



General Assembly

Distr.: Limited
4 October 2021

Original: English

**United Nations Commission on
International Trade Law
Working Group V (Insolvency Law)
Fifty-ninth session
Vienna, 13–17 December 2021**

Civil asset tracing and recovery in insolvency proceedings

Note by the Secretariat

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I. Introduction

1. The background information about the project on civil asset tracing and recovery in insolvency proceedings referred to the Working Group by the Commission at its fifty-fourth session¹ may be found in the provisional agenda of the fifty-ninth session of the Working Group (A/CN.9/WG.V/WP.173). This note was prepared by the secretariat to facilitate an initial consideration of the topic by the Working Group. It should be read together with the report of the Colloquium on Civil Asset Tracing and Recovery (Vienna, 6 December 2019) (A/CN.9/1008) that addresses asset tracing and recovery generally (the “Colloquium report”).² This note supplements that report by focusing, first, on provisions relevant to civil asset tracing and recovery in insolvency proceedings found in UNCITRAL³ and other insolvency texts⁴ and, second, on civil asset tracing and recovery tools found in other areas of law that may be used in insolvency proceedings.

II. Provisions of relevance to asset tracing and recovery found in insolvency texts

A. Measures for the protection and preservation of the insolvency estate

1. General

2. The surveyed insolvency texts provide for various measures to ensure that the value of the estate is not diminished by the actions of the debtor, creditors or third parties. Those measures may be provisional, i.e., apply before commencement of an insolvency proceeding or recognition of the foreign proceeding,⁵ or apply upon commencement or recognition.⁶

3. Where the application for the commencement of insolvency proceedings does not automatically commence the proceeding,⁷ the provisional measures may be ordered by the court upon request of the debtor, creditors or third parties. Such provisional measures may include a stay of execution against the assets of the debtor and the appointment of the provisional insolvency representative who may displace the debtor, in full or in part, from the day-to-day operation of the business.⁸ In the cross-border context, provisional measures may be granted at the request of the foreign representative.⁹

¹ *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17 (A/76/17)*, paras. 215–217.

² For the mandate given to the secretariat for organization of the Colloquium, see *ibid.*, *Seventy-fourth Session, Supplement No. 17 (A/74/17)*, para. 203.

³ The UNCITRAL Model Law on Cross-Border Insolvency (1997) (the MLCBI); the UNCITRAL Legislative Guide on Insolvency Law (Parts one and two (2004), three (2010) and four (2nd ed., 2019)) (the Guide); the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgements (2018) (the MLIJ); and the UNCITRAL Model Law on Enterprise Group Insolvency (2019) (the MLEGI).

⁴ E.g., Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (binding and directly applicable in EU member States) (the EU Regulation); the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (2021) (the WB Principles); the ALI-III Global Principles for Cooperation in International Insolvency Cases (2012) (the ALI-III Global Principles); and national insolvency acts.

⁵ See e.g., recommendation 39 of the Guide; article 19 of the MLCBI; and recital 36 and article 32 of the EU Regulation.

⁶ See e.g., recommendation 46 of the Guide; and articles 20 and 21 of the MLCBI.

⁷ See in that respect recommendations 18 and 19 of the Guide.

⁸ See e.g., recommendations 39 and 41 of the Guide; and principle C6.1 of the WB Principles.

⁹ See e.g., article 19 of the MLCBI.

4. Measures applicable on commencement usually include a stay of proceedings¹⁰ and, if the debtor-in-possession is in place, restricting the ability of the debtor-in-possession to dispose of (certain) assets and to enter into certain transactions.¹¹

5. In some jurisdictions, courts may have discretion to tailor measures for the protection and preservation of the insolvency estate to particular circumstances, including by combining them. Some measures may also have an extraterritorial effect. International texts¹² may envisage cross-border recognition of some measures, although interim measures of protection are usually excluded from their scope.¹³

6. Measures for protection and preservation of the insolvency estate are usually accompanied by safeguards against their misuse, including the requirement of notice about their imposition,¹⁴ unless otherwise ordered by the court,¹⁵ and the right of the affected party(ies) to be heard,¹⁶ to challenge the imposition of such measures¹⁷ and to seek relief from them.¹⁸ The court usually retains discretion to impose, review, modify or terminate them.¹⁹

7. As in other areas of law,²⁰ additional safeguards usually apply in connection with provisional measures in insolvency proceedings, in particular those ordered *ex parte* and *in camera* (i.e., in private). Since they are granted before the court's determination that the commencement criteria have been met, the law may require the court to be satisfied that there is some likelihood that the debtor will satisfy the commencement requirements, that the debtor's assets are indeed at risk of dissipation or value loss and that the need for provisional measures is therefore urgent and outweighs any potential harm resulting from such measures. The requesting party may be required by the court to provide sufficient evidence to satisfy the court on all those points. Some form of security for costs, fees or damages, such as the posting of a bond, may also be required in case insolvency proceedings are not subsequently commenced or the measure sought results in some harm to the debtor's business. Where provisional measures are improperly obtained, the court may impose costs, fees, damages and sanctions against the requesting party for the measure.²¹

2. Asset tracing and recovery powers of the insolvency representative

8. The UNCITRAL Legislative Guide on Insolvency Law (the "Guide") explains the term "insolvency representative" as "a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate" (the Glossary term (v)). The definitions of the terms "foreign representative" and "insolvency representative"

¹⁰ Explained in term (rr) of the Glossary of the Guide as "a measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor's assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate."

