholders when parties leave the business. In addition, such rules may establish a degree of predictability when such scenarios arise.

2. Exit rules

36. Default exit rules in legislation establishing simplified corporate forms could provide members or partners in the enterprise with the power to compel the dissolution of the firm and the liquidation of its assets. Such rules could also permit individual members or partners to withdraw and/or be expelled from the firm upon the receipt of fair value of their ownership interests.[33]

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[30] Note that UNODC maintains and administers the International Money-Laundering Information Network (IMoLIN), a one-stop anti-money-laundering/countering the financing of terrorism research resource on behalf of a number of intergovernmental organizations and groups active in this area, including FATF. The multi-faceted website serves the global anti-money-laundering community by providing information about relevant national laws and regulations, as well as providing contacts for inter-country assistance and identifying areas for improvement in domestic laws, countermeasures and international cooperation (www.unodc.org/unodc/en/money-laundering/imolin-amlid.html?ref=menuside).

[31] For example, the United States (Delaware) LLC provides for a traditional derivative suit in Subchapter X.

[32] For example, it may be required that the minority shareholder own stock both at the time of the challenged action and throughout the course of the law suit, that any out-of-court settlements be subjected to judicial scrutiny to avoid abuse, and that any recoveries resulting from the derivative suit go to the enterprise and do not benefit shareholders directly.

[33] The default provision on expulsion in the Regulations to the UK LLP Act provides that: "No majority of the members can expel any member unless a power to do so has been conferred by express agreement between the members." The same rule appears in the First Schedule of the Singapore and India LLP Acts. The default provision of the Colombian SAS provides for

37. In order to avoid the possibility of a minority interest using the exit rules opportunistically, and to improve the overall stability of the enterprise, it could be argued that limitations should be placed on exit rights in the case of simplified corporate forms. However, rather than locking participants into an unwanted business arrangement, lawmakers could define specific default rules that comprise the different involuntary and voluntary exit provisions. Establishing clear default rules could not only reduce litigation costs, but could also allow for greater settlement of disputes. As the valuation of a member's or partner's interest can be a particularly difficult issue, default exit rules should also establish clear valuation rules. For example, such rules could state that dissociating shareholders should receive the same amount in a buyout as they would receive if the company were dissolved. In addition, specific rules could be established to determine when goodwill should be taken into account.

3. Specialized business courts and procedures

38. Judicial intervention may also be used to protect participants in simplified corporate forms, but this type of adjudication may be costly and time-consuming. In addition, it has been suggested that it may be difficult for a court to disentangle the personal relationships often at stake in such situations.

39. Some success has been seen in respect of specialized business courts, such as the Inquiry Procedure before the Dutch Enterprise Chamber (a division of the Amsterdam Court of Appeals) which has become a leader in the resolution of disputes against controlling shareholders of non-listed companies. In particular, the granting of injunctive relief has induced business parties to seek out settlements that might otherwise end up in litigation. Five factors key to the success of the Enterprise Chamber have been identified as: (1) its integrity and speed; (2) its level of deference to insiders; (3) its ability to focus on the key underlying issues before it; (4) the degree of formalism in its decisions; and (5) the concern it has for the effect of its decisions on other corporate actors. Parties benefit from the reduced cost as well as the consistent quality of the decisions and the inducement to settle matters in a less formal setting.

40. Another system has been established in Colombia, in which a new specialized Corporate Law Court was established in the Superintendencia de Sociedades (Office of Corporations) in order to adjudicate issues arising pursuant to the SAS legislation. While complaints filed before the specialized court from 2008 to 2011 related only to four different issues (appeals of previous decisions, intra-corporate disputes, actions to set aside shareholder resolutions and requests for dissolution), the court has heard and resolved a broader array of issues from 2012 to date. These include: actions to lift the corporate veil, the appointment of experts to provide appraisals to parties, and actions arising from the abuse of rights provision in the SAS. The broader range of cases examined by the Court, along with the quality of the decisions rendered and the speed of the decisions is reportedly providing

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shareholder exclusion from the corporation by a majority decision and upon receipt of fair market value for their shares (art. 39).

credibility to the Court and indicating that its establishment has been a successful experiment in adjudicating in this specialized business context.[34]

II. Information in respect of simplified corporate forms

A. Factors for success of simplified corporate forms

41. The success of simplified corporate forms in general has been attributed to the fact that they typically bundle together a number of advantageous aspects from both corporate law features and partnership principles for the benefit of enterprises of all sizes. These key advantages are generally agreed to be limited liability for stakeholders coupled with maximum flexibility and autonomy for firm participants to contractually establish the firm's governance structure. In addition, simplified corporate forms have the added advantage of requiring a much-reduced burden in terms of future documentary and operational formalities than under traditional corporate regimes. Moreover, like traditional corporate forms, simplified corporate forms still provide members with almost a complete shield against personal liability, but with the added advantage that they do not impose burdensome formation and capital maintenance rules.

