

SUBJECT: 32ND SESSION OF WORKING GROUP I MICRO, SMALL AND MEDIUM-SIZED ENTERPRISES - UNCITRAL¹

New York City, USA from 25 to 29 March 2019

TITLE: REPORT TO LAWASIA AND UNCCA

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SUMMARY: The Author, with the approval of UNCCA², represented LAWASIA³ as an invited international NGO to the UNCITRAL Working Group I MSME⁴ in New York City, USA from 25 to 29 March 2019. This report to LAWASIA and UNCCA documents the representation of LAWASIA in the Working Group I session, provides a report on substantive issues and observations from the session for LAWASIA's membership.

DATE OF 31 May 2019

REPORT:

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1. LAWASIA REPRESENTATION

1.1 Working Group I MSME

Working Group I MSME, which is composed of all States Members of the Commission, held its thirty-second session in New York from 25 to 29 March 2019. The session was

¹ United Nations Commission on International Trade Law

² UNCITRAL Coordination Committee for Australia

³ The Law Association for Asia and the Pacific

⁴ Micro, small and medium enterprises

attended by representatives of certain States Members of the Working Group, observers from other States, observers from organizations of the United Nations system and Intergovernmental organizations, and invited international non-governmental organizations including LAWASIA.

The Working Group Chair was Ms. Maria Chiara Malaguti (Italy) and the Rapporteur was Ms. Katarzyna Michalak (Poland).

The Working Group Secretariat has released its report, 'Report of Working Group I (MSMEs) on the work of its thirty-second session (New York, 25-29 March 2019)', 'Official Report'.⁵

1.2 Observation for LAWASIA

The Working Group Secretariat indicated the objective of finalising the UNLLO Legislative Guide to present it to the Commission within the coming year or so. It is an appropriate time to confirm that LAWASIA stay informed as the Legislative Guide is progressed. The UNLLO may be relevant to LAWASIA membership in States where the legislative guide may be adopted or where UNLLOs may carry on business.

2. 32ND SESSION

Working Group I was convened in New York from 25 to 29 March 2019. The Working Group purpose was to engage 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 Organization⁶. Also, to consider the findings of the Colloquium on contractual networks and other forms of inter-firm cooperation -

“to further analyse the relevance of the contractual networks to the current work on developing an enabling legal environment for MSMEs and the desirability of taking up work of those networks. In addition, it was agreed that the colloquium should also explore legal tools that achieve goals similar to

⁵ A/CN.9/968 Official Report

⁶ A/CN.9/WG.I/WP.114

contractual networks that were being used in both civil and common law jurisdictions.”⁷

The first two days, 25 to 26 March, of the session were devoted to a Colloquium on contractual networks and other forms of inter-firm cooperation. Following the Colloquium, the Working Group convened on 27 to 29 March.

3. REPORT ON THE COLLOQUIUM

The Author attended all Colloquium sessions and these were noted by UNCITRAL⁸.

The Colloquium panels identified the following obstacles in relation to MSME⁹: difficult access to information on export opportunities which increased costs and barriers to entry in the markets for MSME; mandatory and voluntary standards and regulatory requirements for export and the barriers for MSME to become informed of these; lack of funding especially from conventional credit providers; difficulties for MSME to attract high-quality workers; limited ability for MSME to influence decision-making processes in the regulatory environment; informality and registration costs being disproportionately high; low scope for innovation and technology adoption, and increased difficulty in joining regional and global value chains.

In response to these challenges the panel through a series of presentations discussed network strategies for MSME which emphasised the role of mutual trust of members. Three categories of networks were considered - business ecosystems organised by a large company for MSME, cooperatives of independent competitors, and chains of economic solidarity.

The panel also discussed several examples of multi-party contracts which require collaboration by the different players and called for specific rules for them to be effective. In the case of developing economies contract farming was highlighted as this permits small suppliers to engage in a broader agriculture supply chain network.

Examples from developed economies were also considered to including in biotech, automotive, the French economic interest grouping, Italian collaboration models,

⁷ Official Report *ibid* at pages 3 and 4

⁸ A/CN.9/WG.I/XXXII/CRP.2 and A/CN.9/WG.I/XXXII/CRP.3

⁹ *Ibid* 8

Chinese contractual joint-venture, the limited liability company from the USA, and the example from Africa OHADA.

A recurring theme in the presentations was the potential value of these contract networks in permitting a governance structure around the development of technology to support and promote MSME.

As to the Working Group deliberation of the outcomes of the Colloquium, there was a consensus that there are several successful examples of collaboration. However there was a view that despite the success of the models presented that these arrangements may not be optimal for MSME and in some cases could fetter MSME including where they constrained the principle of freedom of contract.

Quoting UNCITRAL -

*“The Working Group noted the findings of the colloquium on contractual networks and other forms of inter-firm cooperation and discussed the appropriate way to reflect them in the final report of its thirty-second session. It was agreed that the topics discussed at the colloquium were interesting and innovative in many ways. **One delegation noted that the governance aspect of contractual networks and multiparty contracts was a cutting-edge theme which might deserve further consideration in the future as a mechanism that would help address inequality.** Another delegation agreed on the innovative aspect of contractual networks but noted that they incorporated several dimensions which might require separate consideration. Overall, the Working Group agreed that consideration of such topic would not be a matter of priority in the context of its current work.”¹⁰*

4. INTERVENTION AT THE WORKING GROUP

The Author attended all sessions and addressed the Working Group. Chairperson Ms. Maria Chiara Malaguti, addressing the Working Group, thanked the Author for her intervention, referenced in the bolded words in the quote above. After the Intervention several Member State members and International Organization representatives also approached the Author and noted appreciation of the Intervention especially in the

¹⁰ Official Report *ibid* at page 10

context of extension of the United Nations Sustainable Development Goals to governance in technology development.