¹¹ See recommendation 112 of the Guide and accompanying commentary.

¹² See e.g., article 32 of the EU Regulation.

¹³ See the definition of "judgment" in article 2 (c) of the MLIJ that explicitly states that an interim measure of protection is not to be considered a judgment for the purposes of the MLIJ.

¹⁴ See e.g., recommendations 25 (d) and 42 of the Guide.

¹⁵ See e.g., recommendation 42 of the Guide.

¹⁶ See e.g., recommendation 43 of the Guide.

¹⁷ See recommendation 45 of the Guide.

¹⁸ See e.g., recommendations 49 and 51 of the Guide.

¹⁹ See e.g., article 22 of the MLCBI and recommendation 44 of the Guide.

²⁰ See e.g., A/CN.9/WG.II/WP.119 that discusses interim measures in support of arbitration. Provisions on such measures were subsequently included in chapter IV A of the UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006).

²¹ See e.g., recommendation 40 of the Guide.

in the UNCITRAL insolvency model laws are similar to that explanation but add a function to represent the proceeding.²²

9. According to recommendation 120 of the Guide, the insolvency representative has an obligation to protect and preserve the assets of the estate. Under recommendation 35 of the Guide, the estate includes assets of the debtor,²³ assets acquired after commencement of the insolvency proceedings and assets recovered through avoidance (see section 3 below) and other actions.²⁴ Any undisclosed or concealed assets would form part of the insolvency estate.²⁵

10. Some surveyed texts refer to broad powers of the insolvency representative with respect to preservation and protection of the insolvency estate and the debtor's business, without specifying any asset tracing and recovery functions.²⁶ Other texts specifically refer to the expected asset tracing and recovery functions of the insolvency representative, including in the cross-border insolvency context.²⁷

11. Among the functions of the insolvency representative listed in the Guide, the following ones are relevant to asset tracing and recovery: (a) taking immediate control of the assets comprising the insolvency estate and the debtor's business records; (b) representing the insolvency estate; (c) exercising rights for the benefit of the insolvency estate in respect of court, arbitration or administration proceedings under way; (d) obtaining information concerning the debtor, its assets, liabilities and past transactions (especially those taking place during the suspect period), including examining the debtor and any third person having had dealings with the debtor; (e) taking all steps necessary to protect and preserve the assets of the insolvency estate and the debtor's business, including preventing unauthorized disposal of those assets and exercising avoidance powers; (f) registering rights of the estate (where registration is necessary to perfect the rights of the estate against bona fide purchasers); and (g) appointing and remunerating accountants, attorneys and other professionals that may be necessary to assist the insolvency representative in performing its functions.²⁸

12. Domestic insolvency and non-insolvency laws may make various tools available for the implementation of the insolvency representative's asset tracing and recovery functions. For some of them, special court orders may be required, for example to search premises, seize records or compel testimony of individuals. For others, no such

²² See article 2(d) of the MLCBI; article 2(b) of the MLIJ; and article 2(i) of the MLEGI.

²³ Explained in term (b) of the Glossary of the Guide as property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor's interests in encumbered assets or in third party-owned assets.

²⁴ Includes actions against third parties, such as insurers, including of directors' liabilities.

²⁵ See the UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises (2021), recommendation 44 and accompanying commentary. As noted in the commentary to that recommendation, the discovery of concealed or undisclosed assets after the closure of the proceeding may lead to the reopening of the proceeding, revocation of a discharge granted and imposition of sanctions.

²⁶ E.g., principle C8.2 of the WB Principles stating that after the commencement of the insolvency proceedings, the insolvency representative should be allowed to take prompt measures to preserve and protect the insolvency estate and the debtor's business.

²⁷ See e.g., article 21 of the EU Regulation referring to the general power of the representative of the main insolvency proceeding to remove the debtor's assets from the territory of the member States in which they are situated, subject to some limitations; and principle 9.4 of the ALI-III Global Principles stating that following recognition, a foreign representative should be entitled to use all available legal means to obtain information about the debtor's assets in all jurisdictions where those assets may be found.

²⁸ See the commentary to recommendation 120. Lists with specific functions of the insolvency representative, including those of relevance to asset tracing and recovery, are found in some surveyed domestic legislation. See e.g., sections 437A and 437 B of the *Corporations Act 2001* (Cth) of Australia; article 25 of the Enterprise Insolvency Law of China of 2006; and schedule 1 of the Insolvency Act 1986 of the United Kingdom of Great Britain and Northern Ireland.

requirement may exist.²⁹ Limits may be imposed on how some tools could be used (e.g., matters that could be covered in examination of witnesses, methods that could be used in such examination and how results of examination could be used). The violation of those requirements may trigger charges against the insolvency representative for abuse of power or abuse of process.

13. The ambit of the insolvency representative's asset tracing and recovery powers would be limited by law, court orders, terms of appointment of the insolvency representative and practical considerations.³⁰ Traceability and recovery of certain assets may be hindered (e.g., disputed assets) or restricted by law (e.g., assets, although belonging to the debtor, excluded from the insolvency estate by law³¹ or assets for protection of interests of local creditors in the cross-border context³²). Some asset tracing and recovery powers may cease upon commencement of legal proceedings triggering the formal process of discovery and legal protection (e.g., against self-incrimination) for the person in question.