42. Other aspects of simplified corporate forms that have contributed to their success have been the fact that they allow for formalization of the enterprise in an accessible and understandable form, which is achieved by way of a simple and fast procedure at a very low cost. These factors have greatly increased the accessibility of formalization for businesses of all sizes and levels of sophistication, but in particular for those on the micro and small end of the scale.

43. Most simplified business regimes provide that contributions for payment of shares or interests can be made in many different forms, such as tangible or intangible property, or other benefits to the firm, including cash, promissory notes, services, or other agreements to contribute cash or property, or contracts for services to be performed.[35] In addition to acceptance of a broad range of contributions, such regimes have the advantage of providing a great deal of flexibility regarding the internal organization of the enterprise, so as to allow the founders of the business to tailor the regime as much to their own context as they wish, or to rely mainly on default provisions. Default provisions not only fill intentional or unintentional gaps in the parties' agreement, but they have the added advantage of providing rules that are based on the traditional company law regime, and thus are both well-established and well-understood.

44. One disadvantage of adopting simplified corporate forms may be that they can be relatively untested entities that have not yet generated a large body of case law and academic research. However, the knowledge and information base pertaining to these simplified regimes is growing rapidly, as may be seen from the information presented below.

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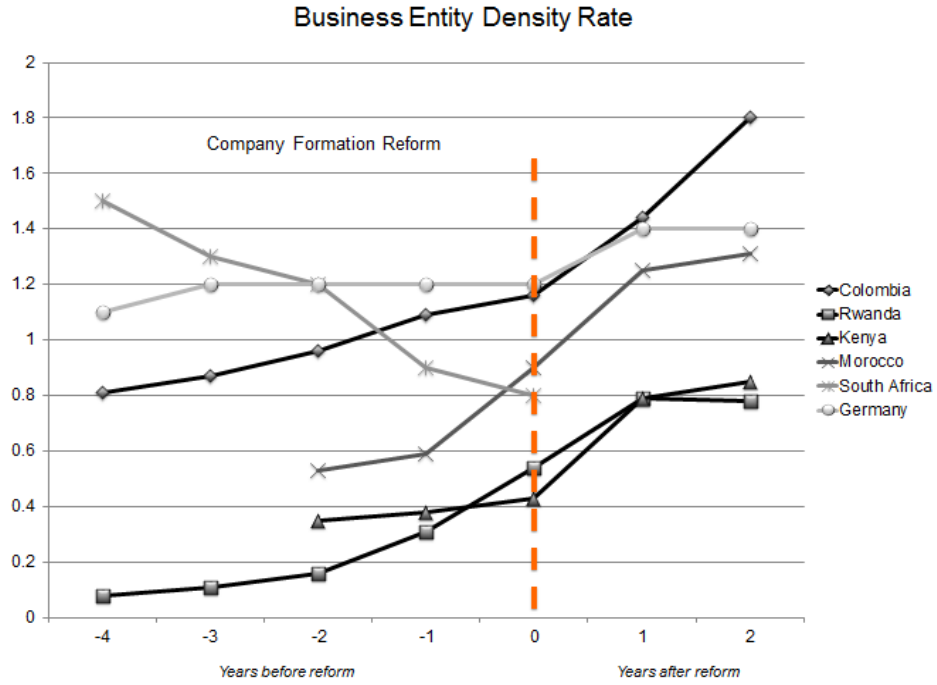
[34] Francisco Reyes Villamizar, The Colombian Simplified Corporation: An Empirical Analysis of a Success Story in Corporate Law Reform (November 2013) (Available at SSRN: http://ssrn.com).

[35] See, for example, s. 32 of the India LLP and §18-101(c) of the US-Delaware LLC.

B. Empirical information on simplified corporate forms

45. Company law reforms — particularly when they modernize the traditional company law systems in terms of the implementation of simple formation requirements, online business registrations and easy access to limited liability — tend to improve the Business Density Rate (which is the number of newly registered companies with limited liability per 1,000 working-age people per calendar year). Figure 1 provides this information in respect of selected States that have modernized their traditional company law systems as described, and indicates that there is a positive relationship between the reforms and an increase in the number of new businesses registered.