In the Author's intervention, the Author thanked UNCITRAL for the opportunity for LAWASIA to attend and confirmed respect for the decision of the Member States to not take forward the Colloquium as part of the Working Group. The Author then instanced that some of the Colloquium structures could assist to promote the development of the ethics and governance of technology development to support MSME. Specifically, for the networks owning the technology to – be open to MSME on the basis of inclusion and open access, not assume literacy, and not assume written contracts. The Author also noted that civic minded investors in technology are seeking development of a governance framework to inform their investment decisions much as the UN SDGs are increasingly referenced by civic minded investors. As such the Author noted that as appropriate there may be other opportunity for other UNCITRAL groups to take forward the outcomes of the Colloquium.

5. REPORT ON SUBSTANTIVE ISSUES

5.1 Ongoing work

Essentially the objective of the Working Group continues developing a legislative guide for potential adoption by States to establish a legislative framework for micro, small and medium enterprise informal businesses to facilitate them participating in the formal economy. This includes the concept of separation of owner and organization and resulting limiting the liability of the owner. The objective is for the UNLLO to facilitate greater certainty for the micro, small and medium enterprises businesses and the third parties dealing with them. In turn another objective is for this to encourage expansion of businesses in economies in development.

5.2 Observations on discussions

Each discussion canvassed in substantial detail the issues arising from the relevant Recommendations. The discussions canvassed a broad spectrum of views reflecting the different State and observer policy positions, legal systems and experiences of the delegations. Delegates referenced simple corporate structures within their jurisdictions or as understood to be successful in other developing economy States.

Common themes in the discussion continue around how the UNLLO framework would relate to a State's existing company law and whether the UNLLO Recommendations were standard setting or a default position subject to a State legislating otherwise.

Whilst the discussion reflected many different views the session interventions overall reflected the objective of the Working Group and the values, to promote micro and small businesses in developing economies, underlying this.

In particular, this 32nd session was focussed on use of terminology and for terminology to not constrain the UNLLO inadvertently. Two aspects, below, are focused on to demonstrate this point. In addition the Working Group deliberated what would be a 'share' in an UNLLO, with the issue to be taken forward into subsequent sessions.

5.3 Organization Rules¹¹

The main aspect of the session was the fundamental issue of whether the UNLLO should have a "members' agreement" and whether it should be recorded.

The issues around this included whether the requirement for an agreement may inadvertently exclude single-member UNLLOs. There was consensus that the UNLLO even if single member would need a set of operational rules and the Working Group agreed to use "organization rules" as a defined term.

The Working Group discussed whether such organization rules would need to be recorded, and if so, in what form. Whilst the importance of recorded writing as an evidentiary requirement was noted, the Working Group agreed to remove the word "recorded" and to permit evidentiary requirement to be on a State basis.

Some Member States highlighted that oral agreements and agreements by conduct were common and that requiring written organization rules could merely impose additional transactional costs on members of the UNLLO. It was added this was unnecessary for UNLLO members deciding to merely rely on the default rules in the draft Guide. It was also noted that some existing legal forms in some jurisdictions do not require organization rules to be written or recorded.

¹¹ Official Report *ibid* at pages 6 and 7

After very extensive discussion, the Working Group agreed that a requirement to record organization rules would be left to States to decide. Further that the Commentary reflect this policy choice and it left to States to considering advantages and disadvantages.

5.4 Duty of the UNLLO Manager¹²

The Working Group discussed the list of duties in draft Recommendation 16(a) and the value of retaining the list or using the term “fiduciary duties” as it appeared in 16(b).

There was significant discussion around definition and terminology. It was noted that most jurisdictions have their own understanding of fiduciary duties and there was some concern that national laws should not be displaced.

After discussion, the Working Group agreed to list a duty of care and duty of loyalty in draft Recommendation 16(a) but leaving the possibility open for States to include additional mandatory duties, including fiduciary duties of members who were not managers. Further, it was agreed to specify that the duties were owed to the UNLLO.

6. ENGAGEMENT FOR LAWASIA

6.1 Working Group Secretariat

The Author spoke with Monica Canafoglia, Legal Officer of the International Trade Law Division (monica.canafoglia@un.org) and discussed LAWASIA’s willingness to assist to promote the Working Group I approved Key Principles of a Business Registry legislative guide which was adopted by the Commission at its fifty-first session in July 2018. Ms Canafoglia confirmed that she had made contact to LAWASIA however UNCITRAL was yet to take advantage of the LAWASIA opportunity, as the best means of doing so is still under consideration by the Working Group Secretariat.

6.2 UNCITRAL

The Author spoke with UNICTRAL’s Mme Anna Joubin-Bret who expressed her appreciation of the contribution of LAWASIA to the UNCITRAL Working Groups.

¹² Official Report *ibid* at pages 7 to 10

The Author also met most delegations of Member States and observers.

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