14. Some surveyed texts authorize the insolvency representative to exercise asset tracing and recovery powers across borders; others limit them to the domestic context. The exercise of such powers across borders is facilitated by a number of international instruments, including UNCITRAL model laws on cross-border insolvency that envisage a wide range of relief that the recognizing court can provide to the foreign representative, as a provisional measure or upon recognition of the foreign proceeding. As specifically relevant to asset tracing and recovery, such relief may include: (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities; (b) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor; (c) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; and (d) entrusting the administration or realization of all or part of the debtor's assets located in the recognizing State to the foreign representative or another person designated by the court. The texts explicitly envisage that courts may provide any assistance available under the domestic law, not limiting it to the assistance listed in the model laws or to the assistance available only under the domestic insolvency law.³³

15. The powers exercised by the insolvency representative abroad would be limited by the law and court orders of a foreign jurisdiction³⁴ or by practical impediments.³⁵ A representative of a foreign non-main proceeding may have less powers than a representative of a foreign main proceeding.³⁶ In addition, the insolvency

²⁹ For example, "stop notices" could be used by the insolvency representative in some jurisdictions independently of a statutory stay and court orders to prevent, for a short period of time (e.g., 14 days), persons to whom such notices are addressed from taking actions (e.g., transferring shares). See e.g., part 49 of the Civil Procedure Rules of the Eastern Caribbean Supreme Court.

³⁰ E.g., some asset tracing and recovery measures may be expensive (e.g., conducting forensic investigations, especially across borders and in several countries) raising questions about sufficiency of funds in the insolvency estate, chances of success, expected benefits for the general body of creditors and possible alternatives (third-party funding and actions and litigation trusts).

³¹ See e.g., recommendation 38 of the Guide.

³² See e.g., article 21.2 of the MLCBI.

³³ See e.g., articles 7 and 21 (g) of the MLCBI.

³⁴ See e.g., article 5 of the MLCBI and MLIJ. Article 21.3 of the EU Regulation states that in exercising its powers, the insolvency practitioner shall comply with the law of the member States within the territory of which it intends to take action, in particular with regard to procedures for the realization of assets. Those powers may not include coercive measures, unless ordered by a court of that member State, or the right to rule on legal proceedings or disputes.

³⁵ E.g., the lack of a local identification card. In comparison, the use of some other tools (e.g., registries of rights to immovable and movable property and of legal entities, insolvencies, judgments, etc.) across borders would not necessitate any recognition.

³⁶ See e.g., article 21.3 of the MLCBI envisaging that, in granting relief to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that

representative may face obstacles in recovery of public debts, especially abroad. Challenges on jurisdictional and standing grounds, including because of expiration of statutory limits for bringing actions, which are not harmonized across jurisdictions, may also impede the exercise of the insolvency representative's powers abroad. (Similar issues will be faced by creditors or third parties to whom the insolvency representative may assign rights to pursue actions.)

3. Avoidance

16. The Guide recommends including in the insolvency law provisions that would preserve the integrity of the insolvency estate and facilitate the recovery of money or assets from persons involved in transactions that have been avoided.³⁷ The Guide refers to three common types of avoidable transaction:

(a) Transactions intended to defeat, delay or hinder the ability of creditors to collect claims (e.g., transfer of assets to any third party with the intention of putting them beyond the reach of creditors);

(b) Undervalued transactions (e.g., transfer of assets for nominal or non-existent value, such as a gift, or value much lower than the true value or market price, provided the transaction occurred within the suspect period³⁸);

(c) Preferential transactions (e.g., transactions with a creditor within the suspect period, as a result of which, the creditor received a larger percentage of its claim from the debtor's assets than other creditors of the same rank or class (in other words, a preference). Examples include payment or set-off of debts not yet due or granting a security interest to secure existing unsecured debts).

17. Where the types of transaction subject to avoidance involve related persons,³⁹ insolvency laws usually provide a longer duration of suspect period and dispense with requirements that the debtor was insolvent at the time of the transaction or was rendered insolvent as a result of the transaction. Claims of related persons in insolvency may become subject to scrutiny and special treatment (e.g., equitable subordination).

18. Insolvency laws adopt different approaches to establishing the elements that have to be proved in order to avoid a particular transaction. In some laws, the onus is on the debtor to prove that the transaction did not fall into any category of avoidable transactions. Other insolvency laws provide that the insolvency representative is required to prove that the transaction satisfies the requirements for avoidance. Some laws allow the burden of proof to be shifted to the counterparty where, for example, it is difficult for the insolvency representative to establish that the debtor's actual intent was to defraud creditors.

under the law of the recognizing State should be administered in that proceeding or concerns information required in that proceeding; see also article 19.4 of the MLCBI providing that the court may refuse to grant relief of a provisional nature if such relief would interfere with the administration of a foreign main proceeding. See also article 21.1 and 2 of the EU Regulation.

³⁷ See recommendations 87–99 and 217 and accompanying commentary.

³⁸ Explained in term (ss) of the Glossary of the Guide as “the period of time by reference to which certain transactions may be subject to avoidance. The period is generally calculated retroactively from the date of the application for commencement of insolvency proceedings or from the date of commencement”. Some insolvency laws provide one suspect period for all types of avoidable transaction, while others have different periods depending upon the type of transaction and persons involved.

³⁹ Explained in term (jj) of the Glossary of the Guide as: “as to a debtor that is a legal entity, a related person would include: (i) a person who is or has been in a position of control of the debtor; and (ii) a parent, subsidiary, partner or affiliate of the debtor. As to a debtor that is a natural person, a related person would include persons who are related to the debtor by consanguinity or affinity.”

