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Possible modifications of the draft legislative guide on an UNCITRAL Limited Liability Organization

Observations by the Government of Italy

Note by the Secretariat

The Government of Italy has submitted to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) the following observations in order to provide the Working Group with additional information for its deliberations. The text of the observations is reproduced as an annex to this note in the form in which it was received by the Secretariat, with formatting changes.



Annex

Possible modifications of the draft legislative guide on an UNCITRAL Limited Liability Organization

I. Introduction

1. Due to the spread of the coronavirus disease 2019 (COVID-19) and the measures adopted by States and the United Nations in response to the pandemic, the thirty-fourth session of the Working Group scheduled to take place in New York from 23 to 27 March 2020 was postponed until further notice. To allow the discussion on the draft legislative guide on an UNCITRAL Limited Liability Organization to continue, the UNCITRAL secretariat invited States to provide official comments to the working paper [A/CN.9/WG.I/WP.118](#), which were submitted to the fifty-third session of the Commission,¹ and organized two online informal consultations in May and June 2020. The Government of Italy wishes to take stock of the discussion at the informal consultations and submit the following comments for consideration by the Working Group at its thirty-fourth session, at the date of this note scheduled to take place in Vienna from 28 September to 2 October 2020. Whilst the following remarks reflect the understanding of the Italian delegation of appropriate solutions, these were written in the light of the debate that occurred in the course of the two above-mentioned informal consultations and represent an attempt to progress in the discussions towards a shared understanding of open questions.

II. Suggested amendments to the draft legislative guide on an UNCITRAL limited liability organization (UNLLO)

1. Member's share of the UNLLO and use of the term "share"

2. The use of the term "share" has been discussed repeatedly by the Working Group. This is currently referred to only in recommendations 21 and 25. In particular, pursuant to the current drafting of recommendation 25, the law should provide that, upon agreement or reasonable cause, members may withdraw from the UNLLO and be paid over a reasonable period of time the fair value of their share of the UNLLO, unless otherwise agreed.

3. Should the Working Group believe that the term "share" is not neutral enough and may recall joint stock companies (which are under many aspects different from an UNLLO), it could be replaced by the term "financial rights", so that the recommendation would read as:

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 financial rights in the UNLLO, unless otherwise agreed.

4. The term "financial rights" could then be defined in the Terminology section of the draft legislative guide as:

the member's financial stake in the profits and losses of the UNLLO;

5. The reference to "share" in recommendation 21 and the related commentary should be eliminated accordingly (see also further section 2 of chapter III, Membership and the scope of equal rights).

¹ Due to the Covid-19 situation, the 53rd session was held virtually from 6 to 17 July 2020. A resumed session will be held from 14 to 18 September 2020 in the format to be determined by the Commission in August 2020

2. Transfer of rights

6. Because of the intended simplicity of the UNLLO, this delegation believes that the default rule in recommendation 24 (a) on transfer of rights should not provide for the possibility of partial transfer of the membership rights of an UNLLO member, and the term “or a part thereof” should be deleted accordingly. The recommendation could thus read as follows (modified text is in italics):

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

(a) *A member of an UNLLO may transfer its membership, when the other members, if any, agree to the transfer;*

7. In order to take stock of the possibility of partial transfer of rights in some jurisdictions, including the assignment of financial rights, this could be discussed in the related commentary for recommendation 24. Paragraph 106 of [A/CN.9/WG.I/WP.118](#) could thus be modified as follows:

Accordingly, the default provision set out in the Guide permits members of the UNLLO to transfer their membership subject to the agreement of the other members. The laws of some States may permit the transfer of certain rights (often financial rights) with the retention of others, while laws of other States require all rights attached to the membership to be transferred. Even in that latter instance, members are generally able to make use of their financial rights in the UNLLO without being required to transfer their membership. For instance, they can enter into a derivative contract with another party over their financial rights or use their share of an UNLLO as collateral for other obligations or business opportunities. The Guide recognizes that pursuant to domestic legislative systems, specific principles of implementation of recommendation 24 may differ by State.

3. Record-keeping of organization rules

8. The draft legislative guide emphasizes the importance of recording the organization rules in paragraph 58 of [A/CN.9/WG.I/WP.118](#). It is the opinion of this delegation that, in the interest of UNLLO members as well as third parties potentially dealing with an UNLLO and public authorities, organization rules should be recorded and this should be clarified in a recommendation.

9. As a second best, in order to encourage UNLLO members to record the rules, the commentary to recommendations 29 and 30 could urge members to record their agreement regardless of its form. Paragraph 126 of [A/CN.9/WG.I/WP.118](#) could thus read as follows (inserted text is in italics):

Open communication and transparency are important issues for any business entity, but they are arguably of even greater importance in respect of the UNLLO. Members of the UNLLO are likely to have an equal share of the UNLLO, and establishing and maintaining trust among them is of great importance. Access to and proper dissemination of information to all members will further enhance trust among members and will permit them to be meaningfully involved in decision-making processes, thus providing a strong basis for the positive performance of the UNLLO. *In this regard, the importance to keep records of the organization rules should be again emphasized (see para. 58 above).*

4. Model Organization Rules

10. In order to keep model organization rules simple to use by UNLLO members, there should be only one set of model organization rules (applicable to multi-member UNLLOs managed by all members exclusively), which should in principle only include the default rules in the draft legislative guide. To the extent that certain provisions in the model organization rules are not applicable to single-member

UNLLO and multi-member UNLLO managed by designated managers, an explanation should be provided in the model organization rules.

11. The following provisions seems unfitted for single-member UNLLO and multi-member UNLLO managed by designated managers:

<i>Relevant provisions</i>	<i>Single member UNLLO</i>	<i>Designated managers UNLLO</i>
Section 2. a-f	X	
Section 3. c-e	X	
Section 4	X	X
Section 5	X	
Section 8	X	

III. Further issues to be discussed in relation to the draft legislative guide on an UNLLO

1. Name of the UNLLO

12. Having in mind that the Working Group was told the acronym “UNLLO” would remind of the “United Nations” and consequently cannot be maintained, the Working Group should consider the adoption of a different word to name the entity at stake. So far, proposals for an alternative name have highlighted two main objectives. First of all, in order to signal to third parties that they may be dealing with an UNLLO, it was told that the law should require the name of the UNLLO to include a phrase or abbreviation or logo that would enable it to be distinguished from other types of business entities. The use of the same or a similar phrase or abbreviation in different States would assist UNLLOs engaging in cross-border trade as the defining characteristics of the entity would be immediately ascertainable upon recognition of the phrase or abbreviation, even in the cross-border context. Since the UNLLO is proposed as a legal form specifically tailored to MSMEs in addition to existing models, it is best identified by a phrase or abbreviation that is independent from the local legal context.

13. On the other hand, some observed that the search of the name should focus on the aim to provide clear notice to third parties of the nature of UNLLO being limited liability. Under this perspective, words “limited liability” could be included in the name. Paragraph 38 of [A/CN.9/WG.I/WP.118](#) could thus be amended as follows (inserted text is in italics):

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

14. The Italian delegation further suggests that the Working Group may consider whether a symbol could instead be used, if this facilitates understanding in all languages.

2. Membership and the scope of “equal rights”

15. Different views have been expressed in relation to the meaning of the term “equal rights” in recommendation 11. We see the need to clarify, at least in the commentary, whether “equal rights” encompass all kinds of rights, including management rights and financial rights of the UNLLO Members. In doing this, it is suggested to consider that recommendation 21 provides for distributions to be made in proportion to their respective [share] of the UNLLO.
