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Civil asset tracing and recovery in insolvency proceedings

Note by the Secretariat

Contents

	<i>Page</i>
Introduction	2
Annex	
A draft text on civil asset tracing and recovery in insolvency proceedings	3



Introduction

1. The provisional agenda of the sixty-third session of the Working Group (A/CN.9/WG.V/WP.188) provides background information about the project on civil asset tracing and recovery in insolvency proceedings (ATR) referred to the Working Group by the Commission at its fifty-fourth session.¹ This note contains in an annex the second draft of a descriptive, informational and educational text on civil asset tracing and recovery in insolvency proceedings that builds on the first draft considered by the Working Group at its sixty-second session (A/CN.9/WG.V/WP.186) and incorporates comments made to the first draft at that session (A/CN.9/1133, paras. 11–21).

2. In particular, as was requested by the Working Group, the draft text was expanded with a more detailed discussion of: (a) restrictions on disclosure of information; (b) criminal law aspects; (c) registers (see appendix II); and (d) applicable law in insolvency proceedings. In addition, the draft text was expanded with a toolkit of measures that could expedite ATR in cross-border insolvencies (see appendix I). The toolkit is based on the proposal by Canada submitted at the sixty-second session of the Working Group (A/CN.9/1133, annex) and comments made on that proposal at that session (A/CN.9/1133, paras. 17–21).

3. At the sixty-second session of the Working Group, different views were expressed on the desirability of including a chapter on digital aspects in the text since it was considered that including it might delay completion of the project in the light of nascent, evolving and unsettled areas that such a chapter would be expected to address and ongoing work on the same or related issues in other forums, such as UNIDROIT.² It was also considered that the text should not discuss in detail ATR-related issues arising from: the use of artificial intelligence (AI) and Internet of Things (IoT); liability; cybercrime and cyber security; and prudential and other similar regulations, such as on segregation, capital and other requirements. Specific concerns were expressed about addressing carbon credits in the text.

4. The Working Group may wish to agree on desirability of including a separate chapter on digital aspects in the text. Alternatively, a chapter could be included to address specifics of tracing and recovering certain assets, including digital assets, while other digital aspects (such as those arising from the use of data as evidence or as means of communication) could be addressed throughout the text where and as appropriate. Pending that decision by the Working Group, the secretariat elaborated in chapter IV on data as an asset being traced and recovered, addressing other digital aspects briefly throughout the text.

5. Footnotes in bold indicate the source of revisions. They are not intended to be retained in the text. Other footnotes are intended to stay in the final product of the Working Group on the topic.

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

² See e.g. information about the UNIDROIT project on best practices for effective enforcement (BPEE) at www.unidroit.org/work-in-progress/enforcement-best-practices/.

Annex

A draft text on civil asset tracing and recovery in insolvency proceedings

I. Introduction

A. Origin, scope and purpose of the text

1. This text discusses civil asset tracing and recovery in insolvency proceedings (ATR). UNCITRAL insolvency texts set out a cumulative list of requisites that a proceeding must meet in order to be considered an “insolvency proceeding”:¹ (a) collective proceeding (judicial or administrative);² (b) pursuant to a law relating to insolvency;³ (c) under control or supervision (present, past or potential)⁴ by a court,⁵ including the debtor-in-possession;⁶ (d) with respect to a debtor (natural or legal person) that is in severe financial distress or insolvent (i.e. actual or imminent insolvency);⁷ and (e) with the goal of liquidating or reorganizing that debtor as a commercial entity.⁸ In the light of those cumulative requisites, insolvency proceedings that may be commenced in some jurisdictions as a corporate governance or fraud remediation action are excluded from the scope of this text.

2. “Insolvency proceedings” under UNCITRAL insolvency texts encompass: (a) “liquidation”, defined as proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law;⁹ (b) “reorganization”, defined as the process by which the financial well-being and viability of a debtor’s business can be restored and the business can continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or part of it) as a going concern;¹⁰ (c) “expedited reorganization proceedings” that combine voluntary restructuring negotiations and acceptance of a

¹ See the main Glossary of the UNCITRAL Legislative Guide on Insolvency Law (the “Guide” and the “Glossary”), term (u); article 2 (a) of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-related Judgments (2018) (MLIJ); and article 2 (h) of the UNCITRAL Model Law on Enterprise Group Insolvency (2019) (MLEGI). The definition of “foreign proceeding” in article 2 (a) of the UNCITRAL Model Law on Cross-Border Insolvency (1997) (MLCBI) is substantively the same.

² The Guide to Enactment and Interpretation of MLCBI (GEI), paras. 69–72.

³ GEI, para. 73.

⁴ GEI, paras. 74–76.

⁵ “Court”: a judicial or other authority competent to control or supervise an insolvency proceeding (the Glossary, term (i)). In this text, the term “court”, depending on the context, is used also to refer to a judicial or other authority, other than the one competent to control or supervise an insolvency proceeding, that may have adjudicative functions with respect to proceedings related to ATR (e.g. adjudication of disputed claims or administration of avoidance proceedings). For convenience, the term “court” also refers to the “competent authority”: an administrative or judicial authority that is responsible for conduct or oversight of simplified insolvency proceedings or both (the Guide, part five, section two, para. 25 (b)). Where the context so required, those separate terms were used.

⁶ “Debtor-in-possession”: a debtor that by the decision of the court retains full control over the business after commencement of insolvency proceedings, with the consequence that the court does not appoint an insolvency representative (the Glossary, term (l)) or appoints it for limited functions specified by the court (e.g. to assist or supervise the debtor-in-possession). See also recommendation 112 of the Guide, and GEI, paras. 71 and 86. The term does not intend to capture self-appointed debtors-in-possession.

⁷ GEI, paras. 1, 48, 49, 65 and 67, cross-referring to recommendations 15 and 16 of the Guide that set out standards for commencement of insolvency proceedings by the debtor (the debtor is or will be generally unable to pay its debts as they mature or its liabilities exceed the value of its assets) and creditors (the debtor is generally unable to pay its debts as they mature or the debtor’s liabilities exceed the value of its assets).

⁸ GEI, paras. 77–78.

⁹ The Glossary, term (w).

¹⁰ Ibid., term (kk).

plan with an expedited procedure conducted under the insolvency law for court confirmation of that plan;¹¹ (d) proceedings commenced by a micro- or small enterprise (MSE) debtor at an early stage of financial distress;¹² and (e) interim, restructuring and any other proceeding that the court may ascertain on a case-by-case basis as meeting the cumulative list of the requisites set out in paragraph 1 above.¹³

3. Being non-prescriptive, the text aims at increasing awareness of ATR tools and related matters among policy makers, legislators, judges and practitioners. States may find the text informative when they assess availability, accessibility, effectiveness and efficiency of their domestic ATR framework. Judges and practitioners may find helpful references in the text to ATR tools used in other jurisdictions, including legal requirements for their use, issues that arise from the use of those tools and possible solutions for addressing them. [Appendix I contains a toolkit of measures that could expedite ATR across borders, which is essential in the digital age that brings new challenges for ATR across borders, in particular due to the ease of movement of assets between jurisdictions and the instantaneous conclusion of multiple and numerous transactions whose parties may not be (immediately) identifiable. At the same time, technological developments bring new opportunities, including for updating or otherwise adjusting traditional ATR measures and practices to make them more flexible, creative and innovative to keep up with ATR challenges. The toolkit could assist States with those endeavours.]

4. The text has originated from proposals to UNCITRAL to provide States with a set of options to choose from for enactment in their jurisdictions with a view to improving, if necessary, the domestic ATR framework, including as regards cross-border cooperation on ATR.¹⁴ The proposals were discussed at the International Colloquium (Vienna, 6 December 2019)¹⁵ and in the Commission¹⁶ before being referred for consideration by UNCITRAL Working Group V (Insolvency Law) in 2021. During those discussions, it was acknowledged that adequate ATR tools might not be available in all jurisdictions, while access to existing ATR tools, in particular by foreign parties, might not be effective and efficient. While the Commission agreed to refer the subject to the Working Group with the scope of work limited to ATR, it also acknowledged that asset tracing and recovery took place in various contexts, and thus the results of its work on ATR might turn out to be helpful in other areas of law where asset tracing and recovery is relevant.¹⁷

5. The consideration of the text in the Working Group¹⁸ proceeded on the understanding that enhanced awareness about ATR tools and related matters would contribute to the effectiveness and efficiency of domestic and cross-border ATR, which was indispensable for achieving the objectives of an insolvency law, such as transparency, predictability, certainty, preservation and maximization of the value of

¹¹ See the text on the Purpose of legislative provisions preceding recommendation 160 of the Guide. See also GEI, para. 75.

¹² The Guide, recommendation 294.

¹³ As regards interim proceedings, see GEI, paras. 79–80. As regards restructuring proceedings, see the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, para. 11, under article 2.

¹⁴ The proposals by the United States of America for possible future work by UNCITRAL on civil asset tracing and recovery (A/CN.9/WG.V/WP.154 and A/CN.9/996).

¹⁵ The report of the Colloquium may be found in document A/CN.9/1008, available at <https://uncitral.un.org/en/commission>.

¹⁶ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 250 and 253 (d); *ibid.*, *Seventy-fourth Session, Supplement No. 17 (A/74/17)*, paras. 200–203; *ibid.*, *Seventy-fifth Session, Supplement No. 17 (A/75/17)*, part two, paras. 62–65; and *ibid.*, *Seventy-sixth Session, Supplement No. 17 (A/76/17)*, paras. 215–217.

¹⁷ *Ibid.*, *Seventy-sixth Session, Supplement No. 17 (A/76/17)*, para. 217.

¹⁸ For the reports of the Working Group on the sessions at which the topic was considered, see documents A/CN.9/1088, A/CN.9/1094, A/CN.9/1126, A/CN.9/1133, [to be added], available at https://uncitral.un.org/en/working_groups/5/insolvency_law.

the insolvency estate¹⁹ and protection of the legitimate interests of creditors,²⁰ the debtor and other parties in interest.²¹ The absence of such a framework, on the other hand, may increase risks of fraudulent dissipation of assets, diminishing the chances of reinstating the integrity of the insolvency estate and successful reorganization of viable businesses or an orderly and speedy liquidation of non-viable businesses. In addition, a weak ATR framework jeopardizes the ability to effectively realize value on assets, creating uncertainties for creditors, which may discourage investment. Therefore, an effective and efficient ATR framework contributes not only to the objectives of insolvency law and broader objectives of the rule of law and good governance but also to an enabling environment for trade, business, investment, access to credit and sustainable development.²²

6. The objectives cited in the preceding paragraph underpin UNCITRAL work and instruments in the area of insolvency law, including its Model Law on Cross-Border Insolvency (1997) (MLCBI), Legislative Guide on Insolvency Law (the Guide), Model Law on Recognition and Enforcement of Insolvency-related Judgments (2018) (MLIJ), Model Law on Enterprise Group Insolvency (2019) (MLEGI) and guidance materials related thereto.²³ The present text builds on and complements that work and those instruments, by focusing on provisions commonly found in international, regional and domestic insolvency and other law that enable and facilitate ATR, by describing ATR main and supplementary tools found in those provisions (the purpose, conditions for use and safeguards against abusive use of those tools), by highlighting issues arising from the use of those tools, including in the digital context and across borders, and by suggesting measures that could expedite ATR across borders.

B. Asset tracing and recovery generally

7. While there is no common definition of asset tracing and recovery, “asset tracing” generally refers to a process of identifying and locating assets or their proceeds. “Asset recovery” follows the asset tracing process and can be understood as the process of returning the assets or their proceeds to their legitimate claimant(s). “Assets” being traced and recovered may encompass anything of value to its legitimate claimant(s).

8. In commercial relationships, asset tracing and recovery usually take place, as the case may be: (a) for due diligence (e.g. before a business transaction, such as merger or acquisition); (b) in anticipation of a dispute (litigation or arbitration); (c) during litigation or arbitration; (d) for enforcement of a security interest, judgment or arbitral award; and (e) before the commencement²⁴ of, and during, insolvency proceedings. In other contexts, asset tracing and recovery is relevant to, for example, tax collection, the settlement of insurance claims, the resolution of family, inheritance

¹⁹ “Insolvency estate”: assets of the debtor that are subject to the insolvency proceedings (the Glossary, term (t)).

²⁰ “Creditor”: a natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings (the Glossary, term (j)). As a general rule, the term includes the creditors in the forum State and foreign creditors (the Glossary, para. 10).

²¹ “Party in interest”: any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, the insolvency representative, a creditor, an equity holder, a creditor committee, a government authority or any other person so affected. It is not intended that persons with remote or diffuse interests affected by the insolvency proceedings would be considered to be a party in interest (the Glossary, term (dd)).

²² See the Guide, part one and <https://sustainabledevelopment.un.org>

²³ The guides to enactment of the model laws as well as the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (the “Practice Guide”), the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency (the “Digest”) and the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (the “Judicial Perspective”). All texts cited in the paragraph are available at <https://uncitral.un.org/en/texts/insolvency>.

²⁴ “Commencement of [insolvency] proceedings”: the effective date of insolvency proceedings whether established by statute or a judicial decision (the Glossary, term (h)).

and succession matters, the protection of consumers and deposits and, at the pre-investigation, investigation, sentence, and post-sentence stages of criminal proceedings. In the latter context, asset tracing and recovery has been in the focus of international instruments and activities on combating transnational organized crime (e.g. money-laundering and corruption).²⁵

9. Irrespective of the context in which asset tracing and recovery takes place, practitioners use similar techniques (e.g. consulting the comparable sources of information for tracing assets, such as registers, witnesses, government files and court records as well as the Internet and other public sources of information). They have to meet similar requirements and take into account similar considerations (e.g. specifics of tracing and recovering certain assets, applicable international norms, safety and security, due process, probable cause, no speculative requests (“fishing expedition”), privacy, data protection, bank secrecy laws and the attorney-client privilege). They also face similar challenges, such as bureaucratic hurdles and inertia, deficiencies in the enabling environment and unresolved issues of law (e.g. as regards competing, including intermingled public and private, claims on the same asset; rights of bona fide third parties; and third-party funding of asset tracing and recovery actions).

10. Additional challenges arise in the cross-border context, in particular because of differences in jurisdictional, procedural and substantive rules and tools relevant to asset tracing and recovery. For example, different regimes for traceability of assets²⁶ and different rules on standing and limitation periods may apply. Concepts known in some jurisdictions (“constructive trust”, “actio pauliana”; see the relevant section below) may be unknown in others. Tools used in some jurisdictions (e.g. discovery, restrictions on disclosure of information and interception of correspondence) may create tension with public policies in other jurisdictions. Moreover, courts may not recognize extraterritorial effects of tools used by courts in other States. As a result, some asset tracing and recovery tools might be effective in the domestic context or across only some jurisdictions and less effective in other settings. In addition, practical issues of varying complexity often arise in cross-border asset tracing and recovery: from the need to deal with complex corporate and trust structures that are often used to obfuscate true ownership of assets to the need to overcome difficulties with access to information held locally that may be relevant to asset tracing and recovery, such as information in registers access to which may be hindered (e.g. because of language, local identification requirements or other set-up features) (see the relevant section below).

11. Digital means, open sources of information (such as online registers, databases and social networks) as well as modern investigative methods (dynamic, smart and multifactorial) and forensic technology considerably facilitate the tracing of both physical and digital assets, including across jurisdictions. However, they cannot eliminate all obstacles to effective and efficient asset tracing and recovery, such as those arising from unresolved legal obstacles or restrictive policy choices, or the need to involve intermediaries in asset tracing and recovery.²⁷ Challenges peculiar to data as a digital asset, evidence, means of communication or source of information, to digital transactions and to digital environment also arise (see the relevant section below).

²⁵ See, e.g. United Nations Convention against Corruption (UNCAC), articles 52–59.

²⁶ For example, in some jurisdictions, the creditor may be able to claim the misappropriated property and any subsequent assets into which the original property was converted. 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.

²⁷ Cloud service providers and digital platform operators are examples of intermediaries in the digital world.

C. Specifics of ATR

12. While having the same features and facing the same challenges as described in section B above and relying on asset tracing and recovery tools available also in other areas of law, ATR has its specifics, which arise from the nature and objectives of insolvency proceedings as collective enforcement proceedings. As noted above, those proceedings pursue, among others, the goals of recognition of existing creditor rights, equitable treatment of similarly situated creditors, and preservation, protection and maximization of the value of the insolvency estate to allow equitable distribution to creditors. ATR constitutes the means of achieving those objectives, including by verifying assertions of no assets in the insolvency estate for distribution among creditors, of creditors' claims²⁸ that may turn out to be fictitious and of dealings by the debtor-in-possession, directors²⁹ or the insolvency representative³⁰ that may turn out to be self-dealings. Together with an effective sanctions regime to prevent abuse or improper use of the insolvency regime and to impose appropriate penalties for misconduct, ATR plays an important preventive role against dissipation of assets before and during insolvency proceedings. Moreover, where such dissipation occurs, ATR is the means to reconstitute the integrity of the insolvency estate for the benefit of all the creditors and other parties in interest.

1. The meaning and scope of ATR

13. In the specific context of insolvency proceedings, asset tracing is a process of identifying and locating the assets of the debtor. Under the Guide, assets of the debtor are defined broadly to include 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 assets³¹ or in third-party owned assets.³² Ownership and property rights are determined by reference to the relevant applicable law.³³

14. Asset recovery follows asset tracing for the purpose of returning to the insolvency estate those assets of the debtor that under the applicable law are to be made subject to the insolvency proceedings. The Guide recommends that the insolvency law should specify that the insolvency estate should include: (a) assets of the debtor, including the debtor's interest in encumbered assets and in third-party owned assets; (b) assets acquired after commencement of the insolvency proceedings;

²⁸ "Claim": a right to payment from the estate of the debtor, whether arising from a debt, a contract or other type of legal obligation, whether liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent. Some jurisdictions recognize the ability or right, where permitted by applicable law, to recover assets from the debtor as a claim (see the Glossary, item (g)).

²⁹ The Guide, part four refers to directors broadly as persons who exercise factual control over the debtor in the period approaching insolvency, including formally appointed directors as well as de facto and shadow directors.

³⁰ "Insolvency representative": 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 (see the Glossary, item (v)). For convenience, depending on the context, the term "insolvency representative" may also refer to an "independent professional": an individual or entity of appropriate qualifications, independent from the debtor, creditors and other parties in interest, appointed by the competent authority to perform one or more tasks related to a simplified insolvency proceeding, subject to appropriate clearances as regards ethical, professional and other requirements and the absence of conflicts of interest. In the performance of any tasks assigned to it by the competent authority, the independent professional remains accountable to the competent authority and is expected to adhere to any applicable instructions or guidance that may be issued by the competent authority with respect to a task assigned to the independent professional (see the Guide, part five, section two, para. 25 (d)). Where the context so required, those separate terms were used.

³¹ "Encumbered asset": an asset in respect of which a creditor has a security interest (the Glossary, term (o)).

³² The Glossary, term (b).

³³ See a footnote to recommendation 35 (a) of the Guide.

and (c) assets recovered through avoidance³⁴ and other actions.³⁵ In addition, the Guide recommends stating in the insolvency law that any undisclosed or concealed assets of the debtor form part of the insolvency estate.³⁶

15. Some jurisdictions include in the insolvency estate all assets of the debtor regardless of their location. Other jurisdictions include in the insolvency estate only those assets of the debtor that are located within the boundaries of that jurisdiction unless there are treaties or other inter-State or inter-court cooperation agreements that facilitate including the assets of the debtor located abroad in the insolvency estate. Yet other jurisdictions follow an intermediate approach; for example, that the insolvency estate in the main proceeding³⁷ should include all assets of the debtor wherever located. Some laws envisage, like the MLCBI, that certain assets of the debtor can be reserved for administration in a particular proceeding (main, non-main,³⁸ or proceeding at the place of the location of the assets). They may also restrict removal of the local assets of the debtor abroad before local creditors' interests are satisfied.³⁹ The Guide recommends that in the case of insolvency proceedings commenced where the debtor has the centre of its main interests (COMI),⁴⁰ the insolvency law should specify that the insolvency estate should include all assets of the debtor wherever located⁴¹ and, where the insolvency law adopts a universal approach, as recommended in the Guide,⁴² the law should also address the issue of recognition of foreign proceedings.⁴³ The Guide recommends MLCBI for enactment by States.⁴⁴

16. The date from which the insolvency estate is to be constituted could be either the date of application for commencement or the effective date of commencement of insolvency proceedings;⁴⁵ for a simplified insolvency proceeding, the Guide recommends that the effective date of commencement should be the date from which the insolvency estate is to be constituted.⁴⁶ The significance of the difference between the dates relates to the treatment and the protection of the debtor's assets in the interim period between application and commencement (see chapter III below, under "Provisional measures").