4. Actions against directors, shareholders and other persons

19. The Guide envisages that, under certain conditions, personal liability of persons exercising factual control over the debtor's business⁴⁰ may arise for their conduct during the period when the debtor was insolvent or in the period approaching insolvency of the debtor. If they are found in breach of their obligations during those periods,⁴¹ they may be ordered to pay in full any damages assessed by the court to the insolvency estate.

20. The Guide emphasizes that the cause of action for loss or damage suffered as a result of the breach of the obligations by such persons during those periods belongs to the insolvency estate and that the insolvency representative has the principal responsibility for pursuing an action for breach of those obligations. Creditors or any other party in interest may pursue such actions with the agreement of the insolvency representative or, where the insolvency representative does not agree, with leave of the court.⁴² Challenges similar to those outlined in section 2 above may arise, in particular where the director is located abroad and where untimely disclosure or the lack of disclosure of relevant information leads to the expiration of the statutory limit for bringing actions.

21. The Guide also discusses such tools as piercing the corporate veil, contribution orders and substantive consolidation of assets that may be taken against shareholders, enterprise group members or other persons, especially where a fraudulent scheme or activity is involved.⁴³

B. Obligations of the debtor

22. Among obligations of the debtor that arise on the commencement of, and continue throughout, insolvency proceedings, recommendation 110 of the Guide lists the following obligations: (a) to cooperate with and assist the insolvency representative to perform its duties; (b) to provide accurate, reliable and complete information relating to its financial position and business affairs, including lists of (i) transactions occurring prior to commencement that involved the debtor or the assets of the debtor, (ii) ongoing court, arbitration or administrative proceedings, including enforcement proceedings, (iii) assets, liabilities, income and disbursements, (iv) debtors and their obligations and (v) creditors and their claims; and (c) to cooperate with the insolvency representative to enable it to take effective control of the estate and to facilitate or cooperate in the recovery by the insolvency representative of the assets, or control of the assets of the estate, wherever located and business records.⁴⁴

23. The Guide underscores the importance of putting in place effective procedures for eliciting the required information in order to ensure its ultimate usefulness. If, for example, members of the management of the debtor are responsible for the debtor's insolvency, they may be unwilling to give full and frank disclosure or to disclose information that may be self-incriminating (although many criminal laws provide that self-incriminating evidence may not be used in subsequent criminal proceedings in order to encourage frank disclosure). Accordingly, the Guide recommends that, in addition to the debtor's obligation to provide information, the insolvency representative and the creditors or the creditor committee should be given the corresponding right to demand and receive information from the debtor, with

⁴⁰ See recommendation 258 and accompanying commentary that refers to de facto and "shadow" directors.

⁴¹ See recommendation 256 of the Guide and accompanying commentary that refer to steps expected to be taken by directors to avoid insolvency or minimize the extent of insolvency.

⁴² See recommendation 263 and accompanying commentary.

⁴³ See recommendations 219–231 and accompanying commentary.

⁴⁴ In some jurisdictions, like in Switzerland, such obligations extend to all, including public authorities. Incentives for timely disclosure of the relevant information to the insolvency representative are also found (e.g., in the United States, reduction of a prison sentence).

appropriate sanctions where the requested information is not forthcoming. The debtor's obligation may be supplemented by additional measures, for example appointing an independent person to examine the debtor as to its financial affairs or requiring the debtor itself (where it is a natural person) or one or more of its directors to be represented at, or attend, a meeting of creditors to answer questions (except where this is not physically possible for geographical reasons). In serious cases of withholding information, criminal sanctions for contempt of court (fine, imprisonment) may be imposed.⁴⁵

24. The Guide acknowledges that the information provided by the debtor or by third parties (e.g., banks) concerning the debtor will often be of a commercially sensitive nature, confidential or subject to obligations owed to other persons.⁴⁶ The obligation to observe confidentiality and protect this type of information from possible abuse may need to be imposed on all persons who may come across such information. In addition, limits may be imposed on the use of such information other than for its intended purpose unless the court orders otherwise.

25. Asset tracing and recovery in insolvency proceedings with the debtor-in-possession⁴⁷ arrangement may raise specific issues. Recommendation 113 of the Guide envisages that the insolvency law would specify those functions of the insolvency representative that may be performed by the debtor-in-possession. This arrangement does not exclude a possibility to appoint an independent practitioner for certain functions related to the administration of insolvency proceedings, such as avoidance discussed above, or for tracing and recovery of assets. Recommendation 112 (a) of the Guide explicitly refers to appropriate protections in the debtor-in-possession cases including varying levels of control of the debtor and provision for displacement of the debtor in specified circumstances. The parallel operation of the debtor and the insolvency representative is explicitly envisaged in recommendation 41 of the Guide where an insolvency representative is appointed as a provisional measure.

C. Cooperation and coordination

26. Provisions of UNCITRAL insolvency texts envisaging cooperation and cooperation between courts, between courts and insolvency representatives and between insolvency representatives⁴⁸ are relevant in the context of civil asset tracing and recovery in insolvency proceedings given the difficulty of achieving an international agreement on cross-border recognition and enforcement of court orders for some civil asset tracing and recovery tools (see chapter III, section D, below). Those provisions aim at facilitating direct communications, including direct requests for information and assistance, which may expedite obtaining local relief in aid of asset tracing and recovery measures in foreign insolvency proceedings.

