

Multiparty Contractual Networks: New Tool for Global Entrepreneurship and Supply Chains

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Traditional corporate law designs templates for legal entities for organised commercial collaboration among individuals, investors, lenders and licensors serving customers over a long period. In many cases, corporate law is ill-suited to define legal rights and responsibilities among commercial participants under more limited circumstances. For example, a unique framework for such collaboration may be more flexible and desirable where all the participants are micro, small and medium-sized enterprises (MSMEs). In MSME contractual networks, collaboration may be limited to a specific project or may be intended only as a prelude, or experimental cohabitation, to a potential long-term commitment under a future corporate framework. Conversely, MSME ecosystems can help large global enterprises to build reliable, resilient, compliant and efficient global value chains (GVCs).

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By promoting innovative operational relationships, multiparty contractual networks may provide a flexible alternative to a traditional corporate entity. Whether powered by interpersonal relations of trust or an anonymous internet transactions platform, such contractual networks may facilitate MSME participation in regional and global commerce by achieving economies of scale. The United Nations Commission for International Trade Law (UNCITRAL) has completed a long list of international business law projects.¹ Recently, UNCITRAL proposed a legislative guide to a standalone model of simplified corporation law for a UN limited liability organisation.² Now UNCITRAL is exploring suggested models for multiparty contractual networks as a further tool for facilitating MSME commercial success in integrating into global supply chains and sustaining private enterprise.³

At its colloquium in March 2019 in New York, UNCITRAL's Working Group I (targeting MSMEs) of professors, lawyers, business entrepreneurs and UN Commission for Trade and Development (UNCTAD) experts explored how to frame a model law on inter-firm 'cooperation' and 'contractual networks'.⁴ This covers several subtopics. What are the unique challenges faced by MSMEs? How can they achieve sustainable economic development? In a local or global economy driven by online 'digital platforms', how will the digital online platform shape MSME contracting practices? How can MSME networks be designed for MSME success in the global economy?

1 UNCITRAL has addressed other issues over the years: online dispute resolution in global e-commerce including arbitration and conciliation; arbitration and conciliation; commercial fraud; e-commerce; insolvency law; the UN Convention on Contracts for the International Sale of Goods (CISG) (1980); reform of investor-state dispute settlement; microfinance; procurement and privately financed infrastructure projects (including public-private partnership); security interests; and transport law.

2 UNCITRAL, 'Draft Legislative Guide on an UNCITRAL Limited Liability Organisation', available at <https://undocs.org/en/A/CN.9/WG.I/WP.114> accessed 16 January 2019. The draft guide seeks to show 'how a State could devise and regulate a simplified legal form for MSMEs that can best facilitate their success and sustainability, thereby stimulating entrepreneurship and innovation'. *Ibid* 5. It cites other existing legal entity forms akin to United States limited liability companies, the German Gesellschaft mit beschränkter Haftung (GmbH), the French société à responsabilité limitée (SARL) and entreprise individuelle à responsabilité limitée (EIRL) and other simplified business models. It promotes 'think small first', under principles of: (1) freedom, autonomy and flexibility to act; (2) simplicity and accessibility; (3) identity and visibility; (4) certainty and protection of intellectual property rights; and (5) control and the entrepreneur's right to manage the business without an external manager. Shares grant both financial rights and decision-making authority.

3 Other organisations support private enterprise for social benefit, whether for B Corporations or for developing economies. See, eg, Center for Independent Private Enterprise, www.cipe.org accessed 24 July 2019.

4 The annotated provisional agenda is available at <https://undocs.org/en/A/CN.9/WG.I/WP.113> accessed 24 July 2019.

Informal (non-contractual) networks

Existing informal networks range from chambers of commerce to incubator-sponsored panels of experts for startups and national governmental trade promotion and even to Twitter hashtag groups. In addition, UNCTAD provides a framework (known as UNCTAD EMPRETEC)⁵ for durable development of MSMEs globally and governmental support through e-government initiatives.

Challenges of informal networks

Some national governments promote local entities to share in research and development (R&D). In the German Digital SME Alliance, small tech companies are encouraged to cooperate in information and communications technology (ICT) development. But obstacles prevent cooperation if there is no functional digital interoperable interface between companies. Further, a collaboration platform must present to the public a common identity. Yet it must also link disparate entities that must retain their identities, service responsibilities and legal liabilities for compliance with data protection and other consumer laws.