17. Not all assets of the debtor would be part of the insolvency estate. The types of assets that are usually excluded in respect of natural persons include assets that are necessary for the debtor to earn a living, post-application earnings from the provision of personal services, and personal and household items necessary to satisfy the basic

³⁴ "Avoidance": provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors (the Glossary, term (c); the Guide, part five, section two, term (a)).

³⁵ Recommendation 35.

³⁶ Recommendation 314.

³⁷ "Main proceeding": an insolvency proceeding taking place in the State where the debtor has the centre of its main interests (the Guide, part four, section two, term (d); art. 2 (j) MLEGI; the definition of "foreign main proceeding" in art. 2 (b) MLCBI is substantively the same). See footnote 40 below for the explanation of the term "centre of main interests (COMI)".

³⁸ "Non-main proceeding": an insolvency proceeding, other than a main proceeding, taking place in a State where the debtor has an establishment (defined as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services) (art. 2 (k) and (l) MLEGI; the definition of "foreign non-main proceeding" in art. 2 (c) MLCBI is substantively the same).

³⁹ Protection of local creditors' interests is envisaged in article 21 (2) of MLCBI.

⁴⁰ COMI is the location (a) where the central administration of the debtor takes place and (b) which is readily ascertainable by creditors (see GEI, para. 145).

⁴¹ Recommendation 36.

⁴² The Guide, part two, chap. II, footnote 7.

⁴³ "Foreign proceeding": a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation (art. 2 (a) of MLCBI).

⁴⁴ Recommendation 5.

⁴⁵ Recommendation 37.

⁴⁶ Recommendation 315.

domestic needs of the debtor and his or her family. Further exemptions may apply to joint assets such as matrimonial property. Tort claims of personal nature (e.g. arising from bodily injury, defamation, damage to reputation) are also usually excluded from the insolvency estate of the natural person debtor.⁴⁷ International treaty obligations may apply to this type of exclusions. In comparison, insolvency laws adopt different approaches to exclusion of assets from the insolvency estate where the debtor is a legal person. Some laws may exclude trust assets and assets subject to contractual or other arrangement that does not involve a transfer of title but rather use of the assets and return to the owner once the purpose for which they were in the possession of the debtor has been fulfilled (such an arrangement may be known as a bailment or depositum). Some laws may also exclude assets subject to reclamation, such as goods supplied to the debtor before commencement but not paid for and recoverable by the supplier (subject to identification and other applicable conditions).⁴⁸ There are also different approaches to treating encumbered assets: some jurisdictions make them part of the insolvency estate, others do not. In addition, different approaches may be taken to the manner of constituting the insolvency estate in simplified insolvency proceedings. In particular, all assets of the MSE debtor may be included in the insolvency estate, and the MSE debtor may be allowed to request exclusion of some assets up to a specified value limit. Alternatively, the assets of the MSE debtor subject to specific ceilings or categories could be excluded, or across-the-board exclusion of all assets of the MSE debtor could be permitted, unless creditors object.⁴⁹

18. Because of those exclusions, not all assets of the debtor would belong to the insolvency estate. Practical considerations (e.g. availability of funds in the insolvency estate, costs of ATR and probability of success) may influence the choice of assets that would be worthwhile attempting to recover for the insolvency estate. For example, recoverability of some assets may be hindered by special protections (e.g. those that are usually accorded to bona fide third parties). Special regimes, including those under international instruments, may complicate tracing and recovery of some assets. Some assets may need to be substituted by their cash value or the value of an avoided transaction.

2. Specific challenges of ATR and possible solutions to them

19. ATR is enabled and facilitated by the entire insolvency law framework, including broad administrative and investigative powers of the court and of the insolvency representative. Those powers may not exist outside insolvency proceedings.

20. At the same time, ATR faces specific challenges. For example, cooperation by the debtor and third parties that have had dealings with the debtor is often crucial for timely ATR actions, including avoidance. The latter, although a powerful ATR tool, may be unpredictable or ineffective if avoidance proceedings are slow, complex or possible only on very narrow grounds. In addition, the lack of, or insufficient, funds in the insolvency estate may hinder avoidance or other ATR actions unless alternative funding or other arrangements are put in place.⁵⁰ Some of them, such as assigning claims to third-parties for those parties to take actions in their own name, may have

⁴⁷ The Guide, part two, chap. II, footnote 8.

⁴⁸ The Guide, part two, chap. II, section A.3, paras. 17–21 and part five, paras. 173–175 and 197.

⁴⁹ The Guide, part five, para. 175.

⁵⁰ Litigation or other third-party funding arrangements are usually subject to regulation. In insolvency proceedings, they would most likely need to be authorized by the court. Before authorizing them, the court would be expected to assess their impact on the conduct of the proceeding, its outcomes, the equal treatment of similarly situated creditors and the protection of all parties in interest. The arrangements may be refused if they create tensions with other, more important, considerations involved in the insolvency proceeding. Where authorized, litigation or other third-party funding arrangements are usually accompanied by safeguards, such as oversight over actions and expenses and assessment of their reasonableness and necessity. Among others, those measures aim at mitigating risks of delays and other hindrances to effective and efficient administration of insolvency proceedings that may occur if challenges arise on the ground that alternative funding arrangements inappropriately influence the conduct of insolvency proceedings and their outcomes.

multiple benefits for the insolvency estate (e.g. providing an immediate payment into the insolvency estate, avoiding costs of ATR and eliminating the need to wait for outcomes of litigation or other ATR actions, thereby not delaying distribution of proceeds to creditors and closure of insolvency proceedings).

21. In cross-border ATR, in addition to the usual issues arising from divergent jurisdictional, standing and limitation period rules, specific challenges may arise from the application of different rules to insolvency law matters, such as the composition of the insolvency estate, treatment of certain assets, rights or claims, and avoidance. Non-recognition and non-enforcement of effects of the opened insolvency proceeding on those matters across borders as well as measures that the State may decide to take to protect local interests may create additional challenges for cross-border ATR.

22. UNCITRAL's recommended approach is to: (a) provide for direct and expeditious access of the foreign representative and foreign creditors to courts in enacting States; (b) make available a broad range of assistance and relief, including provisional relief, to the foreign proceeding and the foreign representative;⁵¹ (c) put in place measures that would expedite consideration of applications for recognition, enforcement and relief;⁵² (d) enable direct communication and cooperation of courts and insolvency representatives; (e) ensure coordination of concurrent proceedings; and (f) defer to the law of the State in which the insolvency proceedings are commenced (the *lex fori concursus*) on most issues of relevance to ATR.

23. At the same time, ATR closely interacts with other provisions of insolvency and other laws, in particular those that ensure accountability and transparency for ATR actions and those that aim at achieving appropriate balance between effective and efficient ATR and provision of certainty in the market to promote economic stability and growth.⁵³ In addition, the effectiveness of ATR depends on a general enabling legal environment and practical means, such as institutional support (including the speed with which courts can handle ATR actions), professionalism of insolvency representatives and other practitioners involved in ATR, and quality of enforcement mechanisms. (See the relevant section below.)

D. Organization of the text

24. The subsequent parts of the text are organized as follows:

(a) Chapter II discusses ATR in the broader insolvency law context and an enabling framework for an effective and efficient ATR;

(b) Chapter III surveys ATR tools. It is accompanied by two appendixes: one containing a toolkit of measures aimed at expediting ATR across borders; and the other listing and describing main features of commonly found registers of relevance to ATR; and

(c) [The last chapter highlights distinct issues arising from tracing and recovering certain assets].

25. The terms are explained either in footnotes or in the text. The usual rules of interpretation apply: "or" is not intended to be exclusive; use of singular also includes the plural; and "include", "including", "such as" and "for example" are not intended to indicate an exhaustive list. References to "person" should be interpreted as including both natural and legal persons unless the context suggests otherwise.

⁵¹ "Foreign representative": a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding (art. 2 (d) of MLCBI).

⁵² E.g. apart from procedural deadlines, specialization of domestic courts in cross-border insolvency matters and procedural rules designed specifically for cross-border insolvency cases may help handling applications for recognition, enforcement and relief expeditiously.

⁵³ The Guide, recommendation 1 (a).

II. ATR in the broader context

A. ATR and the key objectives of insolvency law

26. When a debtor is or will generally be unable to pay its debts as they become due or when its liabilities exceed the value of its assets, an effective and efficient insolvency law provides legal mechanisms for addressing claims against the insolvency estate collectively, either through liquidation of failed businesses or reorganization of viable businesses. Creditors and other parties in interest, including the debtor, its owners and employees, have strong incentives to achieve maximum value for the insolvency estate since this will ensure higher distributions and reduce the burden of insolvency for the debtor. One of the key objectives of insolvency law, therefore, is to preserve, protect, and maximize the value of the insolvency estate.⁵⁴ This objective is furthered by ATR since its primary goal is to identify, collect and recover as many insolvency estate assets as fast and with as low costs as possible.

27. Another common key objective of an insolvency regime is to ensure equitable treatment of similarly situated creditors.⁵⁵ It is based on the principle that in collective proceedings creditors with similar legal rights should be treated fairly, receiving a distribution on their claims in accordance with their relative ranking and interests. This means that any adjustments made by insolvency law to the priority accorded to the claims of a similar class affects all members of that class in the same manner. This objective is closely linked to other objectives of an effective and efficient insolvency law – to ensure transparency and predictability and to recognize existing creditor rights.⁵⁶ ATR furthers the achievement of those objectives by addressing fraud, favouritism,⁵⁷ preferences⁵⁸ and other acts or transactions detrimental to equitable treatment of similarly situated creditors.

28. ATR is also relevant to the achievement of other objectives of an effective and efficient insolvency law since all those objectives are interconnected and reinforce each other. For example, identification, collection and recovery of insolvency estate assets without delay and with as low costs and disruptions as possible contribute to achieving the objective of efficient and impartial resolution of insolvency.⁵⁹ This, in turn, contributes to achieving the objectives of the maximization of the value of the insolvency estate and of equitable treatment of similarly situated creditors.

B. Enabling environment for ATR: insolvency law framework

1. Comprehensive scope of an insolvency law

29. ATR is enabled and facilitated where insolvency law governs insolvency proceedings against all debtors that engage in economic activities⁶⁰ and where mechanisms exist to cover the costs of administering insolvency proceedings and ATR actions where the insolvency estate is insufficient to meet the associated costs.⁶¹

⁵⁴ Ibid., recommendation 1 (b) and (f).

⁵⁵ Ibid., recommendation 1 (d) and (f).

⁵⁶ Ibid., recommendations 1 (h), 3 and 4.

⁵⁷ “Favouritism”: transactions at undervalue where the debtor wished to advantage certain creditors at the expense of the others. [A/CN.9/1133, para. 13 \(b\)](#).

⁵⁸ “Preference”: a transaction which results in a creditor obtaining an advantage or irregular payment (the Glossary, term (ff)).

⁵⁹ The Guide, recommendation 1 (e).

⁶⁰ Ibid., recommendations 8 and 9.

⁶¹ Ibid., recommendations 26 and 280. Some insolvency laws provide for the possibility that a creditor or a group of creditors may advance the approximate costs of insolvency proceedings or ATR actions. There may be an incentive for creditors to do so if they believe that there are avoidable transactions or concealed assets that can be found. Where creditors are unwilling to invest time and resources in insolvency proceedings and those actions (e.g. recoveries may be insignificant for them), alternative funding arrangements for the commencement of insolvency proceedings and ATR actions may be considered. See discussion of possible alternative solutions

2. Mechanisms for protection, preservation and maximization of the value of the insolvency estate

30. Urgent provisional relief between application and commencement or recognition and measures put upon commencement of insolvency proceedings or recognition, discussed in the relevant sections below, facilitate ATR by preserving the status quo, decreasing risks of (further) dissipation of assets of the debtor (by the debtor, creditors or other persons) and allowing sufficient time for more orderly and efficient ATR.

3. Convenient means for identifying, collecting, preserving and recovering insolvency estate assets

31. The notice of commencement of insolvency proceedings, among others, advises about the regime in place in insolvency proceedings, i.e. whether it is the full or partial displacement of the debtor or the debtor-in-possession. It therefore informs whether further dealings with respect to the insolvency estate are to be made with the debtor or the insolvency representative. In some jurisdictions, a notice of commencement of insolvency proceedings obligates all who have custody of any of the debtor's assets and business records to make them, under penalty of law, available to the court or the insolvency representative, as the case may be.

32. An important means of identifying and recovering insolvency estate assets is an obligation on the debtor to disclose complete, reliable and accurate information about the debtor's situation and the location of the debtor's assets and business records (see the relevant section below.)

4. Incentives and deterrents

33. Of relevance to ATR are: (a) appropriate incentives to induce compliance with law (for example, incentives for gathering information about the debtor's assets and affairs); (b) measures to prevent non-compliance (e.g. awareness-raising, education and early warning signals); and (c) effective remedies to deter and punish non-compliance (e.g. a penalty on any person in control or possession of the debtor's assets or business records for each day of delay to deliver them to the insolvency representative).

34. These incentives and deterrents are often found not only in insolvency law but, for example, also in company law, administrative law and criminal law. Insolvency law incentives and deterrents, because they facilitate recovery of the insolvency estate assets for the benefit of all the creditors and may provide the courts with more flexibility to devise and impose targeted and tailored measures on a broader group of persons, may be preferable for creditors and other parties in interest than criminal or administrative law incentives and deterrents that have different objectives and may not allow for flexibility required for efficient administration of insolvency proceedings.

35. Insolvency law incentives and deterrents are found, for example, in provisions on discharge⁶² (e.g. granting an earlier discharge or, conversely, denying discharge or revoking a discharge already granted)⁶³ and conversion of proceedings (e.g. conversion of reorganization to liquidation).⁶⁴ In addition, an effective insolvency law deterrent against dissipation of assets is a provision recommended in the Guide that any concealed or undisclosed assets form part of the insolvency estate.⁶⁵

36. Another insolvency law deterrent and, at the same time, an important factor for timely ATR, is a provision that allows not only debtors but also creditors to apply for

in parts two and five of the Guide, in the context of recommendations 26, 125 and 280. See also para. 20 above on discussion of related issues.

⁶² "Discharge": release in accordance with applicable law of a debtor from claims addressed in the insolvency proceedings.

⁶³ See e.g. the Guide, recommendations 194–196 and 354–361.

⁶⁴ Ibid., recommendations 158, 353 and 367–370.

⁶⁵ Recommendation 314.

commencement of insolvency proceedings.⁶⁶ Prioritizing the cessation of payments test over the balance sheet test, as recommended by the Guide,⁶⁷ allows creditors to initiate insolvency proceedings and ATR sufficiently early. Accompanying safeguards are also relevant in this context.⁶⁸

37. Where the application for commencement of insolvency proceedings does not automatically trigger the commencement of insolvency proceedings, delay between application and commencement may cause, among others, (further) dissipation of assets and complicate subsequent ATR actions. UNCITRAL insolvency texts recommend mechanisms, including presumptions of insolvency,⁶⁹ to expedite the commencement of insolvency proceedings. The recommended mechanisms are significant also in the cross-border context where States require the commencement of a local insolvency proceeding before the foreign representative can obtain access to local ATR remedies (see the relevant section below).

5. Clarity and certainty

38. Several courts may claim jurisdiction over ATR actions. Different jurisdictional rules and connecting factors may apply.⁷⁰ Some States may assert exclusive or extraterritorial jurisdiction.⁷¹

39. The Guide recommends that the insolvency law should clearly identify the court that has jurisdiction over the commencement and conduct of insolvency proceedings, including matters arising in the course of the proceedings,⁷² which would include ATR, and should also determine which debtors have sufficient connection to the State to be subject to its insolvency law. The location of the debtor's COMI, establishment or assets in the State are the usual connecting factors.⁷³

40. The debtor may become subject to the insolvency law of more than one State, which may result in opening parallel insolvency proceedings. The UNCITRAL cross-border insolvency framework suggests measures to achieve appropriate coordination of such proceedings, implicitly acknowledging the coordinating role of the insolvency proceeding opened in the COMI jurisdiction (or the planning proceeding⁷⁴

⁶⁶ See e.g. the Guide, recommendations 14–29 and 292–301.

⁶⁷ Recommendation 15 and accompanying footnote and commentary.

⁶⁸ E.g. denial of an application for commencement of insolvency proceedings, dismissal of proceedings, orders for compensation of costs and damages and sanctions and other negative consequences for the applicant acting in bad faith. See e.g. the Guide, recommendations 20, 28, 301 and 309 and accompanying commentary.

⁶⁹ See e.g. recommendation 17 of the Guide and article 31 of the MLCBI. In some jurisdictions, additional presumptions of insolvency exist, including the closure of the business (the administrative headquarters or other place where the debtor carries out its main business activity) or hiding or absence of the members of the administrative body or legal representatives from the registered office or principal place of business for more than the established number of days without leaving legal representatives with sufficient powers and assets or means to comply with their obligations. In addition, the failure to present (audited) annual financial reports for a number of subsequent years fixed in the law creates presumption that the business is unable to meet its due obligations, which is a legal ground for opening the insolvency proceeding.

⁷⁰ E.g. the location of the debtor or other relevant persons (e.g. respondents, defendants), the location of evidence, the location of assets, contractual provisions (choice of law and choice of forum provisions), the place where the act was committed or the place where the committed act produced effects.

⁷¹ See e.g. article 9 of the United Nations Convention on the International Effects of Judicial Sales of Ships that provides that the courts of the States of judicial sale shall have exclusive jurisdiction to hear any claim or application to avoid a judicial sale of a ship conducted in that State that confers clean title to the ship or to suspend its effects, which shall extend to any claim or application to challenge the issuance of the certificate of judicial sale.

⁷² Recommendation 13.

⁷³ The Guide, recommendation 10 and accompanying footnote.

⁷⁴ “Planning proceeding”: a main proceeding commenced in respect of an enterprise group member provided: (i) one or more other enterprise group members are participating in that main proceeding for the purpose of developing and implementing a group insolvency solution; (ii) the enterprise group member subject to the main proceeding is likely to be a necessary and integral participant in that group insolvency solution; and (iii) a group representative has been

in the enterprise group⁷⁵ insolvency context). It also enables and encourages direct communication and cooperation of courts and insolvency representatives, including as regards ATR actions. (See the relevant sections below.)

41. [UNCITRAL recommends deferring to the *lex fori concursus* for all aspects of the commencement, conduct, administration and conclusion of insolvency proceedings and their effects, with only very few exceptions.⁷⁶ The ATR-related aspects covered by the *lex fori concursus* include: (a) the debtor that may be subject to insolvency proceedings; (b) constitution and scope of the insolvency estate (i.e. which assets belong to the insolvency estate and can thus be traced and recovered for the insolvency estate); (c) measures for protection and preservation of the insolvency estate; (d) rules for the use or disposal of assets during insolvency proceedings; (e) avoidance; (f) insolvency law rules for set-off; (g) rights and obligations of the debtor; (h) duties and functions of the insolvency representative; (i) functions of the creditors and creditor committee;⁷⁷ and (j) costs and expenses relating to the insolvency proceedings.⁷⁸]

42. These measures enhance predictability and clarity, and could inform ATR actions and where they should be taken.

C. Enabling environment for ATR: other areas of law and institutional framework

43. The success of ATR depends on many factors, including the adequacy of the court infrastructure. If the court infrastructure is not able to respond to the demands for swift action, the inclusion of ATR tools in the law will not achieve the ATR goals.