27. Similar provisions may be found in other insolvency texts.⁴⁹ The ALI-III Global Principles for Cooperation in International Insolvency Cases (2012) emphasize in principle 9.1 that cooperation between courts and between administrators should include prompt and full disclosure regarding all relevant information, including assets and claims, with a view to promoting transparency and reducing international fraud. The need for such cooperation may continue after the closure of proceedings, for

⁴⁵ See recommendation 114 of the Guide and accompanying commentary.

⁴⁶ See recommendation 111 and accompanying commentary.

⁴⁷ Explained in term (l) of the Glossary of the Guide as a debtor in reorganization proceedings, which retains full control over the business, with the consequence that the court does not appoint an insolvency representative. In the cross-border insolvency context, UNCITRAL texts point out that reference to the "foreign representative" is sufficiently broad to include the debtor-in-possession after the commencement of the insolvency proceeding. See e.g., para. 86 of the Guide to Enactment and Interpretation of the MLCBI.

⁴⁸ See e.g., articles 25–27 of the MLCBI and 9–15 of the MLEGI.

⁴⁹ See e.g., articles 42, 43 and 56 of the EU Regulation; and principles C17.2 and 17.3 of the WB Principles.

example for post-closure discovery of assets or information that may lead to reopening the proceedings in some cases.

III. Inventory of civil asset tracing and recovery tools that may be used in insolvency proceedings

A. Classification of civil asset tracing and recovery tools

28. As noted in the Colloquium report, a wide variety of civil asset tracing and recovery tools exist worldwide. They are referred to by different names in various jurisdictions and may be found in different sources of law. Some tools originated in the case law have subsequently been codified in the statutory law.⁵⁰ Many such tools could be used in insolvency proceedings.

29. Civil asset tracing and recovery tools could be grouped into different categories according to different parameters although the distinction between these different categories is not always clear and specific tools could fall into more than one of the categories. According to their primary purpose, they may be grouped into three broad categories: (a) tools that are primarily used for identifying and tracing assets, evidence or a wrongdoer (tracing tools); (b) tools that are primarily used after the assets, evidence or the wrongdoer has already been identified and traced, for obtaining the evidence, freezing or seizing the assets or bringing actions or enforcing measures against the wrongdoer (recovery tools); and (c) tools that are used in conjunction with other tools to ensure their effectiveness (ancillary tools). Some tools may serve several purposes.⁵¹ Some courts may have discretion to tailor tools to particular needs of a case, including in the cross-border context.⁵²

1. Tracing tools

30. Tracing tools comprise various types of disclosure orders. Some such disclosure orders could be issued for the purpose of obtaining information or documents directly from the alleged wrongdoer while other disclosure orders could be issued against third parties.⁵³ Such third parties might have become involved in or facilitated the wrongdoing, innocently or not, or could be in possession of relevant information that may, for example, help to determine what has happened to certain assets and their location. These tools may be issued before and after the institution of any proceeding. They usually supersede banking secrecy rules or duties of confidentiality owed, for example, by a bank to its customers.

⁵⁰ E.g., the search and seizure order originated in *Anton Piller KG v. Manufacturing Processes Ltd and Others* has been codified in Section 7 of the Civil Procedure Act 1997 and in the Civil Procedure Rules, Part 25, and Practice Direction 25A, of the United Kingdom. The Mareva injunction, originated in *Mareva Compania Naviera SA v. International Bulkcarriers SA*, has been codified in section 37 of the Senior Courts Act 1981 of the United Kingdom.

⁵¹ “Passport orders” may fall into that category (made e.g., in the United Kingdom under section 37(1) of the Senior Courts Act 1981). They entail the seizure of passports or other documents for a short period of time. Such measure could be used for tracing information (e.g., about travels abroad), restricting movement or preventing use of a particular asset (e.g., a car when a driver’s license is seized). For other examples, see reference to EAPO in the Colloquium report (footnote 21), which can be used in the EU member States for both tracing information about bank accounts and for freezing them. Online tools found in some jurisdictions enable the discovery and immediate freeze of all bank accounts of an individual or a legal entity based on its unique identifier.

⁵² E.g., the Code of Civil Procedure of Brazil (article 294 et seq.) grants discretion to courts to select what they consider the most adequate remedy for the case at hand.

⁵³ Differences between common and civil law jurisdictions arising as regard orders directed to third parties are discussed in the context of Rule 20, in the Reporters’ Study, appendix to the ALI/Unidroit Principles of Transnational Civil Procedure (the ALI/Unidroit Principles). An introductory note to that appendix explains that, although the Rules were not adopted by Unidroit or ALI, along with the Principles, they can be considered as a model for reform in domestic legislation.

31. Disclosure orders can be found in civil and common law jurisdictions. They take various forms and include Norwich Pharmacal Orders,⁵⁴ Bankers Trust disclosure orders,⁵⁵ disclosure orders devised in aid of foreign proceedings,⁵⁶ the EAPO procedure⁵⁷ and early disclosure orders.⁵⁸

2. Recovery tools

32. Tools for obtaining evidence or freezing or seizing the assets are often granted ex parte and with other measures put in place to prevent their premature disclosure to the affected parties because it is considered that the element of surprise is essential for their effectiveness. This raises issues of due process and protection for the respondent and leads to imposition of extra conditions and safeguards against the misuse of those tools, discussed in section B below. Like some disclosure orders mentioned in section 1 above, some tools in this category may be devised specifically to overcome banking sector rules that restrict disclosure of client information to third parties.⁵⁹

33. Tools in this group include a wide variety of preliminary injunctions and preservation orders used in civil law jurisdictions for securing assets and evidence,⁶⁰ although some may be designed for specific areas of law.⁶¹ The European Union directives referred to in the Colloquium report (footnote 21) address some of them.