Extending informal networks via informal clusters

A cluster is a collaboration, without ownership linkages, among small and medium-sized enterprises (SMEs) linking activities to a defined territory, where proximity fosters trust among participants. How, then, can SMEs globalise using a cluster to market and sell, in linkage with other SMEs, on a multinational level? As Professor Assens suggested, international trust

5 Under this programme, UNCTAD promotes workshops, pilot initiatives, supports SME supplier development programmes, 'Women in Business' awards in entrepreneurship and linkages among SMEs and between SMEs and multinational enterprises (MNEs) as catalysts for SME suppliers to upgrade and integrate into global supply chains. UNCTAD has developed frameworks for governments to facilitate business through 'e-regulations' accessible via online info portals; 'e-simplification' to simplify and streamline procedures for compliance with applicable laws; and 'e-registration', enabling online registrations. In short, MSMEs can thrive if governments design a 'mobile state' that enables self-service and easy compliance via a smart phone. See <http://empretec.unctad.org> accessed 24 July 2019.

UNCTAD has also undertaken a bio-trade initiative to support supplier diversity, conservation, socio-economic sustainability, in the value chain of biological products together with simplified, transparent means for legal compliance, assurance of legal rights and clearances for particular transactions. UNCTAD thus promotes trade fairs, market access and trainings in global supply chain management, particularly in sectors where limited capital investment is required (foot care, handicrafts, flora and fauna, sustainable tourism, fashion and forest carbon credit programmes).

depends on personal relationships. Clusters are like ‘friends and family’, either with few actual commitments (other than coordination of action) and no legal enforcement mechanisms.

Extending informal networks via trade clusters

The UN’s International Development Organization (UNIDO) promotes network linkages to overcome the challenges of MSME low productivity, operations in isolation, inability to attract dynamic business partners and, in particular, the inability of MSMEs to build sustainable links with large enterprises. Synergies can be promoted by developing socially and environmentally responsible business models that enable large enterprises to support smaller ones and get consumer buy-in for environmental, social and governance (ESG) goals. UNIDO also promotes public–private partnership to finance growth. ‘Cluster development’ enables MSMEs to avoid the dominance of large suppliers and large enterprise customers.

UNIDO’s approach works with existing organisations to build new networks based upon an initial diagnosis, before creating, implementing and managing an action plan, with ongoing performance monitoring. UNIDO has focused on particular industries in developing countries based on high potential for exports, attractiveness to foreign investors and opportunities for sustainable knowledge capital through vocational education and job creation. In Ethiopia, for example, UNIDO-supported clusters have helped transform the leather, textiles and apparel and agriculture industries. In short, UNIDO helps to build local national networks under a new vision for inclusive and sustainable industrial development.

Types of contractual business networks

Networks and ecosystems are essential components for MSME growth. Networks are crucial because business relationships depend on trust and confidence. A handshake shows that the value of the human relationships is stronger than the value of the assets of the transaction. Networks are created by friends in business who refer others for collaboration. As enablers, networks are essential to overcome MSME problems of legal barriers, financial limitations and financial markets.

So, what is a business network? First, the network is autonomous as an organisation and it invites autonomous players. A network creates reciprocal interdependencies. It is based upon mutual confidence and solidarity; supports the exchange of useful information; and enables the transfer of competencies among different specialists, a sharing of resources,

mutualisation of risks, reciprocal learning and apprenticeship, and constant updating of relevant information. Business networks secure durable cooperation.

What types of networks might be created for MSME contractual collaboration?

- *Enterprise client ecosystem.* In an ecosystem surrounding a main enterprise client, an ecosystem network might be created as an alliance of all suppliers to that enterprise, with a focus on compliance with the enterprise's procurement policies and potentially also looking for integration of the supply chain. Ecosystems might be territorial, such as co-location around one factory, or non-territorial. Or an ecosystem might create informal benefits, such as the sharing of equipment through loan, lease or shared operation. At its most advanced level the enterprise might co-locate suppliers in the enterprise's factory and pay all suppliers only upon delivery of the finished product by integrated suppliers.
- *Cooperatives.* In a cooperative, producers of the same goods or services form an alliance for collective storage, sale and delivery to customers worldwide. A cooperative is a form of co-ownership through a democratically elected self-governing entity. Cooperatives face the same issues as other entities in financing capital assets (especially land and improvements), since investments in one year with capital contributions can generate inequalities between newcomers and long-standing members. Cooperatives have both economic and social benefits.
- *Diaspora.* In a 'diaspora', agreements among participants replace the concept of co-ownership or joint operation of a community. For example, a diaspora of entrepreneurs might create linkages for mutual self-promotion in a target industry or target location (like the Rotary Club). The financing of operations might be achieved by subscriptions, not permanent shares. A classic diaspora exists for expatriates who have left one country or region in search of a better life, allowing them to enjoy the benefits while sending money home to those left behind. Some estimate that such repatriated funds from the global diaspora of expatriates is three times greater than governmental subsidies for the promotion of economic development.
- *Horizontal contractual networks.* MSMEs may gain access to global value chains under a 'horizontal' contract, where each contributes its products or services to a common project. This enables access to GVCs because, as a group, the contract participants play a role similar to a supply chain.
- *Vertical contractual networks.* In a vertical network, suppliers support a top-level enterprise customer. Participants in vertical networks may provide components, subassemblies or even partially finished goods, to be assembled by others. The network coordinates timing and quality. Global

enterprises seek stable relationships that decrease cost and increase quality, speed and stability of supply.⁶

What is the most critical glue for a successful network? Repeated personal contacts create the trust bond indispensable to organisational sustainability. Collective action offers the benefits of economies of scale, cost savings through aggregated purchasing power and interdisciplinary innovation between peers. Networks can optimise by continuous trust relationships and geographical proximity.