44. In addition to courts, professionals involved in ATR (insolvency representatives, legal advisers, accountants, forensic specialists or other professional advisers) play an important role in ensuring that ATR is handled timely, transparently and at the required level of accountability and integrity. They usually must comply with professional standards by which their performance is assessed. Non-compliance may lead to disqualification. They may be required to undertake regular training to keep their license to practice, or to be certified against applicable standards, including those relevant to ATR.

45. ATR is also affected by several parallel processes at the national, regional and international levels, including those that support international efforts against illicit

appointed. Subject to the requirements of subparagraphs (g)(i) to (iii), the court may recognize as a planning proceeding a proceeding that has been approved by a court with jurisdiction over a main proceeding of an enterprise group member for the purpose of developing a group insolvency solution within the meaning of this Law (MLEGI, article 2 (g)). “Enterprise group member”: an enterprise that forms part of an enterprise group (MLEGI, article 2 (d)). “Group insolvency solution”: a proposal or set of proposals developed in a planning proceeding for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members (MLEGI, article 2 (f)). The other related terms are explained in other footnotes throughout this text.

⁷⁵ “Enterprise group”: two or more enterprises that are interconnected by control or significant ownership; “Enterprise”: any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law (the Guide, part three, terms (a) and (b); part four, section two, term (a); art. 2 (a), (b) and (d) of MLEGI).

⁷⁶ [Consequently, ATR actions related, for example, to payment and settlement systems and regulated financial markets will be governed by the law of that system and the market. *To be elaborated.*]

⁷⁷ “Creditor committee”: representative body of creditors appointed in accordance with the insolvency law, having consultative and other powers as specified in the insolvency law (the Glossary, term (k)).

⁷⁸ This rule does not interfere with private international law rules of the State in which insolvency proceedings are commenced, which will determine the law applicable to the validity and effectiveness of rights and claims existing at the time of the commencement of insolvency proceedings. The Guide, recommendations 30 and 31 [*references to future provisions are to be added*].

financial flows and financing of terrorism to end safe havens for corrupt funds, to prevent the laundering of the proceeds of corruption and to facilitate more systematic and timely return of stolen assets for public use. Those processes require States, among others, to cooperate and better coordinate their asset tracing and recovery efforts.⁷⁹ They led, in particular, to: (a) enactment in many jurisdictions of ultimate beneficial ownership (UBO) legislation, including know-your-customer (KYC) provisions;⁸⁰ (b) establishment of registers of relevance to ATR, such as registers of directors and beneficial owners (see appendix II);⁸¹ and (c) implementation of whistle-blowing management policies and systems.⁸²

46. In addition, many generally accepted standards for company organization and management (e.g. bookkeeping and accounting standards) are based on the concepts and principles that help to prevent or minimize loss of assets and recover lost assets. Those concepts and principles include: (a) the double entry system where, for every business transaction, an entry is recorded in at least two accounts as a debit or credit; (b) a first entry journal where all transactions are initially recorded, and a central ledger that keeps track of all transactions; (c) proper documented information, including information relating to the assets (in an asset register and inventories) and information relating to financial position, earnings, transactions with affiliated companies and any other information significant for the assessment of the future development of the business (in financial reports and statements); and (d) prompt corrective actions to eliminate non-conforming practices. Those requirements are supplemented by audit, reporting and public disclosure requirements to ensure that information presented in business records is accurate, complete, transparent, available and accessible, as appropriate, by State authorities (e.g. tax, social security), equity holders,⁸³ creditors, potential investors and the public. In many jurisdictions, it is a criminal offence to misrepresent or provide incomplete information in financial statements or audit opinions or conceal those facts. It is also a criminal offence in many jurisdictions not to report to competent authorities or disclose otherwise as required by law: fraud and other economic crimes; the imminent threat to the continuation of the business as a going concern; and other facts that may cause significant damage to the business, equity holders, creditors or investors, or suspicion thereof.

⁷⁹ See e.g. relevant provisions of UNCAC, where the return of assets is a fundamental principle of the Convention, and guidance materials on asset tracing and recovery related to those provisions.

⁸⁰ A “beneficial owner” is the natural person(s) who ultimately owns or controls a legal person or arrangement even when the ownership or control is exercised through a chain of ownership or by means of control other than direct control. Both UBO and KYC standards aim at facilitating identification of ultimate beneficiaries of funds and protect businesses and financial institutions against fraud, corruption, money-laundering and terrorist financing. They usually require, apart from the verification of beneficial ownership: client identification; politically exposed persons and sanctions checks; the sourcing of funds and wealth checks; enhanced due diligence in the case of high risks or red flags within the client relationship; documentation and notification duties; and the freezing of assets where necessary. Furthermore, the “Travel Rule” applies that requires financial institutions to pass on certain information related to transfers of funds to the next financial institution during wire transfers or similar transmittal of funds. See e.g. the UNCITRAL Legislative Guide on Key Principles of a Business Registry, para. 132 and footnotes 16 and 17; and recommendations 4, 10, 12 and 16 at www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html.

⁸¹ UBO standards encourage States, among others, to conduct comprehensive risk assessments of legal persons, including by registering them in a publicly available company register indicating their company name, proof of incorporation, legal form and status, the address of the registered office, basic regulating powers and a list of directors. Companies are required to keep track of their equity holders. (See e.g. the Guidance to Beneficial Ownership on Legal Persons (recommendation 24) issued by the Financial Action Task Force, available at www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html.)

⁸² See e.g. article 33 of UNCAC related to the protection of reporting persons www.unodc.org/unodc/en/ft-uncac/focus-areas/whistleblower.html.

⁸³ “Equity holder”: the holder of issued stock or a similar interest that represents an ownership claim to a proportion of the capital of a corporation or other enterprise (the Glossary, term (p)).

47. Some of the above-mentioned standards as well as those specifically designed for information technology (IT) applications (e.g. in transport and financial sectors), are relevant to identification and traceability of products and transactions, identification of the chain of possession as well as tracing and tracking of goods, including in real time and throughout the supply chain. Some standards set out specific requirements for digital identity management, digital transactions, digital assets and digital evidence. They include those on: appropriate cyber security measures; responsibilities of intermediaries (e.g. custodians of digital assets, cloud service providers) and developers of IT applications, including artificial intelligence (AI), distributed ledger technology (DLT) and other solutions; and operation and monitoring of the integrated platforms (e.g. Internet of Things (IoT)).

48. Legal frameworks, including those promoted by international standards, applicable to certain assets may also facilitate timely ATR. For example, requirements to provide a public notice of an upcoming sale of a certain asset (e.g. a ship) may allow the insolvency representative to take a timely step to object to and prevent the sale before it would be difficult to undo the sale and its effects (e.g. creation of a clean title for the purchaser) through avoidance or other acts.⁸⁴

49. Other provisions of law may support and facilitate ATR, for example provisions of law regulating limitation periods if they provide that an applicable limitation period starts running from the time of discovery of the asset, information or evidence.

50. In addition, remedies against a non-cooperative or dishonest debtor or other persons, including imposition of administrative or criminal liability on them depending on the gravity of the situation, play an important role. For example, in some jurisdictions, negative inferences (*contra spoliatores*) may follow for the debtor and its directors if it is established that they have documents and information but intentionally refused to present them to the court or the insolvency representative, as the case may be. In such case, the facts most unfavourable to them would be presumed.

III. Survey of ATR tools

A. Tools specifically designed for insolvency proceedings: domestic context

1. Preventive measures

51. An effective preventive measure against dissipation of insolvency estate assets is to impose obligations on the debtor and persons exercising factual control⁸⁵ over the debtor's business in the period approaching insolvency to have due regard to the

⁸⁴ See e.g. articles 4 and 8 of the United Nations Convention on the International Effects of Judicial Sales of Ships. The accompanying commentary notes that avoidance of a judicial sale is exceedingly rare. It is a remedy of limited availability given the difficulty of unwinding the effects of a judicial sale and restoring the parties to their previous position once action has been taken on registration and the proceeds of sale have been distributed. The commentary also notes that the Convention is not concerned with the effects of a judicial sale on the survival of personal claims against the former shipowner that arose prior to the judicial sale, either under contract or in tort, and does not address the coordination of insolvency proceedings and parallel judicial sale proceedings.

⁸⁵ "Control": the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise (the Guide, part three, term (c); and art. 2 (c) MLEGI). "Controlled enterprise group member": those enterprise group members controlled by the parent, irrespective of their legal structure (the Guide, part three, Glossary, para. 5). In the ATR context, the terms "parent" and "control" should be understood broadly, as encompassing the capacity to determine, directly or indirectly, not only the operating and financial policies of a person, natural or legal, the debtor or otherwise, but also, for example, their assets.

interests of creditors and other stakeholders and to take reasonable steps⁸⁶ to avoid insolvency, and, where it is unavoidable, to minimize the extent of insolvency.⁸⁷ Breach of those obligations may lead to liability (civil, administrative and criminal) of the debtor and persons in control of the debtor who would be obliged to compensate for losses and damages (see below under “Actions against directors, equity holders and other persons”).

52. The primary purpose of imposing these obligations is to avoid insolvency and where it is unavoidable to minimize potential losses to creditors.⁸⁸ At the same time, these measures are of direct relevance to ATR since they also obligate persons in charge of the business to keep track of assets, maintain transparency within the business books and records and take other steps that in insolvency proceedings could provide the court and the insolvency representative with a readily available and accurate information about the debtor’s assets and affairs. That information informs the court and the insolvency representative about the need for any or specific ATR actions and facilitates those actions.

53. Some of the steps expected to be taken in the period approaching insolvency may go beyond the steps usually taken under normal business conditions. For example, the management may need to maintain a detailed list of preferential transfers and justifications for making them. MSEs may avail themselves of assistance made available to them before commencement of simplified insolvency proceedings.⁸⁹ Such assistance may take the form of services by an independent professional appointed by the competent authority (e.g. with the collection of assets that will comprise the insolvency estate in the pending simplified insolvency proceeding).

54. In some jurisdictions, the debtor’s representatives, such as an attorney-at-law, may be required to preserve the debtor’s property until the voluntary petition for commencement of insolvency proceedings is filed.

2. Provisional measures

55. Provisional measures in the context of insolvency proceedings are measures granted by the court between the time of application for commencement of insolvency proceedings and the commencement of the proceedings. They are of key importance to ATR since upon learning of the application, the debtor, creditors or other persons may be tempted to transfer the debtor’s assets out of reach of creditors and take other actions that would complicate subsequent ATR. The Guide recommends that, in jurisdictions where an application does not automatically commence insolvency proceedings, the court should be able to grant provisional measures, at the request of the debtor, creditors, or third parties.⁹⁰ In some jurisdictions, provisional measures are imposed by courts *ex officio*.

56. Since the purpose of provisional measures is to protect the debtor’s assets that potentially will comprise the insolvency estate from dissipation, requests for provisional measures should be dealt with expeditiously, especially where fraud is suspected.

57. The Guide provides a non-exhaustive list of provisional measures, noting that any other, non-listed, provisional relief under insolvency law would be of the type applicable or available on commencement of insolvency proceedings. Among those specifically listed are: (a) staying execution against the assets of the debtor;

⁸⁶ Reasonable steps of relevance to ATR include: (a) ensuring that proper accounts are being maintained and that they are up to date; (b) protecting the assets so as to maximize their value and avoid loss of key assets; (c) not committing the business to the types of transaction that might be subject to avoidance unless there is an appropriate business justification; and (d) ensuring that management practices take into account the interests of creditors and other stakeholders.

⁸⁷ The Guide, part four and recommendation 372.

⁸⁸ *Ibid.*, part four.

⁸⁹ *Ibid.*, recommendations 275–279 and accompanying commentary.

⁹⁰ Recommendation 39.

(b) entrusting the administration or supervision of the debtor's business to an insolvency representative or other person designated by the court; and (c) entrusting the realization of all or part of the assets of the debtor to an insolvency representative or other person designated by the court.⁹¹ Other relief may include discovery, judicial inspections, examination of witnesses, the taking and securing of evidence and ordering the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities.

58. In some jurisdictions, upon application for commencement of insolvency proceedings, an automatic stay is imposed on the realization of movable or immovable property of the debtor. In other jurisdictions, courts, upon petition of an interested person, an insolvency representative appointed as a provisional measure (if any), or by their own authority, are required or authorized to conserve the value of the debtor's assets and, can for such purpose: (a) order the immediate drawing-up of a detailed inventory of the debtor's assets, site visits, search of premises or other similar measures by an insolvency representative appointed as a provisional measure; (b) issue a temporary restraining order against the debtor, its assets or third parties (e.g. provisional freeze, seizure, sealing, preventive attachments and embargoes), including for the purpose of securing the right of avoidance; and (c) limit the powers of the debtor as regards its assets (e.g. require the permission of an insolvency representative appointed as a provisional measure for transfers or encumbrances as regards all or certain assets). In some jurisdictions, a judicial overseer may be appointed whose role is to analyse and report on the economic and financial situation of the debtor. That limited intervention may eventually merit a more rigorous intervention, such as displacing the debtor from operation of business.

59. Some jurisdictions allow their courts, upon receipt of an application for commencement of insolvency proceedings, to request information relating to the debtor from the debtor, different registers and other third parties, including information on the debtor's bank accounts, contracts entered into and movable and immovable property. These measures are aimed at assisting the court to decide whether to commence an insolvency proceeding or deny the application and, if to commence, which type of proceeding to commence. In some jurisdictions, the right to request that information is given also to an insolvency representative appointed as a provisional measure and to creditors.

60. Provisional measures are usually accompanied by safeguards against their misuse. The Guide refers to the following: (a) to require the applicant to demonstrate that relief is urgent and outweighs any potential harm that may result from granting it, and to inform the court of all material changes that may necessitate modification or termination of the relief; (b) to require the applicant to provide indemnification for the requested relief, and, if appropriate, to pay costs or fees;⁹² and (c) to impose sanctions in connection with an application for the relief, including on the applicant where the relief was improperly obtained.⁹³

61. Additional safeguards may be imposed in connection with specific provisional measures, for example appointment of an insolvency representative as a provisional measure. In some jurisdictions, that measure is not easily granted, particularly if other measures may adequately preserve the status quo, because of perceived excessive intrusion of that measure in the debtor's affairs and potential bias that the measure may produce towards the eventual commencement of insolvency proceedings. According to the Guide, between the time of an application for commencement of insolvency proceedings and the commencement of those proceedings, the debtor is entitled to continue to operate its business and to use and dispose of assets in the

⁹¹ Ibid.

⁹² Recommendation 40 and accompanying commentary.

⁹³ Ibid.

ordinary course of business,⁹⁴ except to the extent restricted by the court. Appointment of an insolvency representative as a provisional measure is envisaged. The Guide recommends that the insolvency law should clearly specify the balance of rights and obligations between the debtor and any insolvency representative appointed as a provisional measure.⁹⁵ In many cases, unlike the insolvency representative appointed upon commencement of the insolvency proceeding, an insolvency representative as a provisional measure is appointed for limited purposes, depending on the needs at hand, unless the need for the full displacement of the management from operation of business is evident, for example, where directors are removing or dissipating assets, where directors are conducting the management of the business without appropriate care, or where there is no business, just fraud.⁹⁶

62. Any affected persons have the right to challenge the imposition of provisional measures and to seek relief from them. Consequently, there are requirements to provide affected persons with the appropriate notice and an opportunity to be heard, with some restrictions. In particular, provisional measures may be ordered without advance notice on an ex parte basis, meaning that the right to be heard would be given ex post. In such case, the debtor or other party in interest affected by the provisional measure may be entitled under law to be heard promptly on whether the measure should be continued.

63. Provisional measures may be made subject to periodic review by law, or they may be reviewed and modified or terminated upon the court's own motion or at the request of the applicant or an affected person. The circumstances that justify their termination usually include when: (a) an application for commencement is denied; (b) an order for provisional measures is successfully challenged; and (c) the measures applicable on commencement take effect, unless the court continues the effect of the provisional measures. Some jurisdictions limit the duration of provisional measures to a specified time period, or to steps to be fulfilled by the applicant or other persons.

64. While addressing the provisional measures, the Guide acknowledges that ideally there should be a very short gap between the application and commencement of insolvency proceedings.⁹⁷

3. Measures upon commencement

65. The following measures recommended by the Guide for imposition upon commencement of insolvency proceedings are of direct relevance to ATR: (a) a stay of proceedings,⁹⁸ and treatment of continued contracts and ipso facto clauses;⁹⁹ (b) identification of the insolvency estate assets and constitution of the insolvency estate;¹⁰⁰ and (c) control over the use and disposal of assets of the insolvency estate¹⁰¹ and the debtor's business¹⁰² as well as treatment of unauthorized transactions.¹⁰³

⁹⁴ "Ordinary course of business": transactions consistent with both: (i) the operation of the debtor's business prior to insolvency proceedings; and (ii) ordinary business terms (the Glossary, term (bb)).

⁹⁵ The Guide, recommendations 39 and 41.

⁹⁶ **For revisions made in this paragraph, see A/CN.9/1133, para. 13 (c).**

⁹⁷ The Guide, recommendations 18 and 296 and accompanying commentary.

⁹⁸ *Ibid.*, recommendations 46–51 and 317–318 and accompanying commentary. "Stay of proceedings": 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 (the Glossary, term (rr)).

⁹⁹ *Ibid.*, recommendations 69–86 and accompanying commentary.

¹⁰⁰ *Ibid.*, recommendations 35–38 and 313–315 and accompanying commentary.

¹⁰¹ *Ibid.*, recommendation 46 (e).

¹⁰² *Ibid.*, recommendations 112–114 and 284–287.

¹⁰³ *Ibid.*, part two, chapter II, para. 16, and chapter III, paras. 2, 12, 33.

(a) Stay of proceedings and treatment of continued contracts and ipso facto clauses

66. It is common to impose a stay of: (i) individual actions or proceedings; (ii) actions that make security interests effective against third parties and enforce security interests; and (iii) execution or other enforcement against the assets of the estate. In some jurisdictions, the stay is imposed by operation of law (i.e. automatic) on all or certain actions for a period fixed by the law or by the court, while in other jurisdictions the stay is ordered by the court upon application of interested persons, the insolvency representative or ex officio (the duration and scope of the stay may vary).

67. In addition, by operation of the insolvency law, the rights of a counterparty to terminate a contract with the debtor may be unenforceable. Exceptions to this rule exist. Special rules usually apply also to the treatment of continued contracts, in particular their rejection, continuation or assignment.

68. Imposition of those measures has many objectives. As relevant to ATR, they decrease risks of dissipation of assets and allow for orderly ATR.

69. Since those measures prejudice legitimate interests of affected persons, they are usually accompanied by safeguards. In particular, the duration of the stay may be limited. In addition, there may be exceptions from the stay. For example, UNCITRAL insolvency texts provide that the right to commence or continue the individual action or the proceeding necessary to preserve a claim against the debtor is not affected by the stay.¹⁰⁴ In some jurisdictions, any action that intends to increase the value of the estate, an *actio pauliana* or actions against the insolvency representative are also excluded from the scope of the stay. The Guide also refers to the possibility to request relief from the stay, and to the protection from diminution of the value of encumbered assets or third-party owned assets affected by the stay.

(b) Identification of the insolvency estate assets and constitution of the insolvency estate

70. Many insolvency laws require the court or, immediately upon appointment, the insolvency representative to establish which assets belong to the insolvency estate, to draw up a detailed inventory of the insolvency estate assets, to estimate the value of each asset, and to take books, records and other evidence into custody. This is without prejudice to the debtor's obligations to provide accurate, reliable and complete information relating to its financial position and business affairs to the court, the insolvency representative, creditors or the creditor committee, as the case may be (see the relevant section below).¹⁰⁵ Insolvency laws differ as regards requirements to seize, seal, or simply mark the assets over which the debtor no longer has control. This may depend on the type of an asset, on the probability of dissipation of an asset in the absence of such a measure as well as on whether liquidation or reorganization of the business takes place and whether the full or partial debtor-in-possession regime or full displacement of the debtor is in effect. In liquidation, the complete closure of warehouses or the entire business and sequestration of fungible assets, such as cash, usually take place.