34. In common law jurisdictions, search (and seizure) orders, also known as *Anton Piller* orders,⁶² are issued ex parte for the purpose of preserving evidence or property for any pending or future proceedings. They allow the applicant to enter the premises of the respondent to search and seize all evidence or property specified in the order.

⁵⁴ Originated in *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] A.C. 133: action filed in court to obtain information possessed by an innocent third party that cannot otherwise be obtained from the third party and which is needed in order to trace and recover assets in the possession of a defendant or a third party that does not have a right to retain such assets. See further footnotes 67 and 69 below.

⁵⁵ Originated in *Bankers Trust Co. v. Shapiro* (1980 B.N. 3116), and elaborated in *JSC BTA Bank v. Fidelity Corporate Services Ltd. et al*, HCVAP 2010/035: action filed in court to obtain confidential information from a financial institution needed to locate or trace assets to which the applicant asserts a proprietary claim, where strong evidence exists that any funds at issue were fraudulently obtained and a delay in disclosing the information may result in the funds being dissipated or transferred.

⁵⁶ See e.g., 28 U.S.C.A. § 1782 that permits any interested party to obtain discovery for use in foreign proceedings from a person located in the United States. The applicant needs to establish that (a) the evidence sought is not physically available to the applicant in the foreign jurisdiction and (b) if the party against whom discovery is sought were located within the foreign jurisdiction in which the underlying proceeding is taking place, the applicant could seek the same discovery relief it seeks in the United States. It is not required to seek first discovery from the foreign court or to show that judicial proceeding be pending at the time assistance is sought. The focus is on whether the requested discovery will likely be of use in a foreign judicial proceeding or likely lead to the discovery of admissible evidence.

⁵⁷ See footnote 51 above.

⁵⁸ E.g., da produção antecipada de provas in Brazil (CCP art. 381); pretrial evidence gathering orders in Colombia (183-190 GCP); mesure d'instruction in futurum in France; diligencia exhibitoria in Panama. Similar measures are found in Honduras and Mexico.

⁵⁹ See e.g., the Bankers' Book Evidence Act, 1891, in the United States.

⁶⁰ See e.g., prueba anticipada (obtaining evidence), embargo preventivo (attachment of property prior to judgment), inhibicion general de bienes (asset freezing) in Argentina; a preliminary injunction to secure monetary claims in § 379 8 and a preservation order in § 110 StPO in Austria; saisie conservatoire in Belgium; and executory actions (seizure of bank accounts via the BacenJud system) in Brazil. See also rules 192 and 198 of the ELI/Unidroit Model European Rules of Civil Procedure (the ELI/Unidroit Rules).

⁶¹ E.g., articles 6 ("Evidence") and 7 ("Measures for preserving evidence") of Directive 2004/48/EC on the enforcement of intellectual property rights and saisie-description orders in Belgium and saisie-contrefaçon in France (article L.615-5 of the Industrial Property Code ("Code de la Propriété Industrielle")) are relevant for obtaining evidence in proceedings concerning infringement of intellectual property rights.

⁶² See footnote 50 above.

35. In addition, *Mareva* injunction is widely used, which may be described as an action filed in court seeking a freeze order in that jurisdiction, in order to protect assets from being dissipated, when the creditor has demonstrated its right to be paid from those assets. The “worldwide freeze orders”,⁶³ derived from the *Mareva* injunction procedure but operating on a worldwide basis, are also widely used in some common law jurisdictions.

3. Ancillary tools

36. Among tools that are used in combination with other tools to ensure the effectiveness of the latter are “gag and seal orders”. They direct the relevant court staff to prohibit public access to the court file (“seal order”) and prohibit anyone that becomes aware of that file or any information contained therein to disclose it (“gag order”). Those measures are complementary to holding proceedings *ex parte* and in camera.

37. In addition, tools in criminal proceedings are often used in aid of civil proceedings. They include non-conviction-based asset forfeiture,⁶⁴ participation of affected persons in criminal proceedings as a *parte civile* (with possibility to access records obtained by the prosecutor and to seek orders to freeze assets or request restitution)⁶⁵ and other means for obtaining information from criminal investigations for use in civil proceedings.⁶⁶

B. Conditions for use

38. While procedures for access to those tools may be different and some may not be available to foreigners, similar conditions may be identified for their use. They aim to balance various considerations, in particular that: (a) the tools are fit for purpose; (b) they are fair and equitable; and (c) obtaining them is not unnecessarily complicated or costly or entails unreasonable time limits or unwarranted delays.

39. In particular, the applicant would be expected to demonstrate a strong *prima facie* case and serious potential or actual damage to its legitimate interests.⁶⁷ Depending on the tools, the applicant may also be required to demonstrate that the respondent is (likely) in the possession of assets, evidence or other relevant information or documents. For some tools, it may also be necessary to demonstrate that the respondent, innocently or not, facilitated the wrongdoing.⁶⁸ For *ex parte* and secret measures, the applicant may be required to provide strong evidence of the need for confidentiality and the urgent need for the measure because of a risk, or a “real possibility”, of dissipation of assets or destruction of evidence. Proprietary injunctions may be easier to obtain than freezing injunctions:⁶⁹ there might not be a

⁶³ Originated in *Dadourian Group Int. Inc. v. Simms and Others* [2006] EWCA Civ 399.