By contrast, networking based solely on contracts leads to anonymity, non-recurring contacts and thus lack of implicit trust. In market-driven networks, trust is maintained through the leadership of the large enterprise in an ecosystem network, through the charter of rights and duties of a cooperative's members or, in a diaspora, through sharing of value and social identity.

Contractual networks based on digital platforms

Online platforms increase MSME visibility and access to markets, reducing costs of entry and exits, simplify buying and selling procedures and promote innovation. Other advantages include wider access to buyers and suppliers, easier access to information, improved access to financial capital and lower gender bias. Thus, the digital platform economy creates a better future for emerging economies.⁷

Digital platforms can be used to leapfrog from emerging to digital economies without passing by the early industrial stage. For example, a ride-sharing platform can open new self-employment opportunities by 'financial inclusion' and an open path to empowerment for all. An effective digital platform can promote several economic goals, including health, gender equality, jobs and economic growth, innovation and infrastructure creation, and sustainable cities.

Digital platforms disrupt the traditional linear pipeline of 'product-based' thinking. Instead of requiring the entrepreneur to invest capital in organisational development (finance, capital equipment, human resources (HR) administration, with full-blown corporate governance and supply chains), a digital platform does much of the organisational structuring and compliance as well as marketing, sales and accounting. This allows the entrepreneur to invest only in the revenue-producing equipment. In

6 See generally 'Contractual Networks and Economic Development: A Proposal by Italy for Possible Future Work by UNCITRAL on Alternative Forms of Organization to Corporate-Like Models —Advanced Proposal' (2 May 2018) <https://undocs.org/A/CN.9/954> accessed 24 July 2019 (the '2018 Italian Proposal').

7 See the remarks of Professor Eric Vermeulen at UNCITRAL Working Group I, 25 March 2019.

Indonesia, GoJek Tech created a platform to connect multiple suppliers to customers (business-to-customer (B2C) and business-to-business (B2B)), providing access to finance where individuals lacked such access. The platform executes transactions and completes the payment and accounting for both parties. The platform expands its reach by adding new customer services, ‘micro-services’, that it launches.

Unfairness in digital platforms

Digital platforms may acquire monopolistic or oligopolistic power. While enabling intense competition by MSMEs, a digital platform may itself face few competitors. The ‘digital divide’ between tech-enabled companies, and between countries, may empower the platform managers unfairly. Digital platforms depend on Big Data, which may be used for biased outcomes. The platform managers might ‘forget’ the importance of improving people’s lives by redistributing power. Governments may respond by regulation or even competition. In Indonesia, the government launched its own app for ride-sharing to compete with gojek.com!⁸ And non-profit organisations may be needed to adopt, embrace and share digital platforms without distortions.⁹

In response, as advanced technologies acquire economic power (eg, the Internet of Things (IoT), blockchain, augmented reality, machine learning, Big Data and artificial intelligence), one can predict efforts by the ‘community’ (governments) to limit anti-competitive conduct, such as soliciting suppliers and later competing with them directly on the platform. Remedies include:

- the principle of technological neutrality, so that technologies do not disintermediate those without technologies;
- the principle of functional equivalency, promoting tech-driven economics but ensuring the competitiveness of other services;
- the decentralisation of the platform’s management;
- appointment of trusted managers (eg, an industry group for administration of an industry-standard ‘immutable’ blockchain ledger management) by all participants obligated to join in a platform to survive its monopolistic power; and
- new *distributed* financing and *distributed* ownership and control.

Such new investment paradigms could be based on legal structures akin to cooperatives. Since cooperatives have been generally limited to one industry

8 See generally Nick Srnicek, *Platform Capitalism* (Polity 2016).

9 See International Trade Center (World Trade Organization (WTO) and UN), ‘SME Competitiveness Outlook: Executive Summary, Business Ecosystems for the Digital Age’ (2018), 5.

in one locality, the investment paradigms will need to extend internationally their collaborative inputs and investments. Professor Assens suggested that collective ownership of new platforms could be resolved by giving specific incentives to those who contribute some value (eg, intellectual property) to the platform. As a tech business lawyer, I posit that a blockchain or smart contract could define the value of each marginal input and compute the value earned from that contribution by disparate users to a platform or application. Where financial funding is needed, crowdfunding might be solicited from users who receive subscription or user privileges in lieu of ownership of shares.