Figure 1
Company Law Reform and Business Registrations (Source: World Bank Data)



46. In terms of specific numbers of business registrations in particular States, some data is available as well. For example, the SAS in Colombia was introduced in December 2008 (when it comprised 7.42 per cent of the total number of business association registrations), and by 2010, the SAS represented 82 per cent of all registered companies. As of September 2013, 96.4 per cent of business entities that filed articles of association with the Commercial Registry did so under the SAS regime. Importantly, the number of SAS cancellations is quite low in comparison with the number of registrations that remain active and in good standing: in 2011, 2,315 SASs were dissolved or wound up; in 2012, the figure amounted to 3,669 SASs; and to the end of July 2013, 3,038 SASs were dissolved or wound up.[36]

[36] For more detailed empirical information on the Colombian SAS, see Reyes Villamizar, The Colombian Simplified Corporation, supra, note 34.

Year	*Total SAS Registrations*	*As a percentage of all incorporations*
2009	17,840	74.2%
2010	37,371	82%
2011	49,024	92.4%
2012	55,359	93.1%
2013	46,950 (as of end Sept.)	96.4%

47. Statistics are also available from Colombia on the size of company that is registering as an SAS incorporation. The following table illustrates the size of the enterprise, the criteria for each under Colombian law, and the number of SAS incorporations in each category in 2011, 2012 and as of the end of September 2013.[37]

Size of company	*Number of employees*	*Total assets*	*2011*	*2012*	*As of Sept. 2013*
Micro	1-10	Under 501	96,831	13,739	167,061
Small	11-50	501-5,000	14,827	23,341	31,818
Medium	51-200	5,001-30,000	3,709	5,797	8,073
Large	Over 200	Over 30,000	875	1,398	2,008

48. Since the adoption of the SAS in 2008 in France, the number of new companies incorporating under the SAS regime has grown steadily. In 2009, the SAS represented over 10 per cent of new incorporations; that figure grew to over 14 per cent in 2010 and up to 16 per cent in 2011.

49. The LLP in India was first introduced in 2009; as of 28 May 2012, 9,395 LLPs were active in India. There are, as yet, no data available in respect of the number of incorporations under the new company regime, which was adopted in May 2013.

50. The LLC in Japan has grown steadily in popularity, growing from 4,066 business registrations in 2006 to 15,772 in 2010.[38] However, the formal corporate regime remains by far the preferred choice of a business form in Japan.

51. In Singapore, 5,234 LLPs were incorporated between 2006 and 2008. This amounted to approximately 8 per cent of all newly established private firms registered each year.

52. The LLP in the United Kingdom has been quite successful since its creation in 2001, reaching over 52,000 registrations in 2012. The annual number of business registrations under the LLP regime in the United Kingdom is reflected in the table below.[39]

March (Year)	*Total LLP Registrations*	*Annual Increase*
2002	1,845	1,845

[37] Ibid.

[38] The number of LLC registrations in Japan in 2007 was 9,557; in 2008 that figure rose to 10,785, and in 2009, the number of Japanese LLC registrations was 13,667.

[39] Reproduced from Francisco Reyes and Erik P. M. Vermeulen, Company Law, Lawyers and "Legal" Innovation: Common Law versus Civil Law, Banking and Finance Law Review, 2013.

March (Year)	*Total LLP Registrations*	*Annual Increase*
2003	4,442	2,597
2004	7,396	4,799
2005	11,924	4,528
2006	17,499	5,575
2007	24,555	7,056
2008	32,066	7,511
2009	38,443	6,377
2010	40,604	2,161
2011	45,376	4,772

53. Finally, the LLC regime has become the choice of business form for closely held firms in the United States. According to data derived from the Annual Reports, Delaware Department of State, Division of Corporations, in 2011, LLCs comprised 70 per cent of all business registrations, while corporations made up the next biggest group at 22 per cent, LLP registration amounted to 6 per cent, and statutory trusts comprised 2 per cent.

III. Issues for possible discussion

54. The Working Group may wish to consider the following non-exhaustive list of issues in its discussion:

(a) States may wish to provide their experience in terms of incorporation procedures for closely held businesses, including in respect of the following issues:

(i) Is easily accessible limited liability protection available?

(ii) Is online registration possible and desirable?

(iii) Is there a single point of entry for enterprises wishing to formalize?

(iv) How are creditors and other stakeholders protected?

(v) Is disclosure of beneficial ownership required?

(vi) Is there intragovernmental and cross-border collaboration and sharing of information?

(b) What should be the preferred internal governance structure for the simplified corporate form?

(i) Should the focus first be on smaller and micro-sized enterprises or should the simplified regime be capable of accommodating businesses of all sizes?

(ii) Should the focus be on creating a single regime or on creating various possible regimes?

(c) Would the Working Group like to consider the possible attributes that a draft text on simplified business incorporation might contain?

(d) Does the Working Group currently have any view on what form its work on simplified business incorporation should take, i.e. a model law with or without a guide to enactment, a legislative guide, or some other text?