⁶⁴ See e.g., articles 70–72 of the Criminal Code of Switzerland.

⁶⁵ See e.g., article 21 bis (2) of the Criminal Procedure Code of Belgium and articles 85 to 91-1 of the Criminal Procedure Code of France.

⁶⁶ E.g., under rule 6(e)(3)(E)(1) of the United States Federal Rules of Criminal Procedure, an action may be filed in court to obtain information gathered during a grand jury proceeding for use in another judicial proceeding. If the request is granted, court administers production of information so as to protect criminal investigation. Access may also be requested to information obtained in criminal investigations under mutual legal assistance treaties.

⁶⁷ See e.g., rules 193 and 199 of the ELI/Unidroit Rules.

⁶⁸ E.g., conditions for imposition of the *Norwich Pharmacal* include that there should be a strong evidence that the innocent third party was involved in the furtherance of the transaction identified as the relevant wrongdoing (i.e., the order is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his/her possession).

⁶⁹ Proprietary injunctions are those that are issued to preserve assets for which a claimant has a proprietary claim so that they can be turned over to the claimant if the claimant is successful in the action while freezing injunctions are designed to protect the applicant against the dissipation of assets against which the applicant might otherwise execute judgment whether immediately or

need to prove a risk of dissipation, only to demonstrate that there is a credible case and it is just and convenient to grant the injunction.

40. Requests would be refused if conditions for obtaining a requested tool are not met.⁷⁰ Requests may also be rejected for other grounds. For example, requests related to obtaining evidence or information may be refused if it is sought for the purpose of obtaining an advantage in another litigation, as opposed to enabling the bringing of a suit, or where the request is an attempt to circumvent evidence-gathering restrictions or policies in the foreign jurisdiction, or where the request is unduly intrusive or burdensome. Requests for tracing and recovering a particular asset using a requested tool may be refused if traceability and recovery of that asset with that tool is not possible under law. For example, in some jurisdictions, the claimant may be able to claim the misappropriated property and any subsequent assets into which the original property was converted while in other jurisdictions, only the original asset may be claimed via a proprietary claim while any subsequent assets into which the original property was converted may only be recovered through personal claims.

C. Safeguards

41. Safeguards take various forms. They may be found in laws or court orders and include requirements that: (a) measures imposed should be notified to the affected parties (ex ante or ex post) unless circumstances of the case justify otherwise⁷¹; (b) they may be challenged; (c) they should be temporary in nature; (d) the bond or security and indemnification for damages should be provided by the applicant for the requested measure; and (e) sanctions, including criminal ones, could be imposed on the applicant for abuse or improper use of measures.

42. A varying degree of discretion could be left to the court in devising particular safeguards within the mandatory requirements of the law.⁷² In addition, detailed rules may be imposed on how court orders are to be implemented and how the obtained information or evidence is to be used. They may be imposed in the context of a particular case or be generally applicable to the use of a specific tool.⁷³ In addition,

in the future (see *Falcon Private Bank Ltd v. Borry Bernard Edouard Charles Limited*, HCA 1934/2011).

⁷⁰ E.g., the *Norwich Pharmacal* order cannot be obtained against persons who are likely to be witnesses or are prima facie defendants in any proceeding instituted on the basis of an alleged wrong. There might also be limits with the use of that order for: identification of the wrongdoer as opposed to obtaining factual information concerning the alleged wrong and vice versa; for obtaining evidence as opposed to information; and for use in aid of a foreign proceeding if the foreign jurisdiction has the statutory regime through which evidence from overseas must be obtained.

⁷¹ See e.g., rule 195 of the ELI/Unidroit Rules. Courts in some jurisdictions retain discretion in deciding whether a notice should be given and if so, its timing. See e.g., section 128(4) and section 922(1) of the Civil Procedure Act of Germany that allows the court to decide on the need to provide a notice of an application for a seizure order.

⁷² E.g., section 921 of the Civil Procedure Act of Germany allows the court to decide whether the applicant has to provide adequate security. Pursuant to section 108 of that Act, the court may specify the type and amount of security required. In England, under Practice Direction 25A, the court may request security if it has serious doubts about the prospect of the substantive claim or the applicant is outside of the jurisdiction of the court; under para. 5.1(1), the claimant has to undertake before the court to pay any damages the court deems appropriate to cover the losses incurred by the respondent, unless otherwise stated in the order.

⁷³ For example, for Anton Piller orders, the following rules may apply: (a) the orders must be carried out meticulously and carefully with the greatest respect for the defendant's rights; (b) orders should be executed on working days during normal office hours to ensure that the defendant has access to legal representation; (c) a detailed record of materials or property removed at the time of execution of the order must be made; (d) the person executing the order should be neutral and experienced; (e) in serving and executing the order, there should be a supervising lawyer present who should explain the order to the defendants and give them the opportunity to consult their legal representatives; (f) if the defendants wish to apply to discharge the order as having been improperly obtained, they must be allowed to do so; (g) if the defendants refuse permission to enter or to inspect, the plaintiff must not force its way in (it must

principles of proportionality and preponderance of considerations of fairness or balance of equities apply, which would require the court to assess the strength of the merits of the applicant's request, any relevant public interest involved, urgency, the practical burden of granting the request and alternative options.⁷⁴

43. The appropriate allocation of the burden of proof, rebuttable presumptions and defences are usually in place to achieve the balance between the competing interests involved in imposition of measures discussed above.⁷⁵ Measures affecting human dignity and human rights (e.g., freedom of movement) may be permitted only in extraordinary situations and are made subject to higher safeguards.⁷⁶

44. In many jurisdictions, the applicant would be required to cooperate with the court, including by providing full, fair and accurate disclosure relevant to the measure requested from the court. This includes not only facts that are favourable to the applicant, but also those that favour the respondent. A breach of this obligation may result in the dismissal of the measure by the court and the court's order to the applicant to indemnify the respondent for damages and losses incurred as the result of the imposition of the measure. Depending on the severity of the breach, criminal sanctions for contempt of court (fine, imprisonment) may also be imposed.