Sharing ownership and benefits across shared platforms

In a UNCITRAL debate, I raised the question of how ownership issues might be resolved legally in a platform-based economy. Challenges as to the valuation of a user's contribution may vary, since the value of investment and ownership of the platform might increase over time while only a few 'owners' (contributors of ideas or value) might have an ownership right that appreciates over time. Further, as the platform morphs, so does the community and the value of individual contributions.

Such new investment paradigms remain to be developed and adopted. New paradigms might inspire broad participation in platform development and operation, based on consensus building and quasi-democratic governance of platforms that become, in effect, quasi-public utilities for broad public benefit. For example, technologies can be designed for broad participation by all participants in a given industry (eg, logistics and supply chain management), and a new paradigm for self-governance using the collectively agreed fixed rules for the industry may validate both the platform and the given industry's use of it.

Currently an international consortium of shipping companies and European customs authorities has tested a blockchain, or 'distributed ledger', to eliminate paper documentation, accelerate compliance, minimise mistakes and penalties for non-compliance, reduce data entry errors, save costs for shippers and governments, transparently share Big Data generated daily to enable predictive analytics and smarter routing and coordination of land-based facilities with ships, and overall improved capacity utilisation. By improving efficiency, such a shared platform can also reduce global pollution and generate savings that could be shared with consumers.¹⁰

10 See Coinrivet, Blockchain at sea: 'How technology is transforming the maritime industry,' International Shipping News (March 2019), reprinted at www.hellenicshippingnews.com/blockchain-at-sea-how-technology-is-transforming-the-maritime-industry

As a lesson for founders and investors, the UNCITRAL conference highlighted that entrepreneurs and their lawyers may be called on to rethink the classic corporate development, funding and scaling of platform applications using investor capital. If the platform becomes too powerful (à la Facebook or Google), it will be regulated heavily, impairing investors' expectations and rewards. Conversely, if the platform supports both government and enterprises, and if it acquires power with the consent and participation of those whom it serves, it will fulfil the dream of multi-party network agreements.

Contractual networks for MSME growth

Multiparty contractual networks help to integrate disparate SMEs and can be an alternative to joint ventures and co-ownership. But multiparty contracts can also be a prelude to common ownership, such as an equity joint venture or partnership.

For SME collaborations, contracts and company law offer both alternatives or complements. Both can be used to promote stable and innovative cooperation.

When and why do contractual networks emerge? First, a contractual network supports integration and coordinated production across different levels in a supply chain. By joining a contractual network, each individual entity can overcome barriers to entry and gain economies of scale with reduced transaction costs. Such a network can coordinate distribution, integrate production and distribution (whether by agency, distributorship or franchise) and provide access to changing global markets.

Second, a contractual network enables the sharing of innovation. A 'common platform' (in a shared network) creates intellectual property rights (IPR) that can be used under licence by all suppliers in the same supply chain or by the suppliers in different, complementary supply chains.

Third, a contractual network facilitates and reduces marginal costs for SMEs in the implementation of global mandatory and voluntary standards. This solves a critical challenge to SMEs where compliance duties and costs can delay entrepreneurship.

Examples of contractual networks

As a prelude for analysis of the legal parameters for successful contractual networks, several speakers reviewed the frameworks and operations of contractual networks across different industries.

COLLABORATIVE FARMING

Farming operations are suitable for a network contract.

For Italy, Professor Paula Iamiceli noted that, under the Italian legal regime for 'network contracts', the Mondobio farming network orchestrates vertical cooperation among an ever-changing group of network members, ranging from seed providers to farmer organisations, processors, trademark owners and traders, creating innovative products and services, offering SMEs access to new markets and flexible mobility for entering and exiting the network. Similarly, the Italian Etoil oil and gas network promotes horizontal integration of suppliers of complementary products and services under common quality assurance systems, with governance requiring unanimity for new members to ensure complementarity, and non-competition, of new members' goods and services.

For the United States, Professor Harry Gabriel highlighted the American experience with 'contract farming', which solves the problem of capital investment by undercapitalised entrepreneurs (farmers) through leasing of tools by the buyer organisation or by a farmer's cooperative. Quality assurance and branding are achieved through agreed standards and inspections, which form the template for resolving disputes over performance.

OIL AND GAS

Professor Sheraldine Pinto of Venezuela outlined the multiparty agreements in oil and gas production, support services and distribution, in a business that is capital intensive and involves both geological and political risks.

CONSORTIA

Contractual joint ventures, or consortia, among international and national oil companies, local drillers and support services require resolution of governance by an operations committee, the legal basis for sharing rights and obligations, defaults, withdrawals, transfers of interests, external relations of the consortium with third parties, joint liability and indemnifications for breach by others, delegated authority to act for others, tax allocations and exit structures (voluntary, expulsion, governmental-forced expulsion and reputational issues).