71. An inventory of assets is a detailed list, broken down into groups and line items with all the supporting documents itemized. Different rules may apply to the inventory of different assets, for example: (i) for movable assets, their kind, quantity, quality, condition and any other background information or specification required for their proper itemization are identified; (ii) for cash, the quantity, amount and currency are indicated; (iii) for money held in bank accounts, the name of the bank, the account number and the balance are specified; (iv) for motor vehicles, details of registration with a relevant register are included; and (v) for immovable assets, their location, property registration number and other details from the relevant immovable property register are noted. The supervision by the court or a public certifying officer may be

¹⁰⁴ Ibid., recommendation 47; MLCBI, article 20 (3).

¹⁰⁵ A/CN.9/1133, para. 13 (g).

required for drawing up an inventory by the insolvency representative. In addition, the presence of the debtor may be required in all cases. Site visits may take place under similar safeguards. Special rules may apply to handling business records. For example, in liquidation, it may be required to itemize business records and close them for further entries.

72. In some jurisdictions, the court or, upon appointment and if authorized, the insolvency representative may put out a search or tracking order if, upon inspection of the debtor's business records, it discovers that an insolvency estate asset exists but has disappeared. Some insolvency laws provide for the reopening of the insolvency proceedings if the assets that should have become part of the insolvency estate are discovered, or if the fact of concealment or illegal transfer of such assets is revealed, after the closure of the insolvency proceedings.

(c) Control over the use and disposal of the assets of the insolvency estate and the debtor's business; treatment of unauthorized transactions

73. The Guide recommends achieving clarity as regards rights and obligations with respect to the use, disposal¹⁰⁶ or realization of the debtor's assets and management of the debtor's affairs¹⁰⁷ during insolvency proceedings.

74. Where no debtor-in-possession regime is in place, which is usually the case in liquidation, upon completion and certification of the inventory, the court or the insolvency representative, as the case may be, assumes control and responsibility over all assets, records and documents in the inventory, including their preservation and realization of the assets that by their nature or because of other circumstances are perishable, susceptible to devaluation or otherwise in jeopardy. They are usually assisted by law enforcement agencies for obtaining control over the assets. Safeguards, such as court authorization and review of objections, apply if rights of third parties are affected by those measures. Experts may be appointed for estimating the value of the assets.

75. In reorganization, the insolvency representative may be appointed to displace the debtor partly or fully from operation of business. Where the debtor-in-possession regime is in place, the insolvency representative may be appointed to supervise the debtor-in-possession in the day-to-day operation of business. The court's authorization may be required for disposal of certain assets or conclusion of certain transactions. The insolvency representative may be appointed also for specific functions (e.g. avoidance since conflicts of interest may arise: the debtor-in-possession that concluded undervalued or preferential transactions would most likely not question them). A business mediator may be appointed in some jurisdictions, whose functions may include the transfer, under court supervision, of some of the debtor's assets to one or more third parties to prevent their concealment by the debtor-in-possession and to ensure their preservation.

76. Some insolvency laws treat transactions by the debtor involving assets over which the debtor has lost control as invalid and unenforceable against the insolvency estate if they are not authorized by the insolvency representative or the court. They enable assets transferred to be reclaimed and returned to the insolvency estate and any obligations created *ultra vires* to be declared unenforceable against the insolvency estate, except, in some jurisdictions, where the counterparty entered into the transaction in good faith and gave value or can prove that the transaction did not impair creditor rights. In other jurisdictions, depending on the facts of the case, some unauthorized transactions may be automatically void while others may be subject to avoidance by the insolvency representative. Examples of unauthorized transactions include transfer of ownership or encumbrance of significant insolvency estate assets by the debtor-in-possession and acceptance by the debtor of payment that can only validly be accepted by the insolvency representative. In some jurisdictions, the

¹⁰⁶ "Disposal": every means of transferring or parting with an asset or an interest in an asset, whether in whole or in part (the Glossary, term (n)).

¹⁰⁷ See e.g. recommendations 41, 112 and 284–287.

insolvency representative may authorize any transaction that has led to an effective increase in the value of the insolvency estate assets or has a positive effect on creditors.

77. Without prejudice to retaining the possibility for adjustments, the Guide recommends ensuring in each insolvency case clarity as regards permissible disposals of assets by the debtor-in-possession or the insolvency representative. A distinction is usually drawn between the use or disposal of the insolvency estate assets in the ordinary course of business and outside the ordinary course of business. The use and disposal outside the ordinary course of business usually require the approval of the court or of the creditors.

78. The “ordinary course of business” is not understood uniformly across jurisdictions. In defining the “ordinary course of business”, States put a varying emphasis on the different elements. In most jurisdictions, a common purpose of the definition is to determine what constitutes routine conduct of business and to allow a business to make routine payments and to enter into routine contracts, without subjecting those transactions to possible avoidance in insolvency. Those routine payments might include the payment of rent, utilities such as electricity, and possibly also payment for trade supplies. The dimension and frequency of transactions would, in some jurisdictions, be considered when assessing which of them would fall under the ordinary course of business. Nevertheless, illegal and inappropriate activities would be excluded.¹⁰⁸

79. The Guide considers transactions in the ordinary course of business when they are consistent with the operation of the debtor’s business prior to insolvency proceedings and with ordinary business terms. It recommends permitting the use and disposal of insolvency estate assets (including encumbered assets) in the ordinary course of business. A special regime is recommended for the use and disposal of cash proceeds, to protect interests of secured creditors¹⁰⁹ in such proceeds. The Guide also provides that: (i) the use and disposal of insolvency estate assets outside the ordinary course of business may occur only with a notice to creditors, except for urgent sales; (ii) creditors should have the opportunity to be heard by the court; (iii) methods of sale should ensure maximization of the price obtained for the assets being sold; (iv) special protection, including protection of value,¹¹⁰ is accorded to third-party owners of an asset in possession of the debtor, as well as to secured creditors and holders of other interest in an asset, in case of the sale of that asset free and clear of that encumbrance and other interest; (v) to prevent fraud and collusion,¹¹¹ disposal of assets to related persons¹¹² is subject to scrutiny before it is allowed to proceed; and (vi) relinquishing burdensome assets is permitted subject to notice to creditors and the opportunity for them to object, except for encumbered assets whose value is lower

¹⁰⁸ [A/CN.9/1133, para. 13 \(h\)](#).

¹⁰⁹ “Secured creditor”: a creditor holding a secured claim. “Secured claim”: a claim assisted by a security interest taken as a guarantee for a debt enforceable in case of the debtor’s default.

“Security interest”: a right in an asset to secure payment or other performance of one or more obligations (the Glossary, terms (nn), (oo) and (pp)).

¹¹⁰ “Protection of value”: measures directed at maintaining the economic value of encumbered assets and third-party owned assets during the insolvency proceedings (in some jurisdictions referred to as “adequate protection”). Protection may be provided by way of cash payments, provision of security interests over alternative or additional assets or by other means as determined by a court to provide the necessary protection (the Glossary, term (ii)).

¹¹¹ [A/CN.9/1133, para. 13 \(i\)](#).

¹¹² “Related persons”: as to a debtor that is a legal entity, a related person would include: (a) a person who is or has been in a position of control of the debtor; and (b) 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 (the Glossary, term (jj)). In the ATR context, the scope of the term “related persons” may be open-ended and decided by the court on a case-by-case basis. Related persons may in particular be any accomplice in concealing assets. The term should also be interpreted in the ATR context as referring not only to a separate natural or legal person but also to a group of such persons in any combination.

than the value of a secured claim and where the encumbered asset is not required for reorganization.

(d) Other measures

80. Other measures may be set out in a statute or, within limits established by law, authorized by the court. For example, in some jurisdictions, the court may order, including ex parte, interception of the debtor's mail under some conditions and subject to certain safeguards, such as the right to be heard. In other jurisdictions, that measure is automatic (i.e. no court order is needed). Some measures may be directed against assets of the current and former administrators, liquidators or directors.

81. Many jurisdictions require the court decision on commencement of insolvency proceedings to be swiftly forwarded to all relevant authorities such as those that register property rights (e.g. land registries). They may be required by law to immediately place a note on the register entries related to the debtor or its assets, to prevent unauthorized transactions with the assets of the insolvency estate.

4. Obligations of the debtor¹¹³ and third parties, including government agencies

(a) Obligations of the debtor

82. Except for very limited circumstances, the debtor is generally required, among others:¹¹⁴

(i) To cooperate with the court, the insolvency representative and any other person appointed by the court, as the case may be, and assist them to perform their functions in connection with insolvency proceedings, including taking effective control of business records and of the insolvency estate. That obligation may encompass a duty to deliver documents necessary to effectively claim or access an asset as well as to turn over assets and, in the case of digital assets, to turn over the relevant information and access keys;

(ii) To provide accurate, reliable and complete information relating to its financial position and business affairs, including lists of transactions occurring prior to commencement that involved the debtor or its assets;¹¹⁵ ongoing court, arbitration or administrative proceedings, including enforcement proceedings, as well as any regulatory or criminal investigations conducted within a defined period of time before commencement of insolvency proceedings;¹¹⁶ assets, liabilities, income and disbursements, including the estimated value of its assets and liabilities;¹¹⁷ debtors and their obligations; creditors and their claims; all active accounts and accounts closed within a preceding defined period;¹¹⁸ professionals (auditors, business or legal advisors, etc.) retained by the debtor during a defined period preceding the commencement of insolvency proceedings;¹¹⁹ all current officers and past officers within a defined period preceding the commencement of insolvency proceedings;¹²⁰ current insurance policies held by the debtor or its officers; dividends paid to

¹¹³ The Guide, recommendations 110, 111, 284–286 and 290 and accompanying commentary.

¹¹⁴ [A/CN.9/1133, para. 13 \(j\)](#).

¹¹⁵ With respect to secured transactions, it may be required to provide information about the current location of the encumbered assets.

¹¹⁶ This may be accompanied by a requirement to provide a complete copy of related correspondence and identification and contact information of all individuals involved.

¹¹⁷ This includes cash or assets of any type or description that are not listed on the books or records of the debtor and details as to those assets, the location of the assets and identification and contact information of the individuals or companies in control of those assets.

¹¹⁸ Accounts include domestic and foreign, depository or other accounts. Information to be supplied includes the name of financial institutions where accounts are held, the account number, the signatories to the account and account statements for a defined period of time.

¹¹⁹ Information to be supplied would include the names, location and contact details of those professionals, services provided by them, copies of billing and other correspondence with them as well as all books and records of the debtor from them.

¹²⁰ Information to be supplied would include their names, positions, titles, roles, current address and contact information, with copies of employment agreements.

shareholders;¹²¹ beneficial owners, their address, contact information and percentage of ownership held; employees and insiders as these terms may be defined in the domestic insolvency law;¹²² payments to insiders within a defined period of time prior to the commencement of insolvency proceedings; subsidiaries; and locations of the debtor establishments and other business operations and identification of individuals involved in those operations. That obligation may refer not only to the current knowledge but also to the need to perform all preparatory work necessary to provide the relevant information. In some jurisdictions, the debtor may be required to provide that information by sworn statement (affidavit). Where audit was performed or financial statements issued, the debtor may be required to provide a complete copy of the audit reports, including any findings and recommendations by auditors, and financial statements;

(iii) To provide, within a reasonable period of time, the means to make the contents of all information supplied legible;

(iv) To give a necessary explanation concerning insolvency to the court, the insolvency representative or creditors acting through the creditor committee or otherwise, upon their demand;

(v) To hand over all assets and documents of the company to the court or the insolvency representative, as the case may be, within a time limit set by the court;

(vi) To facilitate or cooperate in the recovery of the assets, or the control of the insolvency estate and business records, wherever located; and

(vii) Immediately upon commencement of the insolvency proceedings, to permit access to its premises and to open containers, warehouses and other relevant places for review and inventorization of their content.

83. Additional obligations and varying measures of control may be imposed on the debtor-in-possession. For example, the debtor-in-possession may be required to provide monthly reports of all transactions, income received and expenses paid and banking records for the prior month to the court, creditors or any appointed insolvency representative exercising control over the debtor-in-possession.

84. Many jurisdictions require the debtor or some of its officers or directors to remain at the disposal of the court and the insolvency representative, if any, for the duration of the insolvency proceedings. Consequently, the debtor who is a natural person may be required to give notice to the court before changing his or her habitual residence, while the debtor that is a legal person is usually required to obtain consent of the court before moving its headquarters. In some jurisdictions, this obligation may only be imposed on the debtor by a court order. In other jurisdictions, it is a statutory duty that can automatically be enforced against a non-cooperative debtor.

85. The debtor may be made subject to judicial compulsion as well as sanctions (including criminal sanctions such as fines and confiscation of the property) in case it does not comply with its insolvency law obligations or there are grounds to believe that it will attempt to escape its obligations under the insolvency law. Displacement of the debtor-in-possession by the insolvency representative, conversion of reorganization to liquidation and denial of discharge or revocation of a discharge already granted may be envisaged as a sanction under insolvency law for violation by the debtor of its obligations. In addition to the debtor itself, the person in control of the debtor and their accomplices may be held liable and subjected to a fine, disqualification or an order to compensate for the damages caused by non-performance or improper performance of the obligations imposed on the debtor upon commencement of insolvency proceedings. In serious cases, criminal sanctions may be applied, including imprisonment. In some jurisdictions, lack of collaboration by the debtor or persons in control, including by concealment, disinformation or misrepresentation, is taken as presumption of guilt and

¹²¹ Information to be supplied would include amount, date, names of recipients, and the status of solvency of the debtor when dividends were paid.

¹²² Information to be supplied would include names and contact information of those persons.

may justify granting relief against the debtor on an expedited basis, *ex parte* and without a notice to the debtor and with other measures. Adverse inferences may be drawn in related civil or criminal proceedings. Cooperation with the insolvency court and the insolvency representative, on the other hand, may lead to a reduced sentence for the persons concerned in case of their conviction for insolvency-related crimes.

86. Safeguards against abuses are usually provided to the debtor. In particular, special rules may apply to handling commercially sensitive, confidential and otherwise protected information, or information subject to obligations owed to other persons.

(b) Obligations of third parties and government agencies

87. Upon commencement of insolvency proceedings, third parties, including government agencies, such as tax authorities and social insurance agencies, that have had dealings with the debtor or who have knowledge about the debtor or its assets, may have statutory obligations: (i) to provide the court or the insolvency representative, as the case may be, with information and documents about the debtor's assets, accounts¹²³ and counterparties (within a short period of time and free of charge); (ii) to open rooms and containers for inspection by authorized officials; (iii) to turn over assets of the debtor and, in the case of digital assets, to turn over the relevant information and access keys to the court or the insolvency representative, as the case may be; and (iv) not to enter into any further transactions in respect of the debtor's assets if they leased, borrowed, kept under custody or otherwise used or possessed them. The insolvency representative may demand performance of those obligations *ex officio*, or a separate court order may be required to compel third parties to fulfil those obligations.¹²⁴

88. Limitations include: (i) certain privileges and rules, such as the attorney-client privilege and banking secrecy rules, that may prevent full disclosure of certain information, although those restrictions do not usually apply where the insolvency representative replaces the debtor (see the relevant section below); (ii) depending on the type of information obtained, restrictions on subsequent disclosure and use of information; and (iii) exemptions for assets used for public purposes (e.g. impoundment in a criminal proceeding).

5. Duties and powers of the insolvency representative

89. The general obligation of the insolvency representative is to protect and preserve the assets of the insolvency estate.¹²⁵ A number of duties and functions flow from that general obligation, including those of relevance to ATR. The Guide emphasizes that it is important for the insolvency law to empower the insolvency representative to fulfil those duties and functions efficiently and effectively.

90. The insolvency representative's ATR-related powers would be derived from insolvency and other law, court orders and terms of appointment. In particular, in some jurisdictions, it would be up to the court to confer any investigative powers to the insolvency representative.¹²⁶ In other jurisdictions, the insolvency representative may have certain investigative powers *ex officio* while court authorization would be required for certain other measures, such as examination of records of the wire transfer department of a financial institution related to transactions involving the debtor's account.

¹²³ Where bank account information is to be disclosed, the information to be disclosed may include: (i) the signature card to the account; (ii) the account opening information; (iii) copies of deposits or wire transfer receipts; (iv) copies of checks or outgoing wire transfer details; (v) the current balance in the account; and (vi) e-mails or correspondence involving the account and other relevant information.

¹²⁴ A/CN.9/1133, para. 13 (k).

¹²⁵ See e.g. the Guide, recommendation 120.

¹²⁶ A/CN.9/1133, para. 13 (l).

91. The insolvency representative's ATR-related powers would also depend on the type of insolvency proceeding to which the insolvency representative has been appointed (liquidation or reorganization) and on whether the insolvency representative displaces the debtor fully or partly from control of the insolvency estate and the day-to-day operation of the business. Where limited displacement is in place, the Guide recommends that the law should specify the division of responsibilities between the debtor and the insolvency representative.¹²⁷ The powers, duties and functions of the insolvency representative will thus be aligned with the rights and obligations of the debtor, for example, to provide information to and cooperate otherwise with the insolvency representative, including by verifying information obtained by the insolvency representative.¹²⁸

92. The powers, duties and functions of the insolvency representative of relevance to ATR may be grouped as follows:

(a) Preparing a detailed inventory (including by taking images such as forensic images of electronic records), and taking immediate control, of the assets comprising the insolvency estate and the debtor's business records;

(b) Obtaining information concerning the debtor, its assets, liabilities and past transactions (especially those taking place during the suspect period) from various sources (e.g. registers, government files, court and investigation records) and by different means (e.g. examination of the debtor and any third person having had dealings with the debtor; inspection of premises, containers, safes and boxes; inquiries and other investigative steps). Limits may be imposed on how some of those means could be used. For example, special court orders may be required for (public) examination generally or of only some persons. Limits may be imposed on the matters that could be covered in the examination of the debtor and third parties (i.e. "examinable affairs"). For example, some information may be protected against disclosure under the attorney-client privilege and banking secrecy rules.¹²⁹ In some jurisdictions, the debtor would not be obliged to provide information that is not related to insolvency and would not be expected to obtain documents that are in the hands of third parties. There could also be limits on methods of examination and how results of examination could be used. Special safeguards may apply to the examination of some persons, such as employees. The violation of those requirements may trigger charges against the insolvency representative for abuse of power or abuse of process;

(c) 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. For such purpose, the insolvency representative may, for example, close warehouses or the entire business, sequester fungible assets, such as cash, and take necessary steps to make the rights of the insolvency estate effective against third parties. It may request stay or suspension orders from the court. In some jurisdictions, the insolvency representative can issue "stop notices" independently of a statutory stay or 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);

(d) Taking all steps necessary to restore the integrity of the insolvency estate, including by (i) investigating whereabouts of any missing assets and records, (ii) tracing and recovering them, (iii) requesting, where necessary, tracing, tracking, searching or seizing orders from the court, (iv) initiating individual enforcement and other actions, including avoidance actions and actions against directors, partners and other persons personally liable for the debtor's obligations, (v) representing the insolvency estate in all acts and proceedings related to the insolvency estate (e.g. commercial litigation, arbitration, administrative or other proceedings), (vi) demanding payments due to the debtor and turnover of the assets that belong to the insolvency estate, (vii) submitting enforcement orders to a bailiff (e.g. on the basis of promissory notes, final judgments

¹²⁷ The Guide, recommendation 112.

¹²⁸ [A/CN.9/1133](#), para. 13 (m).