D. Recognition and enforcement

45. Cross-border recognition and enforcement of civil asset tracing and recovery tools may depend on many factors, in particular on the tool in question, and raise complex issues, including of jurisdiction and applicable law, that are not addressed in this note.

46. For example, as noted in paragraph 17 (d) of the Colloquium report, orders for provisional or protective measures are excluded from the scope of the Hague Evidence Convention (article 1). Several Contracting Parties to that Convention declared that they would not execute letters of request issued for the purpose of obtaining pretrial discovery of documents as known in common law countries. Interim measures of protection are excluded also from the scope of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (article 3.1 (b)). As noted in paragraph 5 above, they are excluded also from the scope of the MLII.⁷⁷

accept the refusal and bring it to the court's attention); (h) the order should be carried out in the presence of the defendants or their legal representatives; (i) where the premises are likely to be occupied by an unaccompanied woman, if the supervising lawyer is a man, he must be accompanied by a woman; (j) the order should not be wider than necessary and material that is not spelled out in the order should not be removed; (k) the number of persons who are to execute the search should be limited, and their names should be specified in the order; (l) the order should state explicitly that the defendant is entitled to return to court on short notice to discharge the order; (m) the order should contain a limited-use clause stating that the documents seized may only be used for the pending litigation; (n) a list of all evidence seized should be prepared and provided to the defendant for inspection and verification at the end of the search and before the removal of the evidence; and (o) if a list of evidence cannot be provided to the defendant at the time of the search, the documents seized should be placed in the custody of the independent supervising lawyer.

⁷⁴ See in that respect the ALI/Unidroit Principles, in particular principle 8 and accompanying comment.

⁷⁵ See e.g., rules 26–32 of the United States Federal Rules of Civil Procedure that, among safeguards against misuse of the court-ordered discovery, state that, if an issue of discoverability is raised, the primary burden falls upon the applicant to prove that the information is discoverable under foreign law.

⁷⁶ See e.g., rule 194 of the ELI/Unidroit Rules in that respect.

⁷⁷ In comparison, principle 30 (Recognition) of the ALI/Unidroit Principles states that a provisional remedy must be recognized in the same terms as a final judgment awarded in another forum in a proceeding substantially compatible with the Principles unless substantive public policy requires otherwise. The comment to that principle notes that many jurisdictions limit the effect of most kinds of provisional measures to the territory of the issuing States and cooperate by issuing

47. Court orders for other civil asset tracing and recovery tools may be within the scope of those Conventions with the result that they would be recognized and enforced as judgments by Contracting Parties to those Conventions. As regards insolvency proceedings, which are excluded from the scope of those Conventions, UNCITRAL insolvency model laws would cover them, including court orders that may be issued after the closure of insolvency proceedings but are related thereto.⁷⁸

IV. Issues for consideration by the Working Group

48. The Working Group may wish to consider the objective of the project and, in that light, determine the scope and nature of a draft legal text that the secretariat should prepare for consideration by the Working Group at a future session.

49. It may wish to consider that, regardless of the nature of an instrument to be prepared on the subject, and in the light of a great variety of tools for tracing and recovery of assets, a future instrument should focus on: (a) the purpose of a particular tool; (b) measures to ensure that the tool achieves its intended purpose effectively and efficiently; and (c) safeguards for its use. The need for inclusion of other aspects would depend on the scope and nature of a future instrument. For example, practical issues arising from civil asset tracing and recovery are more appropriate for inclusion in a practice guide than in a legislative text.

50. Regardless of the scope and nature of the future instrument, its preparation should be undertaken in close coordination with related work of UNCITRAL and other bodies.⁷⁹

parallel injunctions. However, the technique of parallel provisional measures is less acceptable than direct recognition and enforcement.

⁷⁸ See paragraph 59 of the Guide to Enactment of the MLIJ that refers in that context to actions for avoidance that may be pursued after the closure of the reorganization proceeding. Paragraph 60 illustrates types of judgment that might be considered insolvency-related judgments within the scope of the MLIJ: e.g., a judgment for the examination of a director of the debtor who may be located in a third jurisdiction; a judgment determining whether an asset should be turned over to the insolvency estate; and a judgment on pursuing the director found liable for actions taken when the debtor was insolvent or in the period approaching insolvency. In comparison, paragraph 56 notes that a stay applicable automatically on commencement of insolvency proceedings pursuant to the relevant law relating to insolvency may not, without additional court orders, be considered a judgment.

⁷⁹ E.g., UNCITRAL's current work on identity management and trust services and on legal issues related to the digital economy and Unidroit's work on effective enforcement and digital assets are all relevant to the project, including digital aspects of asset tracing and recovery, and tracing and recovery of digital assets.