TURNKEY EPC

As an alternative, turnkey exploration and production contracts (EPCs) by a single prime operator (owned by the host country oil company) might achieve similar economic outcomes where the EPC contractor is responsible

for all activities from design to procurement and construction to deliver the asset to the end-user or owner. The EPC contractor may provide all or most services and is responsible for failures by subcontractors.

MANAGED EPCM

Engineering, production and construction management (EPCM) contracts enable one leader to manage the entire project and to price the project variably to reflect risks in engineering, new technologies and politics, where the ‘customer’ assumes certain risks.¹¹

AUTOMOBILES

For the automobile industry, Professor Matthew Jennejohn identified both current and evolving supply chain models. In a conventional supply chain (eg creating a brake system), the general terms and conditions apply to top-level suppliers, who then apply the original equipment manufacturer (OEM) buyer’s terms to all lower tiers. The supply chain would include both generic quality standards (eg, ISO 9001 + IATF 16949) but also the supplier’s and OEM’s own quality control terms. The OEM buyer (final manufacturer) may adopt either a one-time advanced procurement or joint development agreement or a long-term strategic supplier engagement for advance procurement. An OEM may allow the first-tier supplier to select subcontractors or direct which lower-tier suppliers must be used to increase collaboration throughout the supply chain.

Governmental protections

Local governments may open opportunities to SMEs by various protectionist measures:

- *Local content requirements.* A local content requirement for materials or training services (according to local norms) can open doors, but the SME must still perform competently under such norms.
- *Tax promotion.* Special tax incentives may be provided according to ‘enterprise zones’ or classes of participants in a multiparty contract network.

11 See, eg, Damian McNair, ‘EPCM Contracts: Project delivery through Engineering, Procurement and Construction Management Contracts’ (January 2016) www.pwc.com.au/legal/assets/investing-in-infrastructure/iif-8-epcm-contracts-feb16-3.pdf; and Ron Douglas, ‘EPC or EPCM Contracts’ (January 2016), available at www.ausenco.com/en/epc-epcm-whitepaper accessed 24 July 2019.

Contractual networks under existing laws

UNCITRAL is considering Italy's proposal to prepare a model law that would reflect multiparty contracting, separate from a traditional consortium. UNCITRAL has studied the special-purpose 2009 Italian law on network contracts,¹² the French Groupement d'Intérêt Economique (GIE) and the European Economic Interest Group as well as other existing models for contractual networks. The UNCITRAL investigation does not appear to consider public-private 'partnerships' (eg, build-own-transfer or build-own-operate-transfer) that require a high level of project specificity, resources and technical performance. For governance, the UNCITRAL approach to contractual networks focuses on the contractual duties rather than an entity manager's 'fiduciary' duties. Hence, contractually defining such duties is a lynchpin for a well-honed contractual network.

ITALIAN 'NETWORK CONTRACTS' LAW

Italy's special-purpose Law on Network Contracts¹³ has been amended frequently.

The 'contractual network' ('contratto di rete') is an agreement by which: 'more entrepreneurs pursuing the objective of enhancing, individually and collectively, their innovative capacities and competitiveness in the market, undertake a joint program of collaboration in the forms and specific clusters as they agree in the network contract, or to exchange information or services of an industrial, commercial, technical or technological nature, or to engage in one or more common activities within the scope of their business.'

The scope of contractual networks can thus broadly differ, and kind and degree of cooperation are left to the free agreement of parties, as long as, through the determination of a common programme, strategic goals are shared that allow either the improvement of innovative capacity or the growth of competitiveness. Cooperation can range from a plain undertaking to exchange information or services, to the organisation of cooperation, up to

12 See generally 2018 Italian Proposal for Contractual Networks. After several legislative amendments, observers have questioned whether the law on 'network contracts' will be perennially a 'construction site' for new improvements. See, eg, AltalexPedia, voce agg al 23 July 2013, 'Contratto di rete' www.altalex.com/documents/altalexpedia/2013/07/22/contratto-di-rete accessed 24 July 2019.

13 See generally 2018 Italian Proposal for Contractual Networks. After several legislative amendments, observers have questioned whether the law on 'network contracts' will be perennially a 'construction site' for new improvements. See, eg, AltalexPedia, voce agg al 23 July 2013, 'Contratto di rete' www.altalex.com/documents/altalexpedia/2013/07/22/contratto-di-rete.

the joint conduct of economic activities. This leaves the door open to vertical (coordination of suppliers with shared standards of production, distribution or franchise chains) or horizontal integration (research and development, centralised point of sale or of acquisition). Under a recent amendment to the relevant legislation, business networks can also take part in public bids. The sole requirement to enter into a business network contract is to be an entrepreneur, irrespective of the nature and the activities performed.