¹²⁹ *Ibid.*, para. 13 (k).

and settlement agreements), (viii) claiming tax refunds, and (ix) pursuing other potential claims for recovery of assets of the insolvency estate;

(e) Taking other steps allowed under applicable law to protect, preserve and maximize the value of the insolvency estate, including (i) verifying and admitting claims and objecting to claims or their amounts, (ii) handling debt settlement, set-offs and similar actions, (iii) assigning claims, liabilities or debt, and (iv) examining contracts that are not fully performed with a view to deciding whether to assume, reject or continue them;

(f) Appointing and remunerating accountants, attorneys and other professionals that may be necessary to assist the insolvency representative in performing its functions (e.g. for valuation of assets or forensic investigations). In some jurisdictions, court authorization may be required for involving third parties;

(g) Periodically providing information to the court and to creditors detailing the conduct of the proceedings; and

(h) Submitting a final report and accounting of the insolvency estate's administration to the court or the creditors, as required.

93. In jurisdictions where the insolvency representative not only displaces the debtor in operation of the business but also becomes the debtor's representative, many insolvency representative's ATR powers are exercised without court orders. In that capacity, the insolvency representative can exercise the rights that the debtor would have exercised but for insolvency, including placing demands for information to the debtor's debtors or creditors, participating or intervening in commercial litigation or arbitration or administrative or other proceedings, communicating with government agencies and so on. Where the insolvency representative acts in that capacity, third parties (e.g. insurance companies, banks, cryptocurrency wallet providers) are required, upon request, to provide it with the same information that they would have to provide to the debtor. Acting in such capacity thus often obviates the need for any court orders, for example, in order to obtain disclosure of otherwise privileged or protected information. In that capacity, the insolvency representative will be able to avail itself directly of the help of the law enforcement bodies to compel non-cooperative persons to implement their insolvency law obligations. Where the insolvency representative acts in more restricted capacity, it may need to obtain court orders to compel third parties to cooperate with the insolvency representative. Sanctions in the form of a fine or imprisonment may be imposed on non-compliant persons.

94. Practical considerations may influence insolvency representative's ATR strategies and steps. They include availability of funds in the insolvency estate or alternative funding or other arrangements (see para. 20 above), chances of success, expected benefits for all the creditors and general requirements for the insolvency representative to act with due care and diligence of a prudent businessperson. For example, the insolvency representative may give priority to ATR actions with respect to assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy. While recovery of disputed assets for the insolvency estate may be hindered and delayed, the insolvency representative may still benefit from a suspension of any transactions with them to preserve the status quo and prevent dissipation of those assets until disputes are resolved. Holding multijurisdictional forensic investigations with respect to digital assets, although desirable, may be unfeasible due to restrictions applicable in the jurisdictions involved, costs or other considerations. In other cases, the reverse may be true: ATR actions may be feasible but undesirable due to the high volatility and vulnerability of assets concerned and the expected low benefit of their recovery to the insolvency estate, for example because of the lack of a predictable market for realization of those assets. Some insolvency representative's powers may be time bound (e.g. time limits may apply for bringing certain actions), while others may cease upon commencement of legal proceedings. The latter may trigger the formal process of discovery and legal protection for the person in question, for instance, against self-incrimination.

95. Safeguards usually apply to ensure that the insolvency representative's powers are balanced against the possible implications of exercising them on the insolvency estate, the debtor, creditors and third parties. Achieving an appropriate balance is required, for example, when the insolvency representative is provided with the right of access to, and use of, confidential or classified information. The Guide recommends also safeguards to ensure that the insolvency representative performs its duties and exercises its powers with the required integrity and quality (e.g. to avoid collusion or undue pressure from creditors or third parties). The usual safeguards include qualification requirements, disclosure of a conflict of interest, oversight over appointment, remuneration and performance, and special procedures for removal and replacement.¹³⁰ In addition, the usual standards of transparency apply to the insolvency representative's ATR actions (e.g. timely disclosure of planned and taken ATR actions to the court and the creditors).

96. The insolvency representative is accountable and personally liable for fulfilling its duties. The insolvency representative may face liability (fines, displacement, compensation for damages caused to a creditor, the debtor or a third party) and disqualification for not performing ATR or not performing it properly. Where insolvency representatives claim payment for their services from public funds, the law may require them to demonstrate that they have taken all the necessary steps to trace and recover the insolvency estate assets. They may be expected to submit to the relevant authority information of ATR steps taken for verification. Such information may include the record of the seizure (and of the inventory made), minutes of meetings of creditors attesting to any decisions taken not to trace and recover certain assets, information on vehicle searches, tax information and copies of title deeds. Where the competent State authority is in charge of administering insolvency proceedings with the result that no insolvency representative is appointed, the issue of personal liability of the insolvency representative, as opposed to State liability for actions of the relevant competent authority, would not arise.¹³¹

6. Avoidance and similar actions

97. A powerful ATR tool is avoidance. It permits transactions for the transfer of the assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred or their value to be recovered for the insolvency estate. The rationale for including avoidance provisions in insolvency law is to preserve the integrity of the insolvency estate, to support the collective goals of the insolvency proceedings, to ensure that creditors receive a fair allocation of the insolvency estate assets consistent with the established priorities, and to deter actions in the period approaching insolvency that would be detrimental to the collective interests of the creditors.¹³²

98. Provisions on avoidance are found in insolvency law of most jurisdictions. They usually address: (a) criteria for determining which transactions are avoidable; (b) duration of the suspect period;¹³³ (c) persons who may bring avoidance actions; (d) time limits for bringing those actions; (e) consequences of avoidance; and (f) available defences and other safeguards.

99. There is some divergence across jurisdictions in regulating avoidance and linked notions, such as "ordinary course of business" (see para. 78 above) and "related persons". Some jurisdictions use objective criteria by avoiding all transactions that took place during the suspect period, gratuitous transactions and transactions with related persons, while others use subjective criteria necessitating an individualized

¹³⁰ Recommendations 115–125.

¹³¹ [A/CN.9/1133, para. 13 \(n\)](#).

¹³² See e.g. the Guide, Glossary, term (c) as well as recommendations 87–99, 217–218, 228 and 316 and accompanying commentary.

¹³³ "Suspect period": 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 (the Glossary, term (ss)).

approach and proof of intent, knowledge, etc. Yet others use a combination of both. Within the same jurisdiction, avoidance criteria, presumptions, allocation of burden of proof and duration of the suspect period may vary depending on parties involved (e.g. directors or other related persons) and the cause for avoidance (e.g. fraud). The effects of avoidance may also be different depending on all those factors: some transactions may become automatically void while others will be voidable. All of this makes avoidance a complex, lengthy and unpredictable tool to use, especially across borders and when intent and knowledge of the parties to the transactions subject to avoidance are to be proven.

100. Perspectives of long engagement with no or insufficient remuneration made insolvency representatives in some jurisdictions reluctant to bring avoidance actions. In response to those concerns, some jurisdictions allow avoidance actions to continue after the closure of insolvency proceedings by special purpose companies that also handle the outcomes of those actions (i.e. distribution of any additional proceeds among creditors, etc.). This measure alleviates the need to keep insolvency proceedings open (or to reopen them if the outcomes of avoidance so require) and the insolvency representative engaged for the duration of avoidance proceedings.

101. Avoidance actions are differentiated from similar actions available to creditors or the insolvency representative under non-insolvency laws. For example, many jurisdictions provide for actions that creditors may take under the law of obligations to protect themselves from fraudulent legal transactions intended to reduce a debtor's estate by transfers to third parties in bad faith (*actio pauliana*). In some jurisdictions, those actions may be stayed or discontinued upon commencement of insolvency proceedings, and the insolvency representative may take them over or initiate instead avoidance proceedings under insolvency law. In other jurisdictions, commencement of insolvency proceedings does not have such effect: creditor actions would be allowed to proceed until their resolution and the results would be integrated in insolvency proceedings when and as appropriate. Constructive trust is another tool used in some jurisdictions as an effective and efficient proprietary remedy to pursue a tracing claim and to recover misappropriated or misapplied property, or property gained from "wrongdoing". Constructive trusts arise by operation of law where it would be inequitable to allow the recipient of the asset to assert full beneficial ownership over that asset. The purpose is to protect the rights of ownership if the asset has been wrongfully transferred. Those tools may effectively supplement avoidance actions to expedite recoveries for the insolvency estate.

(a) Avoidable transactions

102. The criteria for determining which transactions are avoidable vary considerably across jurisdictions and may include objective and subjective aspects and different presumptions, including with regard to detriment to creditors. The Guide lists the following: (i) transactions intended to defeat, delay or hinder the ability of creditors to collect claims where the effect of the transaction was to put assets beyond the reach of creditors or potential creditors, or to otherwise prejudice the interests of creditors; (ii) transactions where a transfer of an interest in property or the undertaking of an obligation by the debtor was a gift or was made in exchange for a nominal or less than equivalent value, or for inadequate value that occurred at a time when the debtor was insolvent or as a result of which the debtor became insolvent (undervalued transactions); and (iii) transactions that occurred at a time when the debtor was insolvent where a creditor obtained, or received the benefit of, more than its pro rata share of the debtor's assets (preferential transactions). Examples include payment or set-off of debts not yet due or granting a security interest to secure existing unsecured debts. Filing or registration of security interests beyond the deadline established by law may also be avoided.

103. In some jurisdictions, there is no concept of transactions at an undervalue. Instead directors are pursued for disposal of assets below market value or, more commonly, for breach of their fiduciary duties in executing such a transaction. In other jurisdictions, criteria for avoidance are specified in law or construed by courts very

narrowly. In yet other jurisdictions, other or additional criteria to those listed in the Guide may apply, for example, the following transactions may be void or voidable: (i) any payments made by the debtor for debts owed, and any other transactions carried out by the debtor for valuable consideration after the cessation of payments but before the declaration of insolvency is made if those who received payment from or dealt with the debtor were aware of the cessation of payments; and (ii) the lawful exercise of the right to divide property during the suspect period that damaged the interests of all or some of the creditors.

104. Distinct considerations may arise as regards avoidance in reorganization as compared to liquidation, especially if reorganization proceedings are opened for a solvent entity. Jurisdictions regulate that matter differently, with more flexibility and options preserved in reorganization than in liquidation proceedings. The ultimate power to decide which avoidable transactions to pursue in reorganization proceedings may lie with the creditor committee that would be expected to take such a decision on a case-by-case basis, assessing the full impact of an avoidance action on creditors and perspectives of timely and successful reorganization, including acceptance of the plan by unsecured creditors that may benefit from avoidance actions. The creditor committee may also have a say with respect to the fate of avoidance actions initiated by creditors before the commencement of reorganization proceedings although jurisdictions are not uniform in treating that matter (see para. 101 above). Different mechanisms may exist to pursue avoidance actions in reorganization, including their assignment to a trust. In the debtor-in-possession regime, an insolvency representative may be appointed specifically for avoidance actions to eliminate conflicts of interest that would inevitably arise if those actions were to be left to the management responsible for concluding transactions that may become subject to avoidance during reorganization proceedings. That risk is high since transactions that are often made subject to avoidance in reorganization proceedings include insider dealings and transfers of the debtor's assets to related persons.¹³⁴

(b) Suspect period

105. The duration of the suspect period also varies across jurisdictions. Within a single jurisdiction, it may vary depending on the type of transaction and with whom the transaction was concluded. For example, where transactions subject to avoidance involve related persons, insolvency laws usually provide a longer duration of the suspect period. The date from which the suspect period is calculated retroactively is either the date of application for or the commencement of the insolvency proceedings. Special rules may apply for calculating the suspect period retroactively in cases of substantive consolidation.¹³⁵ In some jurisdictions, the suspect period may run from the date of discovery of a concealed transaction.¹³⁶

(c) The right to bring avoidance actions

106. Depending on the jurisdiction, the insolvency representative may have the principal or sole responsibility to commence avoidance proceedings. The costs of avoidance actions are paid as administrative expenses, but alternative approaches to the pursuit and funding of such actions may also exist (see para. 20 above). Creditors are able to pursue avoidance in some jurisdictions only with the agreement of the insolvency representative or, if it does not agree, with leave of the court. The Guide recommends that approach. Some laws permit one or more creditors who wish to do so to pursue avoidance proceedings in cases in which the insolvency representative, based on the balance of considerations, decides not to commence such proceedings.

107. Where creditors are permitted to commence avoidance proceedings, either on an equal basis with the insolvency representative or because the insolvency

¹³⁴ A/CN.9/1133, para. 13 (p).

¹³⁵ "Substantive consolidation": the treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate (the Guide, part three, term (e)).

¹³⁶ A/CN.9/1133, para. 13 (o).

representative decides not to commence such proceedings, insolvency laws adopt different approaches to the assets or value recovered. The most common approach (and the one reflected in the Guide) is to treat the assets or value recovered as part of the estate on the basis that the purpose of avoidance is to return assets or value to the estate for the benefit of all the creditors. In such case, only expenses and costs of creditors' avoidance actions may be reimbursed on a priority basis as administrative expenses in case of successful avoidance proceedings, up to any limit that may be established by law. Other laws may require that the creditors who want to pursue avoidance must do so at their own risk and cost, i.e. they are not reimbursed. Other laws provide that whatever is recovered can be used to cover the costs and satisfy the claim of the suing creditors, with only the remainder going to the insolvency estate, subject to a duty of the suing creditors to detailed accounting.

(d) Time limits for commencement of avoidance actions

108. Time limits may or may not be imposed for commencement of avoidance actions. Where they are imposed, they usually start running from the commencement of the insolvency proceedings. In the case of concealed transactions that the insolvency representative could not be expected to discover, the time limit may run from the time of discovery. Bringing avoidance actions against fraudulent transactions is usually not subject to any time limit.

(e) Elements to be proved and burden of proof

109. There could be different presumptions in relation to avoidance, including as regards detriment to creditors. For example, relative or rebuttable presumption of detriment to creditors may exist where transactions are with related persons or involve new security for pre-existing debt or payment of unmatured secured claims. In particular, in relation to transactions with related persons, the law may dispense with requirements that the debtor was insolvent at the time of the transaction, or was rendered insolvent as a result of the transaction. Irrebuttable presumption of detriment to creditors may exist where gratuitous acts of disposition, except for gifts of use, and payment of unmatured unsecured claims are involved.

110. Insolvency laws adopt different approaches to establishing the elements that must be proven in order to avoid a particular transaction. In some laws, the onus is on the beneficiary of the transaction to prove that the transaction did not fall into any category of avoidable transactions or to disprove at least some of the elements, such as knowledge of the debtor's insolvency at the time of the transaction, or knowledge of the fact that the transaction was undervalued. Other insolvency laws provide that the insolvency representative is required to prove that the transaction satisfies the requirements for avoidance. Others allow the burden of proof to be shifted to the counterparty where it is difficult for the insolvency representative to establish that the debtor's actual intent was to defraud creditors, or with regard to those elements that may be difficult for the insolvency representative as an outsider to the transaction to prove.

111. In the enterprise group context, the court may have regard to the circumstances in which the transaction took place, including the relationship between the parties to the transaction, the degree of integration between enterprise group members that are parties to the transaction, the purpose of the transaction, whether the transaction contributed to the operations of the group as a whole and whether the transaction granted advantages to enterprise group members or other related persons that would not normally be granted between unrelated parties.¹³⁷

(f) Consequences of avoidance

112. The counterparty to a transaction that has been avoided is usually required to return to the estate the assets obtained or, if the court so orders, make a cash payment

¹³⁷ The Guide, recommendation 217.

to the estate for the value of the transaction. Rules for upward valuation may apply that would allow to revalue certain transactions or assets that were previously undervalued or fraudulently transferred by the debtor.

113. The counterparty may have an ordinary unsecured claim against the estate. In cases of bad faith on the part of the counterparty, its claim may be subordinated. If the counterparty does not comply with the court order, its claim may be disallowed. Some jurisdictions require that the claims should be settled at the time when the assets and rights subject to avoidance are restored.

(g) Safeguards

114. Avoidance powers are limited by law. Commonly found limitations, in addition to those already listed above, are exempting certain transactions from avoidance and providing certain defences to avoidance, such as that the transaction was entered into in the ordinary course of business or that the law applicable to an act subject to avoidance does not allow any means of challenging that act in the relevant case.

7. Actions against directors, equity holders and other persons

(a) Civil and criminal liability for embezzlement, misappropriation and other similar actions with respect to the debtor's assets

115. Where misappropriation or a similar action with respect to the assets that should become part of the insolvency estate is suspected, the insolvency representative, creditors or other eligible persons, such as regulatory bodies or competent State authorities, may initiate an inquiry to determine the extent of the involvement of directors, equity holders and other persons and, where applicable, also potential breaches of their fiduciary duties. If fraudulent or dishonest conduct on the part of directors, equity holders and other persons is established (for example, company funds were diverted for personal gain, or the directors were engaged in self-dealing), those persons may face civil and criminal liability and be held personally liable.

116. What would be sought in the pursuit of civil cases against such persons is in the first place the recovery of the assets concerned or, if that is not possible, reimbursement to the estate of the value of those assets. That would aim at ensuring restoration of the integrity of the insolvency estate to the position it would have been if the misappropriation or similar action with respect to the assets that should become part of the insolvency estate had not occurred. In addition, compensation of damages, such as losses resulting from misappropriation or similar action (lost profit, diminished value of assets or other economic harm caused by the action), may be ordered, the amount of which may be assessed by the court on a case-by-case basis. Furthermore, where personal benefits or profits were derived from the assets involved, the persons concerned may be required to account for those gains and surrender them to the insolvency estate. Personal assets of the persons found liable for misappropriation or similar action, such as their bank accounts, real estate or investments, could be used for such purposes.

117. Most considerations arising in avoidance actions are applicable to the pursuit of civil cases against such persons, including that the insolvency representative has the principal responsibility to do so since the cause of action usually belongs to the insolvency estate. Creditors or any other party in interest may pursue civil cases against such persons with the agreement of the insolvency representative or, where the insolvency representative does not agree, with leave of the court. The costs of pursuing such cases would be expected to be paid as administrative expenses; however, alternative sources of funding, for example contingency fees and litigation funding, may be allowed in some jurisdictions (see also para. 20 above). The proceedings in the pursuit of those cases may continue after the closure of insolvency proceedings and their outcomes may necessitate the reopening of the insolvency proceeding.

118. The pursuit of those cases is in addition to avoidance of fraudulent, undervalued or preferential transactions that might have been concluded between the debtor and directors, equity holders and other persons, such as unreasonable remuneration packages as a consequence of modification of labour contracts with chief executive officers or other managers before commencement of insolvency proceedings, or transfer of company assets to directors at less than a reasonable value, or granting a security interest in those assets to the directors under beneficial terms. The pursuit of those cases may also be in addition to other remedies that may be available under insolvency law against directors, equity holders and other persons, such as deferral of payments owed to them by the debtor, subordination or denial of their claims and subsidiary or joint and several liability of those persons in the insolvency proceedings (see below).

119. In addition to possible recovery of a significant asset for the insolvency estate, thereby ensuring increased returns to creditors, the pursuit of such cases also plays an important preventive and deterring function. Although, like in avoidance, costs, time and the likelihood of success may inform desirability of pursuing those cases, broader considerations, such as the rule of law, may dictate doing so (see further below in the section on interaction of ATR with criminal proceedings).

(b) Verification of claims

120. Mechanisms for verification of claims, among other functions, help to identify at an early stage, i.e. before admission of claims to the insolvency proceedings, any falsification or similar acts and to prevent submission of fraudulent or non-existent claims and take appropriate actions. They are thus an effective deterrent against those acts and also eliminate the need for subsequent ATR if such claims were admitted.

121. In addition, during verification, certain claims, such as claims of related persons, are subject to special scrutiny, by default. The results of such scrutiny may inform the need for special treatment of those claims. For example, where justified, the amount of the claim may be reduced or the claim may be subordinated.¹³⁸

(c) Extension of liability (piercing the corporate veil)

122. Some jurisdictions envisage the possibility of piercing the corporate veil and extending liability to equity holders, directors and other persons, for example to a person that controls or significantly owns the debtor (e.g. a parent in an enterprise group context).¹³⁹ The circumstances that may justify those measures include exploitation or abuse of the debtor by the equity holder or a controlling entity as well as fraudulent conduct, including artificial fragmentation and using the enterprise structure as a sham or facade.¹⁴⁰

(d) Contribution orders

123. In the context of enterprise group insolvency, under some circumstances, a solvent group member may be ordered by the court to contribute specific funds to cover all or some of the debts of other group members subject to insolvency proceedings. Those circumstances may include where the solvent group member has acted inappropriately towards the insolvency group member (e.g. transferred the assets of a failing group member to another group member for an inadequate price or took the benefit of tax advantages accruing to a failing group member leaving the creditors of the failing member a reduced pay-out in a subsequent insolvency). Contribution orders may be ordered also outside the enterprise group insolvency context, for example, where a person conceals its commercial activity through the debtor.

¹³⁸ Ibid., recommendations 169–184, 319–325 and part three.

¹³⁹ See e.g. part three, Glossary, para. 5.

¹⁴⁰ Ibid., part three, chapter II, paras. 95–100.

124. The Guide notes that contribution orders are used sparingly because they touch upon many different interests that may be difficult to reconcile.¹⁴¹

(e) Substantive consolidation

125. Substantive consolidation may be ordered as an equitable remedy or otherwise when the court is satisfied that: (i) the assets or liabilities of separate legal entities are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay; or (ii) separate legal entities are engaged in a fraudulent scheme or activity with no legitimate business purpose and that substantive consolidation is essential to rectify that scheme or activity. In such cases, the assets and liabilities of the substantively consolidated entities are treated as though they were part of a single estate. Claims and debts between the substantively consolidated entities, including the secured indebtedness, are extinguished and claims against individual entities are treated as if they were claims against the single insolvency estate. Some case law indicates that substantive consolidation may concern not all but only some assets and liabilities of the substantively consolidated entities.

126. The Guide acknowledges that substantive consolidation should be treated cautiously since it raises sensitive issues and may create tensions with the principle of separate legal entity. Consequently, the Guide refers to commonly found safeguards for imposing such an extraordinary measure, including that: (i) a court order is needed for substantive consolidation and the court should be able to modify the order, where appropriate; (ii) parties in interest should be notified of the hearing at which a possible court order for substantive consolidation will be considered; (iii) some assets and claims may be excluded from an order for substantive consolidation under certain conditions; (iv) as a general rule, the rights and priorities of a creditor holding a security interest over an asset should be respected; and (v) priorities established under insolvency law and applicable with respect to a separate legal entity prior to an order for substantive consolidation should be recognized. Nevertheless, the Guide emphasizes the need not to overlook creditor perceptions and acknowledges that, where an insolvent member of an enterprise group transfers assets to the solvent member in the group, the substantive consolidation of assets and liabilities of those insolvent and solvent members should be made possible if the test for the substantive consolidation is otherwise met.¹⁴²

(f) Procedural coordination¹⁴³ and other forms of consolidation

127. In some jurisdictions, the law provides for the possibility of procedural coordination or consolidation (or joint administration) of related insolvency proceedings (e.g. against the debtor and its affiliates). The consolidated case usually receives the same case file and is assigned to the same insolvency judge, and a single insolvency representative is appointed. However, unlike in substantive consolidation, the assets and liabilities of each debtor involved remain separate and distinct.

128. The Guide addresses procedural coordination in the context of enterprise group insolvency¹⁴⁴ and simplified insolvency proceedings.¹⁴⁵ In the latter context, it refers to procedural consolidation and coordination of linked business, consumer and personal insolvency proceedings in order to address comprehensively intertwined business, consumer and personal debts of individual entrepreneurs, owners of limited liability MSEs and their family members. For ATR purposes, procedural consolidation

¹⁴¹ Ibid., chapter II, paras. 101–104.

¹⁴² Ibid., recommendations 219–231 and accompanying commentary.

¹⁴³ “Procedural coordination”: coordination of the administration of two or more insolvency proceedings in respect of enterprise group members. Each of those members, including its assets and liabilities, remains separate and distinct (the Guide, part three, term (d)).

¹⁴⁴ The Guide, recommendations 202–210 and accompanying commentary.

¹⁴⁵ Ibid., recommendations 364–366 and accompanying commentary.

may reveal transactions between the related debtors as well as assets whose true ownership may be obfuscated through arrangements of the related debtors.

B. Tools specifically designed for insolvency proceedings: cross-border context

1. Initiation of a cross-border ATR action in the requesting State

129. The debtor's assets that should become part of the insolvency estate may be located in different jurisdictions. In addition, evidence or other information that may help to locate those assets may also be located in foreign States. Furthermore, possible sources of information, such as the debtor itself, directors, witnesses or other persons, may not (any longer) be in the State that commenced the insolvency proceeding. Where they do not agree to submit to the jurisdiction of that State or cooperate otherwise with the insolvency proceedings, there are different ways to compel them to comply with the court orders originating in the insolvency proceedings. In all those cases, taking cross-border ATR actions may be necessary. In some States, courts may need to be satisfied that ATR actions across borders are justified, especially in the light of costs involved, before authorizing them. In other States, no additional authorization from the court would be required for the insolvency representative to pursue cross-border ATR actions. The insolvency representative would remain accountable for those actions to the court and the creditors.

130. The insolvency representative may be required to involve a competent State authority (e.g. an insolvency ombudsman) in cross-border ATR actions, for example when requesting from a foreign authority assistance with the examination of directors residing abroad, obtaining other evidence from foreign States or freezing assets located there. International instruments may apply. For example, where the involved States are parties to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters¹⁴⁶ (the Hague Service Convention), procedures of that Convention must be used for service abroad. Where the involved States are parties to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters¹⁴⁷ (the Hague Evidence Convention), procedures of that Convention will be followed for obtaining evidence.

131. Other international instruments and domestic law provisions, including those enacting the UNCITRAL cross-border insolvency framework, complement that framework. They, among others, alleviate the need for the insolvency representative to obtain local licenses and take diplomatic or consular actions (e.g. legalization or letters rogatory) in order to gain access to foreign courts and obtain ATR-related assistance and relief. They also considerably simplify notification of foreign creditors of the commencement of domestic insolvency proceedings by explicitly providing that no letter rogatory and other similar formalities should be required for such purpose.¹⁴⁸

2. ATR actions in the receiving State

132. Cross-border requests for ATR actions in the receiving State may originate from the main or non-main proceeding or from the insolvency proceeding that is neither main nor non-main proceeding. They may be handled by civil, commercial or specialized insolvency courts in the receiving State as part of or in parallel with domestic insolvency or other proceedings related to the same insolvency estate or in

¹⁴⁶ For the status of the Convention and declarations and reservations made thereto, see www.hcch.net/en/instruments/conventions/status-table/?cid=17.

¹⁴⁷ For the status of the Convention and declarations and reservations made thereto, see www.hcch.net/en/instruments/conventions/status-table/?cid=82.

¹⁴⁸ See e.g. article 14 (2) of MLCBI.

the absence of such. The requests may be handled *ex parte* and with other measures required to ensure effectiveness of ATR.

133. Different conditions may be imposed for granting requests. Some conditions may be specific to a particular ATR action. For example, where requesting an order to seal, freeze or seize debtor assets located in the territory of the receiving State, the existence and the location of those assets and the fact that the debtor is their legal or beneficial owner may be required to be demonstrated by *prima facie* evidence when requesting the order. Other conditions may be generally applicable to any ATR action in the receiving State. For example, some States may require the commencement of local proceedings, insolvency or other, before a domestic ATR action can be undertaken. In other States, recognition of a foreign proceeding or a foreign judgment may be a pre-condition for domestic ATR actions, although some relief may be made available also as a provisional measure before recognition. Public policy exceptions and safeguards related to the protection of creditors and local interests usually apply.

134. The UNCITRAL cross-border insolvency framework envisages that ATR-related assistance may be provided by the receiving State irrespective of recognition of foreign proceedings.¹⁴⁹ Given that ATR actions are often initiated in circumstances of imminent danger of dissipation or concealment of the insolvency estate assets, the direct, unconditional and expeditious access by the foreign representative to courts in enacting States may be a valuable ATR tool.¹⁵⁰

(a) Recognition

Provisional measures in the context of pending insolvency proceedings

135. In some jurisdictions, provisional measures in the context of pending insolvency proceedings may be recognized and enforced via *exequatur*, on the basis of a treaty, reciprocity or comity. Other jurisdictions do not recognize provisional measures or recognize only those provisional measures that emanate from the court with the jurisdiction to open the foreign main proceeding. In the European Union, preservation measures originating in the region are recognized automatically.

136. The decision recognizing provisional measures usually conditions continuation of those measures upon the filing of a request for recognition of the foreign main proceeding (e.g. within 20 days). The usual public policy exceptions and adequate creditor protection safeguards apply. Justifications for imposing a provisional measure and accompanying safeguards in the requesting State may affect its cross-border recognition and effectiveness.¹⁵¹

Insolvency-related judgments

137. Most States recognize insolvency-related judgments via *exequatur*, on the basis of reciprocity or an international treaty. The European Union provides for the automatic recognition of insolvency-related judgments originating in the region. Other States recognize insolvency-related judgments related to the foreign proceeding that is eligible for recognition. Some require that the defendant should not have had its local domicile at the time when the claim leading to the judgment was filed. The UNCITRAL cross-border insolvency framework expedites recognition of insolvency-

¹⁴⁹ See e.g. articles 7 and 9 of MLCBI.

¹⁵⁰ In the European Union, such access is enabled for foreign representatives of the main proceeding taking place in the region. They may request directly without any further formalities any measures available under the law of a member State of the region where the debtor's assets are situated to secure and preserve those assets.

¹⁵¹ A/CN.9/1133, para. 13 (c).

related judgments,¹⁵² including, under certain conditions, judgments that originate from neither main nor non-main proceeding.¹⁵³

Foreign proceedings

138. Some States envisage recognition of only foreign main proceedings, via exequatur. In other States, only foreign main proceedings from designated countries may be recognized. Other States may proceed with recognition only where reciprocity is established or an international treaty providing for recognition of foreign proceedings applies. Other States impose a requirement that the insolvency regime of the requesting State should be comparable to the domestic insolvency regime, in particular as regards the treatment of creditors, for recognition of a foreign proceeding to be granted. The UNCITRAL cross-border insolvency framework expedites recognition of foreign proceedings (main or non-main). It envisages that courts should decide on the application for recognition “at the earliest possible time”¹⁵⁴ and provides for measures that enable courts to conclude the consideration of a recognition application and any specific request for a domestic relief at the earliest possible time. Some enacting States fix a time period, usually very short (3–10 days), for consideration of recognition applications.

(b) Consequences of recognition

Effects of recognition

139. In most jurisdictions, once the foreign proceeding is recognized, any decision issued in such proceeding is recognized without the need for any further action. In some jurisdictions, a recognized proceeding has effects of a local insolvency proceeding. However, the recognized proceeding would not have a retroactive effect (e.g. the already undertaken local liquidation cannot be revoked). In other jurisdictions, recognition of a foreign proceeding may lead to the opening of local ancillary proceedings, which are administered according to the domestic insolvency law. Some laws allow a foreign representative to request that no ancillary proceedings should be opened upon recognition. Such an option would not exist if, for example, local creditors (e.g. employees) have filed claims in the call for submission of claims following recognition. In those cases, ancillary proceedings would be opened. In some cases, local insolvency proceedings, although not required to be commenced by law, are commenced for practical reasons, to avoid jurisdictional and other complexities.

140. Under MLCBI, after recognition of a foreign main proceeding, a proceeding in the recognizing State may be commenced only if the debtor has assets in that State. The effects of that proceeding would be restricted to the assets of the debtor that are located in that State and, to the extent necessary to implement cooperation and coordination with foreign courts and foreign representatives, to other assets of the

¹⁵² “Insolvency-related judgment”: a judgment that arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed (art. 2 (d) of MLII). “Judgment”: any decision, whatever it may be called, issued by a court or administrative authority, provided an administrative decision has the same effect as a court decision. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses (art. 2 (c) of MLII). “Insolvency-related judgements” would include judgments dealing with: constitution of the insolvency estate, e.g. whether an asset should be turned over to the insolvency estate, whether a transaction should be avoided or whether the debtor owes or is owed a sum or any other performance; liability of directors for their actions taken in the period approaching insolvency; examination of a director; discharge; approval of a voluntary or out-of-court restructuring agreement; and confirmation or variation of a reorganization or liquidation plan. See article 2 of MLII and accompanying commentary.

¹⁵³ Article 14 (h) of MLII and accompanying commentary. Article X adopted by UNCITRAL together with MLII makes it clear that, notwithstanding any prior interpretation to the contrary, the relief available under article 21 of the MLCBI includes recognition and enforcement of a judgment.

¹⁵⁴ See article 17 (3) of MLCBI.

debtor that, under the law of the recognizing State, should be administered in that proceeding.¹⁵⁵

Relief

141. Types of local ATR relief commonly granted upon recognition include: (i) a stay of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities or execution against the debtor's assets and suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor (under MLCBI, this relief is automatically effective upon recognition of a foreign main proceeding¹⁵⁶); (ii) termination or limitation of the debtor's administration of its assets in the receiving State, together with the appointment of one or more local insolvency representatives or allowing the foreign representative to administer, fully or partly, the debtor's assets in the receiving State; and (iii) urgent realization of the debtor's assets due to the nature of such assets or for any other reason. In addition, the recognizing court may allow a foreign representative, directly or through a locally appointed representative, to examine witnesses and to take evidence located in the territory of the recognizing State. The recognizing court may also order the delivery of information about the debtor's assets, affairs, rights, obligations and liabilities to the foreign representative. Other relief may be granted, which may or may not be limited in its type, scope and other parameters to the ones available under the domestic law of the recognizing State. Some States allow courts to defer to the relief ordered by the requesting court. The relief granted to a representative of a foreign non-main proceeding may be limited in scope (e.g. relate only to the assets administered in the foreign non-main proceeding and concern only information required in that proceeding).¹⁵⁷

Powers of the foreign representative upon recognition

142. In some jurisdictions, upon recognition, the foreign representative obtains the same rights and obligations as a locally appointed one but it may not exercise any public powers or take any coercive actions in the recognizing State. The obligations of the debtor and other persons residing in the territory of the recognizing State would thus arise vis-à-vis the foreign representative. The foreign representative may in particular: (a) make petitions, requests or submissions in an insolvency proceeding concerning the debtor in the recognizing State;¹⁵⁸ (b) intervene in any proceeding commenced by the debtor or against the debtor in the recognizing State;¹⁵⁹ (c) initiate within the limits of the law of the recognizing State local avoidance or similar actions to render ineffective acts detrimental to creditors in the recognizing State;¹⁶⁰ (d) request any protective measure available under the law of the recognizing State; and (e) file claims for the recovery of insolvency estate assets against third parties.

143. In exercising its powers in the recognizing State, the insolvency representative would be expected to comply with the law of that State.¹⁶¹ Nevertheless, deference to the laws of the foreign proceeding (e.g. as regards powers of the foreign representative or information required to be obtained) is not excluded in some States unless doing so would contradict public policy or domestic laws of the recognizing State or would be incompatible with the effects of a domestic insolvency proceeding opened in the recognizing State or with the provisional measures put in place in that State. Removal of assets abroad usually requires the special court authorization.

144. In jurisdictions where, upon recognition of the foreign proceeding, local ancillary proceedings are opened (always or only in certain circumstances), the locally appointed insolvency representative of the ancillary proceedings may be

¹⁵⁵ Article 28 of MLCBI.

¹⁵⁶ Article 20 of MLCBI.

¹⁵⁷ Article 21 of MLCBI.

¹⁵⁸ Article 12 of MLCBI.

¹⁵⁹ Article 24 of MLCBI.

¹⁶⁰ Article 23 of MLCBI.

¹⁶¹ See e.g. article 5 of MLCBI.

primarily responsible for ATR actions. In addition to requesting any kind of information from any party, it may take measures to secure the relevant assets. The foreign representative may commence local avoidance or other actions against a third party (e.g. liability, restitution and compensation claims) only if the locally appointed insolvency representative renounces to do so.

3. Cross-border insolvency cooperation and coordination¹⁶²

145. The United Nations General Assembly, when noting the adoption of MLCBI and MLII by the Commission, acknowledged that inadequate coordination and cooperation in cases of cross-border insolvency make it more likely that the debtor's assets would be concealed or dissipated.¹⁶³ Where cross-border ATR is needed, inadequate coordination and cooperation may lead to duplication of efforts and an increase in costs of all relevant proceedings.

146. There could be different means and forms of coordination and cooperation. Some may be specified in law. For example, insolvency law may require publication in the domestic official gazette of information relating to cross-border insolvency proceedings, to facilitate the exchange of information and coordination of concurrent proceedings.

147. Other coordination and cooperation mechanisms may be designed for a particular case using the range of tools for coordination and cooperation made available to courts and insolvency representatives in the involved States. Their design may depend on the urgency of ATR relief and other considerations, for example: the location of assets being traced or recovered; the location of the debtor, witnesses or other relevant persons; the law governing the assets and other ATR matters; the courts that have jurisdiction over those assets and matters; a party best placed to undertake ATR actions in different jurisdictions; whether an enterprise group is involved; and whether concurrent proceedings take place, or seeking recognition of a foreign proceeding or the commencement of a local proceeding is required.¹⁶⁴

(a) Coordination of concurrent proceedings

148. Where a foreign proceeding and a proceeding in the receiving State are taking place concurrently regarding the same debtor, the court in the receiving State would be expected to coordinate and cooperate with the foreign courts and foreign representatives involved in the concurrent proceedings and ensure consistency between the relief granted in the local proceedings and the relief granted in aid of foreign proceedings.¹⁶⁵

149. In respect of more than one foreign proceeding regarding the same debtor, the receiving court would also be expected to seek cooperation and coordination with the courts and foreign representatives involved and ensure that any relief granted to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding is consistent with the foreign main proceeding. If a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect granted for that non-main proceeding would be expected to be reviewed by the court and modified or terminated if inconsistent with the foreign main proceeding. If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court must grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.¹⁶⁶

¹⁶² Chapter IV of MLCBI and chapter 2 of MLEGI.

¹⁶³ General Assembly resolutions [52/158](#), the fourth preambular paragraph, and [73/200](#), the fifth preambular paragraph.

¹⁶⁴ As noted in other sections of this paper, the commencement of a local proceeding may be required by law or for practical reasons.

¹⁶⁵ Article 29 of MLCBI.

¹⁶⁶ Article 30 of MLCBI.

150. In all cases of concurrent proceedings, in granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.¹⁶⁷

151. MLCBI also provides that, as a general rule, a creditor who has received part payment in respect of its claim in an insolvency proceeding in a foreign State may not receive a payment for the same claim in the local insolvency proceeding regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.¹⁶⁸

(b) Direct communication and cooperation among courts and insolvency representatives

152. Insolvency law may enable or require direct communication and cooperation between and among courts and insolvency representatives for efficient administration of cross-border insolvencies. Those measures may facilitate ATR.

153. Some States have traditionally taken a relatively liberal approach to communication and cooperation of their domestic judges with their foreign counterparts and foreign representatives, including without the knowledge or participation of the representative or counsel for the parties, although in some jurisdictions this approach is taken only with respect to courts and foreign representatives from a particular group of States.

154. In other States, in the absence of specific authorization, judges may not be allowed to be in direct communication with their foreign counterparts or foreign representatives, especially without the knowledge or participation of the representative or counsel for the parties, or may be hesitant or reluctant to do so based upon ethical considerations, legal culture, language or lack of familiarity with foreign laws and their application.

155. In some States, a general duty of cooperation between and among foreign courts and foreign representatives may arise only after recognition and only in relation to the foreign main proceeding. Some States may impose such duty only in relation to courts and foreign representatives from a particular group of States. In some States, such duty may not arise at all.

156. In the absence of generally applicable requirements for maximum possible cooperation in cross-border insolvency matters, courts may be reluctant to provide assistance to related proceedings in other States, particularly when the proceedings for which they are responsible do not appear to involve an international element. They may be even more reluctant to extend cooperation when the request for cooperation does not relate to any pending or existing proceeding before them. This may considerably hinder ATR especially when courts are expected to act with urgency.