FRENCH GIE

The GIE is a French form of collaborative enterprise for a limited duration only.¹⁴ A GIE is a contractual grouping of physical or legal persons with the common goal of facilitating the conduct of the economic activity of its members (or to improve them or increase the results). A GIE must be registered on the commercial registry and has its own ‘legal personality’, yet (as a ‘multiparty contractual network’) it can be created without any capitalisation, and thus no assets.¹⁵ The members place into common usage diverse components of such activity, such as services, sales counters and technical assistance. A GIE may not have the goal of pursuing profits for its own account. The GIE may borrow. Members are guarantors of the GIE’s debts, though new members can contractually limit their guarantees to future debts. Local labour laws require GIE managers to report to employee ‘enterprise committees’ on GIE finances and operations. Admission and exit are governed by the GIE contract. The rigidity of the contract risks sclerosis and early liquidation.

EUROPEAN ECONOMIC INTEREST GROUPING (EEIG)

The EEIG follows the French GIE model and provides a legal framework for a network contract under the laws of European Union Member States.¹⁶ ‘The Member States shall determine whether or not groupings registered at their

14 French Code de Commerce, Art L251-1 et seq (modified since original 1967 version) www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000005634379&idArticle=LEGIARTI000006230960&dateTexte=&categorieLien=cid. See Droit Finances, ‘Groupement d’intérêt économique (GIE) (définition)’, available at <https://droit-finances.commentcamarche.com/faq/25161-groupement-d-interet-economique-gie-definition>.

15 French Code de Commerce, Arts L251-3 and L251-4.

16 EU Council Regulation (EC) No 2137/85 of 25 July 1985 on the EEIG <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31985R2137> accessed 24 July 2019. Under the Brexit ‘EU Withdrawal’ agreement (not yet adopted as of 25 April 2019), the United Kingdom will honour the legal entity of an EEIG (European Economic Interest Grouping (Amendment) (EU Exit) Regulations 2018 www.gov.uk/eu-withdrawal-act-2018-statutory-instruments/the-european-economic-interest-grouping-amendment-eu-exit-regulations-2018).

registries... have legal personality.’¹⁷ ‘The purpose of a grouping shall be to facilitate or develop the economic activities of its members and to improve or increase the results of those activities; its purpose is not to make profits for itself.’¹⁸ No single member may hold a majority of votes. Vetoes may make the EEIG less flexible, if not sclerotic. The unanimous consent of all EEIG members is required for changing the commercial purpose (‘objects’), the number of votes allotted to each member; the conditions for taking decisions; extending the duration of the grouping; altering the contribution by every member or by some members to the grouping’s financing; altering any other obligation of a member, unless otherwise provided by the contract for the formation of the grouping; and any other alteration to the basic contract unless otherwise provided by that contract.¹⁹ EEIG groupings are subject to their national laws relating to employment, insolvency and cessation of payments. Such local laws may provide other grounds for the winding up of groupings.

DELAWARE LLC ACT

While a Delaware limited liability company (LLC) is an entity, that may be just a formality. ‘It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.’²⁰ It is thus a finely tuned ‘network contract’ law. It permits elimination of a manager’s fiduciary duty (but not the duty to act in good faith). Its objective may be both private and public, to pursue ‘public benefits’ (so that the goals need not be solely to promote the financial benefits of members). ‘Public benefit’ means ‘a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than members in their capacities as members) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature’.²¹ A statutory public benefit LLC ‘shall be managed in a manner that balances the members’ pecuniary interests, the best interests of those materially affected by the limited liability company’s

17 *Ibid* Art 1, para 3.

18 *Ibid* Art 3, para 1.

19 *Ibid* Art 17.

20 Delaware LLC Act, Delaware Code Annotated, Title 6, s 18-1101(b) <http://delcode.delaware.gov/title6/c018/sc11/index.shtml> accessed 24 July 2019. See also ss 18-1101(d) and (e).

21 Delaware Code Ann, Title 6, s 18-1202(b), <http://delcode.delaware.gov/title6/c018/sc12/index.shtml> accessed 24 July 2019.

conduct, and the public benefit or public benefits set forth in its certificate of formation'.²²

Legal issues in contractual networks

SMEs come together when they have complementary goods and services, usable for large buyers. A network might pursue one or more projects to be jointly developed. The legal taxonomy would distinguish types:

- single-project versus multi-project networks;
- vertical versus horizontal networks;
- temporary versus stable (continuing) cooperation; and
- variable levels of sharing or licensing of physical and immaterial rights.