157. The UNCITRAL cross-border insolvency framework enables courts to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives;¹⁶⁹ and enables insolvency representatives, in the exercise of their functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.¹⁷⁰ It also envisages that the courts should be required to cooperate to the maximum extent possible with their foreign counterparts or foreign representatives, either directly or through a locally appointed insolvency representative¹⁷¹ and similarly, insolvency representatives in the exercise of their functions and subject to the supervision of the

¹⁶⁷ Articles 21 (3), 23 (2) and 29 (c).

¹⁶⁸ Article 32 of MLCBI.

¹⁶⁹ See article 25 (2) of MLCBI and article 9 (2) of MLEGI.

¹⁷⁰ See article 26 (2) of MLCBI and articles 13 (2) and 14 (2) of MLEGI.

¹⁷¹ See article 25 (1) of MLCBI and article 9 (1) of MLEGI.

court should be required to cooperate to the maximum extent possible with foreign courts or their foreign counterparts.¹⁷²

158. The need for direct communication and cooperation may arise at an early stage, before recognition of a foreign proceeding or an application for recognition and even before commencement of an insolvency proceeding. It may also arise irrespective of the type of the proceeding involved (main, non-main, or proceedings based on the presence of assets in the State).¹⁷³ The UNCITRAL recommended approach is to enable direct communication and cooperation in all those situations and not to require for such purpose involvement of designated authorities and other means traditionally used in court-to-court communications (e.g. via higher courts or diplomatic or consular channels, using letters rogatory).

159. Forms of communication and cooperation may include communication of information by any means considered appropriate by the court and participation in communication with other courts and insolvency representatives, conduct of a hearing in coordination with another court and conclusion of cross-border insolvency agreements by courts and insolvency representatives.

160. Various court-to-court cross-border insolvency cooperation guidelines and principles were issued that follow the same logic and approach as recommended by UNCITRAL for court-to-court communication, coordination and cooperation. Being procedural and administrative in nature, they do not affect substantive, jurisdictional or applicable law rules and domestic public policy and other fundamental principles (e.g. ethical standards that bind the locally appointed insolvency representatives). They typically do not alter or change the domestically applicable court rules or procedures and are not intended to interfere with the independence of courts or affect or curtail the substantive rights of any party in proceedings before the courts.

161. In addition to encouraging courts to issue their orders, decisions or judgments promptly, they provide for: (a) sharing evidentiary and written materials; (b) handling the case to the maximum extent possible with the foreign court and the foreign representative involved, utilizing as far as possible modern means of communication, which should be in common use, reliable and secure; (c) making arrangements as regards the language of communication and proceedings with due regard to convenience, avoidance of undue prejudice to interested parties and the reduction of time and costs, including by dispensing with the requirement of translation into the local language where possible; and (d) permitting the authentication of documents, where it is required, on any basis that is rapid and secure, including via electronic transmission. Under those guidelines and principles, the receiving court would be expected to recognize and accept as authentic the provisions of statutes, statutory or administrative regulations and rules of court of general application applicable to the proceedings in other jurisdictions without further proof or exemplification thereof. Such recognition and acceptance would not constitute recognition or acceptance of the legal effect or implications of those provisions. The receiving court would also be expected to accept that orders made in the proceedings in other jurisdictions were duly and properly made or entered on or about their respective dates and require no further proof or exemplification for the purposes of the proceedings before it, subject to the usual safeguards, such as appropriate court reservations as regards possible appeal and review and proper objection on valid grounds.

162. Implementation of such guidelines by courts voluntarily in jurisdictions that have not enacted a framework similar to or stricter than the UNCITRAL framework for court-to-court cooperation and coordination in cross-border insolvency cases may considerably facilitate ATR. However, courts in some jurisdictions may need to be specifically authorized by law to implement them.

¹⁷² See article 26 (1) of MLCBI and articles 13 (1) and 14 (1) of MLEGI.

¹⁷³ GEI, paras. 211 and 212.

(c) Case-specific cross-border ATR coordination and cooperation mechanisms

163. A case-specific cross-border coordination and cooperation mechanism may include coordination between the courts concerned in the appointment of the insolvency representative or the appointment of a single or the same insolvency representative in concurrent proceedings or the group representative¹⁷⁴ in enterprise group insolvency cases. Such a mechanism may also include approval by courts of a specific cross-border insolvency agreement concluded by the insolvency representatives, which may address coordinated administration and supervision of the debtor's assets and affairs and coordinated hearings.¹⁷⁵ The need for such agreements typically arises in cross-border insolvencies involving multiple proceedings, raising, among others, difficult questions with respect to implementing or respecting stays issued by foreign courts in foreign proceedings or issuing parallel stays in support of those foreign proceedings.

164. Specifically in the ATR context, where ATR actions involve assets located in different jurisdictions, ATR actions may be hampered by different rules applicable to a stay of proceedings and varying scope of the stay. For example, in some cases, an urgent relief from the stay automatically imposed upon commencement of insolvency proceedings may be needed to make an ATR action possible. In other cases, no such stay may be in place, and a court-imposed stay may need to be requested to give the foreign representative the necessary time to prepare for an ATR action.

165. Cross-border insolvency agreements may address those and other issues with the aim of designing an optimal and coordinated approach to ATR actions by several insolvency representatives (e.g. of main, non-main and other proceedings) in order to achieve the best means of recovery of the assets of the debtor. In addition, courts involved in such agreements may agree on modalities of granting and approving provisional and other relief.

166. The agreement may designate a party responsible for tracing assets, a party responsible for the recovery of assets in a particular jurisdiction and a party best placed to preserve and protect the debtor's assets in different jurisdictions. The agreement may coordinate the manner in which the assets would be traced and recovered in all jurisdictions involved and also include provisions on sharing information and progress reports and holding consultations as regards ATR actions. They may also specify the source of funding for ATR actions. For example, in concurrent proceedings, the legal costs of recovery of assets as a result of actions initiated or pursued by the insolvency representatives in the non-main proceeding may be met from the assets of the debtor as an expense of the administration of the main proceeding, subject to certain limits and applicable law. In an enterprise group context, enterprise group members interested in a specific asset of one group member may be willing to provide funding to assist in the tracing and the recovery of that asset for the group.

C. Tools of general application

167. As was noted above, in exercising its investigative powers, the insolvency representative uses different sources of information. Access to them may be subject to various requirements. Some sources may be public (e.g. social media, newspapers, etc.), while others may be restricted for access by the public, or special conditions may be imposed for access. Those restrictions may be set out in laws or terms of operation of the relevant source of information (e.g. trading platforms of precious

¹⁷⁴ "Group representative": a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding (MLEGI article 2 (e)). For the definition of "planning proceeding", see footnote 74 above. Under article 19 of MLEGI, to support the development and implementation of a group insolvency solution, the group representative is authorized to seek different types of relief, including those needed for the protection, preservation, realization and enhancement of the value of assets or the interests of creditors.

¹⁷⁵ See articles 27–32 of MLCBI and articles 10–17 of MLEGI.

metals, commodities or digital assets). They may or may not apply, or be applied differently, to the insolvency representative in the light of its special status. For example, in many jurisdictions, insolvency representatives will have direct access to all sources of information with only few exceptions (e.g. access to some classified information) that would require justifying access and obtaining a special court order.

168. The sections below describe sources of information commonly used for ATR actions, access to which is regulated by law. Many of those sources perform other functions of relevance to ATR, such as prevention of unauthorized transactions with the insolvency estate assets and registration of rights and priority of the insolvency estate against third parties.

1. Registers¹⁷⁶

169. Across jurisdictions, there are multiple registers useful for ATR. They include land and other immovable and movable, tangible and intangible property registers, including motor vehicle, ship, aircraft and intellectual property registers and central registers of bank accounts, bonds and other securities. Those registers serve various purposes, such as: (a) establishing proof of title; (b) providing information on security and third-party interests in property and establishing effectiveness and priority of rights and interests in the same property; and (c) identifying businesses, their beneficial owners as well as directors, officers and other persons authorized to bind the business.

170. Registers may be useful for ATR in many ways. For example, registers establishing proof of title or providing information on interests in property may inform the insolvency representative about the assets of the debtor, transactions concluded during the suspect period and ongoing proceedings affecting the insolvency estate. Registers identifying businesses and their beneficial owners and directors may inform the insolvency representative about persons who may be held liable for possible breach of obligations in the period approaching insolvency. Information in one register may lead to other sources of information about the debtor and its assets. The registers are also means of enforcing provisional measures as well as the stay of proceedings, suspensions of rights of disposal of property and other effects of insolvency proceedings: relevant entries (e.g. the tag “in insolvency” is added to the business name of the debtor) warn third parties against entering into unauthorized transactions with the assets affected by those measures and prevent recording outcomes of any unauthorized transactions (e.g. transfers of the assets of the debtor, creating encumbrances) and making them effective against third parties. At the same time, registers record the outcomes of the transactions authorized during the insolvency proceedings and confirm the title and priority of the insolvency estate against third parties. Also, the records of the registers may be used in civil litigation or other proceedings commenced or joined by the insolvency representative. Some registers come with a presumption of correctness of the information they contain. Registrars may face liability for not maintaining the register properly, and not providing information from the register, as required by applicable law.

171. Standards for access to registers are not uniform and may evolve. For example, materials about the financial situation of a beneficial owner included in UBO registers and made previously public have been found in several jurisdictions to be protected information on the grounds that unhindered access to that information and the possibility to retain and further disseminate it interfere with fundamental human rights (such as privacy).

172. Most registers are public in many States. Some, although public, may not be easily accessible or searchable. For example, local paper-based registers would require in-person and manual searches in each place where the debtor’s property may be located. Some registers may be searchable by an asset or other criteria rather than

¹⁷⁶ The term “register” refers to the record in which particulars are recorded. The term “registry” refers to the entity which maintains the register. The term “registrar” refers to the person who administers the registry.

the name of the debtor. Foreign language and other issues arising from the set-up of registers may also arise. In particular, some registers periodically remove information, not keeping historical data, which may hinder tracing information relevant to transactions that occurred during the pre-commencement period. Regular checks may be required to discover information appearing in registers later or for a limited period of time.

173. Some registers may be closed for public access because information contained therein is considered (commercially) sensitive or confidential. These types of registers may be consulted only by authorized persons (e.g. by a bailiff), the person itself about one's own information, government agencies and persons who can demonstrate a legitimate interest. Unauthorized use of information from registers may be prohibited and punished. In particular, bank account registers may be consulted in some jurisdictions only by prosecutors and courts in criminal cases or only in certain criminal cases, such as those involving money-laundering. A special court order may be needed to obtain information from such registers. In other jurisdictions, all courts have direct access to centralized systems that collect information on transactions with bank accounts, and access to those systems is also granted under mutual legal assistance treaties (MLATs).

174. Restrictions imposed on access to some registers may or may not be applicable to insolvency representatives. In some States, registers are treated as documents and made available to the insolvency representative *ex officio* without any restrictions. Some States enable and facilitate the direct search of all registers by the insolvency representative for assets of the debtor, including telematic searches,¹⁷⁷ in the context of both insolvency and other proceedings (e.g. civil litigation), without the need for the insolvency representative to demonstrate an enforceable title or obtain a court authorization. In other States, access by insolvency representatives to some registers may be conditioned upon obtaining a court authorization, which may be granted one-by-one with respect to each specific register or at once to all registers relevant to the case. On the basis of that authorization, special arrangements may be put in place with the registers concerned, for example to accommodate *ex parte* (without notice to the debtor) requests by the insolvency representative. (See appendix II to this text for further information.)

2. Files of government agencies

175. Files of government agencies, such as tax and social insurance authorities and authorities in charge of granting licenses for certain types of activities (e.g. mining), may contain important information on the assets and affairs of the debtor, including the names of the debtor's counterparties in transactions that may be void or voidable. In some jurisdictions, government agencies have an obligation under insolvency law to provide the insolvency representative with information from their files that pertain to the debtor's assets and affairs. Access to certain data may be restricted (e.g. because privacy protection considerations prevail) or made conditional (e.g. the insolvency representative may be able to obtain only information that is directly relevant and important for the identification of the debtor's assets). Limits may be imposed on the subsequent use of information obtained (e.g. the insolvency representative may be obligated not to reveal the obtained information to other persons or to make sure that the information is not used for purposes outside the insolvency proceeding).

176. In other jurisdictions, while courts may have direct access to government files (e.g. tax and social security databases), a court order is required for the insolvency representative to obtain access to government or any third-party files.

¹⁷⁷ In the context of registers, telematic platforms are used to access information in real time about assets of the debtor directly from the relevant source (e.g. bank registers). Some use the Global Positioning System (GPS) technology for tracking moving assets (e.g. ships, containers).

3. Information disclosure obligations

177. Information disclosure obligations may apply to certain persons, for example politically exposed persons as regards their assets and income. While often protected under personal data law and not accessible in civil proceedings, the disclosed information may be made accessible to the insolvency representative through court orders or through the insolvency representative's participation in criminal proceedings (see the relevant section below) and could subsequently be used in insolvency proceedings. Other information emanating from disclosure obligations may be publicly available, such as information that must be disclosed by listed companies to investors or the public at large.

D. Civil litigation tools

178. As was noted in the preceding sections, there could be many reasons for the insolvency representative to commence, intervene or join domestic or foreign civil proceedings affecting the debtor and its assets or affairs. For example, those steps may be required for avoidance, adjudication of disputed claims or for pursuing actions against directors (e.g. for compensation of damages), debtor's debtors (e.g. for outstanding payments to the insolvency estate), related persons (e.g. for refusal to surrender assets that comprise the insolvency estate) or other third parties (e.g. for failure to assist the insolvency representative to take control of assets of the insolvency estate). Depending on jurisdictional rules, those proceedings may be handled domestically or abroad by civil, commercial or other courts, in parallel with insolvency proceedings. In those cases, outside the insolvency proceedings, usual civil procedure rules apply, including for gathering evidence and imposing interim measures or preliminary orders. They are discussed below.

1. Evidence gathering

(a) Types of measures

179. Almost all jurisdictions provide for gathering of evidence in some form at the pre-litigation, litigation and post-litigation stages although not all evidence-gathering tools available during litigation may be available at pre- and post-litigation stages. In addition, stricter requirements may apply at those other stages.

180. Evidence gathering tools include the party-centred discovery or disclosure of evidence in some countries and the court-centred evidence gathering in other countries, both of which provide for the gathering of evidence that cannot otherwise be readily obtained, from both parties and non-parties. In the court-centred evidence gathering, the competent court may question parties and witnesses, view things or review documents, or appoint an expert. It may order parties and witnesses to appear for questioning and order persons in possession of certain documents to produce those documents. In the party-centred evidence gathering, the evidence gathering proceeds in the form of disclosure or discovery, including obligations to appear for a deposition and to produce documents and other materials, where applicable.

(b) Conditions for use

181. In most jurisdictions, pre-litigation gathering of evidence is available to secure evidence in anticipation of litigation when time is of the essence and there is a danger that the evidence in question will disappear or be lost or significantly changed before litigation is commenced. In some jurisdictions, pre-litigation gathering of evidence is also available, at least to some extent, if there is some other interest of the applicant, most prominently the interest in evaluating the evidence to determine the chances of successful litigation. In all those cases, the applicant is required to show the likelihood

of success of its claim on the merits. Additional requirements may be imposed depending on a specific order.¹⁷⁸

182. Gathering of evidence during the litigation stage is more formal and structured and subject to the rules of court procedure, such as those that govern relevancy, reliability, credibility and admissibility of evidence. The court may exclude some evidence (e.g. prejudicial or improperly obtained) and restrict disclosure of some other evidence, whether gathered at the pre-litigation or litigation stage, for privacy, data protection or other reasons.

183. Some jurisdictions permit the judgment creditor to obtain discovery after litigation, in aid of the enforcement of the judgment, from the judgment debtor or third parties. This allows the judgment creditor to obtain information about the debtor's assets, including concealed assets. Discovery of this kind is broad if requested from the debtor. Discovery from third persons is ordinarily limited to the assets of the debtor and cannot be expanded to the assets of the third person. However, when a third party has close ties to the debtor, more extensive discovery is permissible.

(c) Limitations

184. In most jurisdictions, evidence gathering is only available in respect of evidence that is relevant to the claims on the merits. This will rarely include evidence related to the other party's assets, unless the cause of action is one of civil fraud. In some jurisdictions, relevancy is interpreted more broadly to include any facts that are necessary to prove an element for the intended cause of action, including evidence related to the assets of the parties.

185. In jurisdictions where there is a strict rule against "fishing expedition", the parties are expected to specify the evidence that they intend to collect and use in litigation in detail. Where the court get hold of evidence (e.g. via orders to bailiffs), it will not necessarily disclose it to the parties and use it in the case if the parties fail to prove the relevancy of that evidence to their case.

186. In addition to relevancy, requirements of necessity and proportionality are imposed, which may particularly concern sensitive information (e.g. information covered by bank secrecy or the attorney-client privilege). The latter may be treated differently across jurisdictions. In some jurisdictions, sensitive information is generally protected by privilege and may be revealed only if parties agree to reveal it. In other jurisdictions, the decision whether a litigant or a third person with such information should be ordered to reveal it is made by the court upon balancing the interests involved or a proportionality analysis. In yet another group of jurisdictions, such information is less protected, or must be made available on the basis of applicable law.

187. Limits may be imposed on the subsequent use of the documents or information obtained through evidence-gathering measures. It is usually required to use the obtained materials only for the purpose identified in the application for a given measure (e.g. to trace the assets or their proceeds). If the above limits are not respected, the evidence may not be admissible in the proceedings. At the post-litigation stage, the information must be relevant only to the assets of the judgment debtor subject to the enforcement.

(d) Specific issues arising from the use of data as evidence

188. The principles of functional equivalence, non-discrimination and technology neutrality apply to the use of data as evidence in legal proceedings. In accordance with those principles, in any legal proceedings, no rules of evidence should be

¹⁷⁸ See e.g. *Anton Piller KG v. Manufacturing Processes Ltd.* [1975] EWCA Civ 12, requiring to show a wrongdoing by the respondent; provide strong evidence that the damage to the applicant arising from the respondent's conduct is serious; present clear evidence that the respondent has in its possession incriminating documents or evidence; and show that there is a real possibility that the respondent may destroy such material before discovery or before all parties can be heard.

construed so as to deny the admissibility of data as evidence on the sole ground that it is a data message.¹⁷⁹ The result of electronic identification is also not to be denied admissibility as evidence on the sole ground that the identity proofing and electronic identification are in electronic form.¹⁸⁰ Similarly, the result deriving from the use of a trust service is not to be denied admissibility as evidence on the sole ground that it is in electronic form.¹⁸¹

189. Nevertheless, special procedures may apply, for example, to identification of a person or use of a trust service¹⁸² or capturing data from third-party devices. International texts may apply. Non-compliance may lead to inadmissibility of data as evidence.

190. Information in the form of a data message is expected to be given due evidential weight.¹⁸³ In addition to the usual criteria (e.g. relevancy, authenticity, persuasiveness), specific requirements may apply to assessing the evidential weight of a data message. In particular, regard could be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which the originator was identified, and to any other relevant factor.¹⁸⁴

191. Some jurisdictions presume reliability of data and processes by which data was generated and stored, absent any challenges. Other jurisdictions require the relying party to prove reliability against applicable standards, which may differ across jurisdictions and circumstances. According to UNCITRAL texts, those standards should be appropriate and non-discriminatory and include compliance with any applicable operational rules, policies and practices, security of hardware and software and the regularity and extent of independent audit and certification of reliability.

192. Given the inherent vulnerability of data, much attention is paid to its retention and preservation, including protection from loss and temporary unavailability. UNCITRAL texts provide that, where the law requires that certain documents, records or information be retained, or provides consequences for the absence of retention, that requirement is met by retaining data messages, provided that the following conditions are satisfied: (a) the information contained therein is accessible so as to be usable for subsequent reference; (b) the time and date of archiving is indicated and that time and date is associated with the data message; (c) the data message is retained in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received or in another format which can be demonstrated to detect any alteration to the data message after the time and date of its archiving, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display; and (d) such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time when it was sent or received.¹⁸⁵ An obligation to retain documents, records or information may or may not extend to any information or other metadata the sole purpose of which is, among others, to enable the message to be sent or received.