Shared objectives

A well-defined shared objective can not only mobilise participation, but also replace the formality of a corporate structure. Such objectives could vary according to stages of commercial development. It could range from 'the mere organization of coordination of supply of goods, service or information among participants (e.g. through the establishment of a commercial platform) through collaboration into a strategic project (e.g. a Research and Development (R&D) project for the development of a new product) to the performance of a common activity (e.g. the production and distribution of a new product jointly designed)'.²³

Modularity

An effective network contract offers flexibility through modularity. One class of participants can perform particular roles separate from others. But such modularity should fit within well-established frameworks of sector-specific rules to enable parties to tailor collective operations to specific economic sectors.

Time frame

Network contracts need to define time frames and conditions for extension of common efforts, or for early termination.

²² *Ibid* s 18-1202(a).

²³ 2018 Italian Proposal, at p 8.

Minimum contractual terms

Network contracts generally require a project plan, administrative mechanisms, licensing of both ‘background’ IPR (pre-existing, owned by one participant) and ownership and licensing of new jointly created ‘foreground’ IPR, milestones for performance metrics, indemnification, termination events and consequences (such as who owns what).

Standards of managerial duty

The founders under multiparty network contracts need to choose standards of care for managers. Basic contract law implies a duty of good faith execution. Waivers of fiduciary duty should be considered and, if desired, expressly adopted.

Braided governance

Most master services agreements appoint day-to-day project management teams for operational decisions, subject to escalation to a top-level decision body. In a multiparty agreement, governance needs a modular architecture to address hazardous risks, allowing companies to mix and match their governance approach to the unique environment.

Thus, in a multiparty network contract, governance might need to be modular, or ‘braided’, through different governance for different elements. For example, a project may be managed by a project team, but special remedies (and decision-making procedures) may be necessary to address ownership or licensing rights. For decisions to allocate IPR, the network contract might grant veto rights to those participating in innovation and new technologies, potentially leading to restructuring of the project or mediated resolution of value allocation.

Where governance committees decide issues, the dynamics may focus on building consensus, such as per-capita voting, disproportionate to capital contributions. This promotes harmony and may deny vetoes. The lack of a fiduciary duty by all contract participants, usually intrinsic to entity forms of collaboration, invites adopting both legal and informal relationship-based governance structures.²⁴

24 While Delaware’s LLC Act permits contractual elimination of fiduciary duty, it retains the duty of good faith and fair dealing. Del Code Ann, Title 6, s 18-1101(c) (2018).

Intellectual property

Durable allocation of IPR is crucial in the contract design to avoid ‘spillover’ effects. In a network contract there may be different degrees of asset sharing, with IPR being the most difficult to define and agree upon in advance. If there is asset sharing as to IPR, joint ownership and consensus-based decision-making can resolve the challenges of differing contributions and benefits. Since common ownership may be challenging, in lieu of joint ownership by the contractual partners, the contractual network might joint with a new company (typically owned by a neutral dedicated operator) to own the IPR.

Entry and exit

Network contracts may require a more complex governing structure than bilateral contracts. Changes in participants may require voting by committees representing different interests, so any final vote should represent all (or nearly all) interests. Further, an exit by one participant should not terminate the agreement as to others.

Disputes, enforcement and remedies for breach

Multiparty contracts need new approaches not based on a purely bilateral relationship. A breach may be fixable or fundamental but measuring the ‘fundamental’ character must be done in relation to the common interest of the remaining parties, who may wish to continue after ejection of a non-complying party. Remedies may be spelled out across a broad range of reasonably foreseeable scenarios.

Similarly, a multiparty contract needs to adopt both ‘soft’ (informal) and ‘hard’ (legally enforceable) remedies to prevent a ‘hold-up’ by a party that cannot or will not perform. Where there is more asset sharing, trust levels may be higher, informal persuasion more effective and legal remedies more enforceable (eg, foreclosure on an asset used in the common operations). Informal enforcement factors include repeated dealings, brand management and reputational risk control, social norms, commercial practices and social constructs and influencers in the market.

Further, like ‘braided’ governance, ‘braided’ enforcement tools may be most effective. For example, IPR are publicly evidenced rights, so judicial dispute resolution might be most transparent. But, for performance of duties, private arbitration might best preserve value without impairing enforcement.

Finally, a multiparty contract implies a minimum level of cooperation by and for all participants. The dispute resolution mechanism should aim for

collaborative resolution, not adverse, taking into account the dimension of the cooperation and the impact on each other participant.

Invalidity

In a bilateral contract, one party's obligations might be invalid *ab initio* or performance might be excused due to a breach or other performance failure by the counterparty. Such scenarios invalidate the contract and deprive potential other stakeholders (who are non-parties) from enjoying the anticipated benefits. By contrast, a multiparty contract should preserve the collaboration of others, to continue the contract. A concept of 'partial invalidity' allows the contract to be kept alive if one party is in breach. This approach would protect other members of the multi-party network contract as well as any non-party stakeholders.

Choice of law

UNCITRAL's proposed law targets adoption by member states of their own form of a law of multiparty network contracts. This approach allows members to choose the jurisdiction for applicable law (assuming some reasonable connection). The question of foreign recognition and enforcement of network operations may arise but is out of scope.

Conclusions

One may question whether it is necessary to adopt a new model law for multiparty contract networks or other forms of inter-firm cooperation. Existing laws already offer a multiplicity of non-equity alliance contracts (consortium, joint venture, partnership and business alliance). Existing laws offer flexible special-purpose contract networks (with varying levels of legal entity status) under the French GIE, an EEIG, the Italian *contratto di rete* or the Delaware LLC Act, each of which can be used internationally but comes with local jurisdiction, non-commercial laws and possible tax nexus. For certain countries with a developing legal framework, a new model law for network contracts can be useful for entrepreneurship and participation in GVCs. For all, a new model law can plug a hole in current corporate and commercial legal models, as a complementary alternative to temporary or contingent business groupings.

The multiparty contract might serve as a substitute for a corporate entity for aggregation and allocation of resources and management, limitation of liability and governance. Such a contract offers a wide opportunity for use of business

networks in cases in which formal links fail to supply support cooperation and corporate forms are perceived as too costly and not flexible enough. The Italian proposal encourages MSMEs to use the flexibility offered by multiparty network contracts as a 'trial run' or as an 'easy start' for collaboration among dynamic enterprises seeking economies of scale and global reach.

Unfortunately, the flexibility of multiparty contracts opens a Pandora's box of potential customisation of legal regimes for adoption by MSMEs. Options vary according to funding structures, whether to adopt a common fund, how to allocate liability of individual MSME participants to third parties, admission of new members and exits (voluntary or otherwise) or termination. A new model law has the potential for merely raising the bar for possible complexities from alternative use cases in a variety of industries. As experienced in the US with the introduction of the highly flexible LLC company paradigm, a model 'multiparty contract network' will undoubtedly entail delays in analysis, structuring decision-making and commencement of operations. Experts in law, corporate finance, intellectual property and project management will be needed to develop, negotiate and implement a multiparty contract. While the Italian model offers a 'light' version (with no corporate legal entity and no common fund), the 'heavy' version is more likely to attract attention.

Thus, the multiplicity and variations demonstrate the challenge of adopting a broad framework without special use cases. The choice between a flexible contractual network and a standard corporate form requires the designers and founders to balance commercial collaboration with corporate centralisation. Compared to contractual networks, corporations offer a narrow framework with mandatory rules on ownership, non-ownership benefits, a formal capital structure, owned assets, voting and rights of third parties (OEM manufacturers, consumers, suppliers to the network participants and lenders) and competitors (especially in horizontal networks). A contractual network can redefine all the rules, as we see in the peer-to-peer 'sharing economy' and contract-based joint ventures.

Further, inserting a new legal model for contractual networks must be balanced and respect existing legislation. Under existing unfair competition laws, horizontal contractual networks must avoid abusive conduct if they have any market power. Consumer protection and privacy laws ignore the legal form of a network contract but could impose vicarious liability under agency principles. Tax regimes and tax treaties depend on entity classification, characterisation of transactions and relationships and local nexus (eg, 'permanent establishment'). Securities laws protect investors. Multiparty network contract laws may need to include some form of warning to unsophisticated participants about the limitations and risks of collective action and potential abuses by other

participants. Local laws define trade secrets and collective trademarks, but individual participants may lose such rights and individual brand identity by participation. Local laws on labour, creditors' rights, bankruptcy, insolvency and trade and trade sanctions will also apply.

While multiparty contractual networks may have increasing value, governance and operational structures pose cutting-edge multidimensional challenges. The UNCITRAL's Working Group I chose to not prioritise designing a model law,²⁵ noting the paradigm is complex and cutting-edge.

Existing laws already offer flexible frameworks to deliver innovative benefits through multiparty contractual networks. In the face of rapid digital transformation, such networks can help entrepreneurs and governments adapt to evolving economic, technological, geographical and business contexts. Such adaptation has already yielded various solid legal structures for easy start-up, low-cost and scalable online and offline 'platforms' for compliance and back-office administration, collaboration and trust among MSMEs and ultimately, globalisation of economies through entrepreneurship.

Given such changes, business lawyers will need to adapt their perspectives and templates, just as with any new legal entity form, offering choices and strategies for successful formation, tax management, governance and exit. The most difficult challenges may arise from the creation, ownership, licensing, decision-making control and ongoing investment in intellectual property rights. With some luck, innovative reward structures (perhaps based on smart contracts and blockchain) might evolve to adapt existing laws to a new tool for growing both entrepreneurship and the global value chain, the 'multiparty network contract'.

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25 Report of Working Group I (MSMEs) on the work of its thirty-second session (New York, 25–29 March 2019), A/CN.9/968 <https://undocs.org/en/a/cn.9/968> accessed 12 April 2019.