193. Additional requirements may apply depending on the jurisdiction, for example as regards data protection, data localization, cyber security, medium or service providers to be used for retention of data and interoperability requirements. Particular

¹⁷⁹ UNCITRAL Model Law on Electronic Commerce, article 9, para. 1.

¹⁸⁰ UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services (2022), article 5.

¹⁸¹ *Ibid.*, article 13.

¹⁸² *Ibid.*, article 2 (3).

¹⁸³ UNCITRAL Model Law on Electronic Commerce, article 9, para. 2.

¹⁸⁴ *Ibid.*

¹⁸⁵ See e.g. article 10 of the UNCITRAL Model Law on Electronic Commerce (1996) and, for electronic archiving, article 19 of the UNCITRAL Model Law on the Use and Cross-Border Recognition of Identity Management and Trust Services (2022); and the “Notes on the Main Issues of Cloud Computing Contracts (prepared by the secretariat of the United Nations Commission on International Trade Law, 2019)”, paras. 163–164 and 173.

issues and requirements may arise from the need to retain and store digital signature certificates, especially in the cross-border context.

194. A person may satisfy the applicable requirements by using the services of another person, provided that the applicable conditions are met. For example, cloud service providers are usually under requirements, statutory or contractual, to retain and provide access to data of their clients in accordance with certain minimum standards. In litigation, an authorized officer (e.g. bailiff) may be put in charge of collection, transmission, retention and preservation of data as digital evidence and access thereto. It may be required to record every step of the capture or seizure of data, the transfer to its custody and retention of the transferred data, and of safekeeping the device used for obtaining or storing data.

2. Interim measures and preliminary orders

(a) Types of measures and orders

195. There are various measures and orders available to protect assets or secure performance. They include: attachment or garnishment orders;¹⁸⁶ sequestration;¹⁸⁷ embargoes;¹⁸⁸ freezing orders;¹⁸⁹ judicially ordered security interests or liens;¹⁹⁰ and seizures.¹⁹¹ In addition, the court may order the defendant or a third person (e.g. a register or registrar) to do or not to do something. This includes, among others, orders not to remove a particular thing from a certain place; not to transfer property or to encumber it with a security interest; not to pay a debt or receive payment on a debt; to return a thing to a particular place; or to place the thing into the custody of a trusted third person or the court.

196. Some jurisdictions distinguish between attachment and garnishment and other orders. Where the plaintiff's claim is a claim to pay money, it is secured by attachment or garnishment. Where it is a claim to do or not to do something else, an order is issued. Where this distinction is made, there may be slight differences in the requirements for using these measures and applicable safeguards.

197. Depending on their effect, interim measures and preliminary orders may be characterized as in personam or in rem although the line between the two may be blurred. For example, an attachment order may entail both (i) an obligation of the

¹⁸⁶ Whereby the assets identified in the court order are attached or garnished by a public authority. (Pre-judgment) attachment typically does not cause a change in legal ownership, but it does cause the debtor to lose the ability to transfer or encumber the assets. In some jurisdictions, the creditor does not need to specify assets of the debtor that might be subject to attachment or garnishment. In these jurisdictions, it is the task of the attaching or garnishing authority to find assets for this purpose. Banks and other third parties may be required to provide information on assets held with them. In other jurisdictions, the creditor is required to identify the assets to be seized and their location before an attachment or garnishment can be obtained, which presupposes the creditor's knowledge of assets that the debtor owns within the jurisdiction. In some jurisdictions, a general description, such as "all machines in warehouse X" or "all business accounts with bank Y," may suffice. In other jurisdictions, if there are no known assets, a generic attachment of assets may be requested. In the case of property subject to registration, the attachment operates through the registration of the measure in public records, which has the effect of publicity and effectiveness before third parties. Some assets, such as personal items or wages to the extent necessary for a basic level of income, may not be subject to attachment or garnishment.

¹⁸⁷ Whereby the assets are taken away by a public authority.

¹⁸⁸ Whereby the debtor may use the embargoed assets but must refrain from alienating them and must ensure their diligent preservation.

¹⁸⁹ Known as Mareva injunctions in some jurisdictions. *Mareva Compania Naviera S.A. v. International Bulk Carriers S.A.* [1975] 2 Lloyd's Rep. 509. If ordered with regard to all assets of the defendant anywhere in the world, they are known as "worldwide freezing orders" (WFOs) and usually granted, in addition to the usual requirements applied for freezing orders, where the domestic assets of the defendant within the jurisdiction will not suffice to cover a potential judgment.

¹⁹⁰ E.g. a judgment lien on immovable property whereby a right to enforce the immovable property in question is established irrespective of whether a third person has since obtained, through transfer or encumbrance, a property right in that property.

¹⁹¹ Whereby the seized assets are placed at the disposal of the court.

defendant not to dispose of the attached asset at the risk of facing criminal sanctions and (ii) upon execution of the order, the effective freezing of the asset by rendering any transaction or encumbrance ineffective, including for the involved third party.

(b) Conditions for use

198. Interim measures and preliminary orders may be granted on different grounds depending on whether they are sought before, during or after litigation and whether they are directed against the defendant (e.g. seizure of passports or orders limiting freedom of movement, including arrests) or against a third party, such as a trustee, a bank or the operator of a cryptocurrency exchange, who may hold or control assets of the defendant (e.g. account freeze orders).

199. Where measures are sought before or during litigation, when it is not yet clear whether the claim made by the plaintiff will be recognized by the court, and because the request can be filed with a court other than the one adjudicating or will be adjudicating the plaintiff's claim, the plaintiff must, in most jurisdictions, provide some evidence of the claim. However, since the purpose of requesting those measures is to obtain relief quickly and thus without having to wait for a judgment on the merits, the standard of proof on the cause of action for granting those measures is not as high as that required to prevail on the merits. Thus, a lower standard of proof, such as a good arguable case or a particularly defined minimum probability, is usually sufficient. It is sometimes said that what is required is *fumus boni iuris* or the appearance of a legitimate right (freely translated, "the smoke of good right").

200. Most jurisdictions also require the plaintiff to establish a particular need for the measure. What is usually required is that, without the measure, enforcement of the judgment would be impossible or significantly impaired. In some jurisdictions, the plaintiff must show that without the measure it is likely to suffer an injury not reparable by a claim for damages or other remedy against the defendant, or that the probability of the plaintiff's suffering an irreparable injury is high without the measure while the probability of the defendant's suffering an irreparable injury with the measure in place is low. The need for the measure can be established in various ways, including by showing that there is reason to fear dissipation of the defendant's assets. In other jurisdictions, the reasons for such measures may be more narrowly circumscribed, for instance in an exhaustive list of the specific possible grounds for obtaining a measure (e.g. the danger that the debtor might flee or remove its assets from the jurisdiction). In such cases, ancillary measures may also be imposed.

201. Where the claim has already been recognized in a judgment, the judgment serves as the evidence of the claim. Once the judgment is enforceable, interim measures and preliminary orders may not be available in some jurisdictions because the creditor can immediately commence enforcement proceedings. In some jurisdictions, enforcement is effectuated by a bailiff, without the need for an additional attachment or garnishment order of the court. In other jurisdictions, interim measures may be made available between the application for enforcement and the actual enforcement to secure enforcement of the judgment.

3. Safeguards

202. The requirements of a (good or strong) *prima facie* case, necessity, relevancy and proportionality usually apply. As a result, the scope of the measure is usually limited to what is strictly necessary, and the interests of the applicant in obtaining the measure are balanced against the possible detriment to the person who is personally obligated to comply with the measure and who may face sanctions for non-compliance (henceforth referred to as the respondent, who may be the (potential) defendant or another person). For example, the applicant may be required to identify the premises that need to be searched or assets that need to be attached. The court may impose measures protecting the respondent from annoyance, embarrassment, oppression, or undue burden or expense.

203. Additional safeguards may apply to especially intrusive measures such as site visits, search of premises, forensic examinations of electronic systems and cell phones, inspections or seizure of evidence or assets. They include stronger justifications for granting a measure (e.g. specific and concrete evidence of concealment, destruction or failure to preserve documents, information or assets), the implementation of a measure during ordinary business hours and, during its implementation, the presence of the respondent, its attorney-at-law or third-party witnesses, and a detailed recording of steps taken and items removed, where applicable. Measures affecting human dignity and human rights (e.g. freedom of movement, privacy) are also usually subject to stricter safeguards. These include that the measure must be proportional. For example, if, to secure enforcement of a judgment, it is sufficient to order the defendant to report regularly to a local government agency or to turn over its documents of identification until the defendant has identified its assets or made them available for attachment or garnishment, that order must be chosen over any more restrictive measure, including in the worst case, an arrest of the debtor. In addition, those measures are usually for a short duration, which may be extended only in extraordinary circumstances to achieve the purpose for which they were ordered.

204. The ordered measures are usually subject to a mandatory periodic review by the court. The applicant may be required to inform the court about changes that would require termination or modification of the measure. Sanctions may be imposed on the applicant for abusive requests and for non-compliance with the court's conditions for granting a measure.

205. The respondent has the right to be heard before the measure is taken. However, in cases of urgency or risks of dissipation, measures may be ordered *ex parte*. In such case, the respondent has an opportunity to be heard on the measure at a later stage and to have it overturned by the court if the prerequisites are shown to be missing. In some jurisdictions, for an *ex parte* measure to be granted, the applicant must also set forth the arguments the respondent would likely make, would it be heard (full and frank disclosure). In some jurisdictions, some measures are granted *ex parte* as a matter of course on the assumption that once there is a danger of dissipation, speed and surprise are always of the essence. *Ex parte* measures are usually accompanied in some jurisdictions, under additional safeguards, by restrictions of disclosure information about the case and the measure (see below).

206. The applicant may be required to indemnify the respondent's costs for implementing the measure, which may be recoverable as damages from the wrongdoer. In many jurisdictions, the applicant is also liable to the respondent for any damages caused by a measure that turns out not to have been justified. In some jurisdictions, this is a no-fault liability, that is, the applicant is liable to the respondent for the wrongful granting of a measure independent of whether the applicant acted with intent or negligence in obtaining the measure. The posting of security may be mandatory in all or most cases in order for a measure to be granted. Alternatively, it may be at the discretion of the court to determine whether there is a particular danger that the respondent will not be able to obtain damages from the applicant if the measure turns out to have been wrongly granted.

207. If litigation or enforcement proceedings are not already pending, the applicant may be required to file for their commencement within a fixed, usually short, time period in order to sustain the measure. The defendant may be able to have the measure terminated or to cause a less intrusive measure to be ordered by posting security for the claim. In some jurisdictions, the defendant can have the measure terminated at a later point in time if circumstances have changed, for instance because the defendant has paid the debt or the debt has otherwise been extinguished.

208. Other safeguards vary across jurisdictions and within the same jurisdiction may depend on the specific measure sought, the applicant, the respondent and the context. For example, some jurisdictions do not guarantee a right to refuse testimony and offer no protection against self-incrimination, but bar the use of information obtained in

subsequent criminal proceedings. In other jurisdictions, that may not be the case. In some jurisdictions, the respondent may not be required to permit the search and seizure of any evidence that would expose the respondent to criminal liability or that is protected by privilege. In other jurisdictions, that may not be the case. The same measure may be implemented with variations dictated by circumstances. For example, questioning or examination may take place orally or in writing, publicly or privately, on oath, before the court or otherwise, and in presence of trusted persons or otherwise.

209. In most jurisdictions, courts retain discretion in deciding whether to apply the measure given all the circumstances of the case. In some jurisdictions, courts may combine and tailor measures to the needs at hand, including safeguards for implementing them.¹⁹²

4. Cross-border aspects

(a) Service of process abroad

210. Many jurisdictions require the diplomatic process to be used for service of process abroad. If the involved countries are parties to the Hague Service Convention, the procedures of that Convention must be used “where there is occasion to transmit a judicial or extrajudicial document for service abroad.”¹⁹³ The letter-of-request procedure is envisaged in articles 2–7 and the alternative procedures are envisaged in articles 8–9 (service by way of the serving State’s consular or diplomatic representatives) and article 10 of the Convention (service by direct mail or direct

¹⁹² E.g. the courts have often combined and used with variations *Norwich* and *Bankers Trust* orders, adjusting them, for example, to the needs of tracing digital assets. *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] A.C. 133: this is an action filed in court to obtain information possessed by an innocent 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. There should be 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 connection with the wrong other than having been a spectator or having in their possession some document relating to the wrong). The order cannot be: (i) 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 and vice versa; (ii) used to obtain evidence as opposed to information; and (iii) used to aid a foreign proceeding if the foreign jurisdiction has a statutory regime through which evidence from overseas must be obtained. *Bankers Trust Co. v. Shapira and Others* [1980] 1 WLR 1274: this order requires a financial institution to disclose generally confidential information between a bank and its customer based on strong evidence that the funds about which information is sought belonged to the applicant, the funds were fraudulently dissipated, the information sought will lead to the location or preservation of the funds and that delay in disclosing the information may result in the funds being further dissipated or transferred. It may be requested both prior to and after the institution of any proceedings. If ordered, it will supersede duties of confidentiality. The applicant may be required to undertake that information disclosed would be used only for the purposes of the action to trace the funds.

¹⁹³ Article 1 (see also the Practical Handbook on the Operation of the Service Convention, paras. 29–51 for more details).

communication among courts)¹⁹⁴ Courts have used various means for service abroad¹⁹⁵ and elaborated on criteria and conditions for their use.¹⁹⁶

(b) Evidence-gathering abroad

211. If at least part of the evidence to be gathered is located abroad or if the person with control of the evidence to be gathered is located abroad, a letter of request to the competent foreign authority (under MLATs or otherwise) or the use of the procedures of the Hague Evidence Convention, where applicable, may be needed.¹⁹⁷ Those procedures include the letter of request procedure¹⁹⁸ and alternative procedures (through diplomatic officers, consular agents and commissioners).¹⁹⁹ At the regional level, the direct taking of evidence by members of the court of one State in another is permitted if the person from whom evidence is to be taken voluntarily cooperates.²⁰⁰

212. Domestic discovery for use in a foreign litigation, planned or pending, may be ordered by the court in some jurisdictions. A discovery order is discretionary and may depend on a number of factors, including whether the foreign court itself could order the discovery of the evidence sought and whether the applicant attempts to circumvent proof-gathering restrictions imposed by the foreign country.

213. Generally, evidence-gathering measures are available to foreign litigants as well as to domestic ones. However, rules of judicial competence may require that there should be jurisdiction over the defendant in the planned or already pending litigation for the court to be able to order the measure, irrespective of whether the evidence involved is located within the country. In other countries, the court has also jurisdiction whenever the evidence to be gathered is located within the country. In

¹⁹⁴ The Convention enables service of documents via electronic means through the main channel of transmission (see arts. 5(1)(a) and (b) and 5(2)), alternative channels of transmission (arts. 8 and 10) and derogatory channels of transmission (art. 19). Some States have interpreted the provisions of the Convention as not comprising service, inter alia, by email or social media platforms or applied the Convention only in cases of unsuccessful service through the main channel of transmission (in particular in cases of objection on behalf of a State of the alternative channels of transmission). Further information is available in “Practical Handbook on the Operation of the Service Convention” (2016), HccH.

¹⁹⁵ E.g. email addresses, social media posts, digital platforms, websites, instant messaging applications, NFT airdrops and a combination of traditional and alternative means for service abroad and to “persons unknown” wherever located. See e.g. *D’Aloia v. Person Unknown & Ors* [2022] EWHC 1723 (Ch) (24 June 2022); *Osbourne v. Persons Unknown* [2023] EWHC 39; *LCX AG, v. John Does Nos. 1–25*, Complaint No. 154644/2022 (N.Y June 6, 2022) [these cases are not insolvency specific].

¹⁹⁶ Apart from jurisdictional grounds (e.g. a good arguable case for invoking that court’s jurisdiction, the existence of sufficient connecting factors to that jurisdiction), those criteria included whether efforts have been made to serve the respondent by traditional means, whether using such methods turned out to be, or are deemed ab initio, ineffective or futile, whether communicating by an alternative means has been identified as a fair and effective means of communication with the defendant, whether the defendant has given its consent for service via an alternative means, whether and to what extent the respondent is trying to circumvent the traditional means of service, and whether the chosen alternative means is prohibited by the law of the addressee’s State. Service outside a specific jurisdiction by alternative means may be restricted in some jurisdictions to nationals or residents of the jurisdiction located in another State. In other States, it is used for foreigners but not domestic respondents. Some courts have also elaborated on specific conditions and technical requirements for the use of alternative means (e.g. confirmation of receipt although some jurisdictions may consider service to be automatically effected following a certain period in time after transmission; reliability, integrity, preservation, security and confidentiality of data; the identification of the recipient and of the time of the communication and receipt).

¹⁹⁷ A similar procedure is found in Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast) (the EU Evidence Regulation).

¹⁹⁸ Articles 1–14 of the Hague Evidence Convention. See also articles 5–18 of the EU Evidence Regulation.

¹⁹⁹ Articles 15–22 of the Hague Evidence Convention.

²⁰⁰ Article 19 of the EU Evidence Regulation.

others, jurisdiction depends on the reason for evidence gathering. Since evidence-gathering measures operate in personam, they can be enforced within the jurisdiction against the person or its assets located within the jurisdiction. For that reason, some courts may be reluctant to grant them against persons located abroad unless those persons have some presence in the jurisdiction. Other courts do so, including against unknown persons and in unknown jurisdictions in the digital context.

(c) Jurisdiction to order interim measures and preliminary orders

214. Jurisdiction to order interim measures and preliminary orders in personam usually lies with the court that has jurisdiction over the defendant or that would have jurisdiction over the defendant in the proceedings on the merits. Preliminary orders directing the defendant or third parties to do or not to do something usually operate in personam. They may be ordered by the court irrespective of the location of assets and whether the activity is to take place within or outside its jurisdiction. In comparison, jurisdiction to order or enforce in rem measures, such as attachment and garnishment orders, is usually limited to the jurisdiction where the assets in question are located. Nevertheless, there are jurisdictions in which attachment and similar orders may also be issued by the court that has or would have jurisdiction in the proceedings on the merits.

(d) Cross-border recognition and enforcement of interim measures

215. There are different regimes for cross-border recognition and enforcement of provisional measures, with the growing trend of not refusing recognition and enforcement only because a measure is provisional in nature. The regime may depend on the type of a provisional measure with a stricter regime usually applicable to preliminary orders. Recognition and enforcement of provisional measures, subject to limited grounds for refusal of recognition and enforcement, are enabled and facilitated by some international texts,²⁰¹ including the New York Convention if interim measures are issued by arbitral tribunals in the form of an arbitral award. Other international texts that deal with cross-border recognition and enforcement of foreign judgments, measures or orders, exclude provisional measures from their scope.²⁰² Many jurisdictions limit the effect of most types of provisional measures to the territory of the issuing State, and upon request for recognition and enforcement of foreign provisional measures, issue parallel domestic measures. The receiving court may take into account the measure granted in the issuing State in devising the appropriate local provisional measure. If the provisional measure in the issuing State is not known to, or not available for a given case under, the law of the receiving State, the court may be adapted to the local provisional measure that would produce the same or similar effect or, if that is not possible, to the measure that the receiving court would have ordered in the same or similar circumstances pursuant to its own rules of civil procedure. Other jurisdictions defer to the provisional measures issued by foreign courts, subject to public policy and other exceptions.

²⁰¹ See e.g. the OAS Convention on Execution of Preventive Measures, article 32 of the EU Insolvency Regulation or Regulation (EU) No. 655/2014, OJ L-189, 59 (2014) on the European Account Preservation Order; the UNCITRAL Model Law on International Commercial Arbitration (MAL), articles 17 H–17 I.

²⁰² See e.g. the Hague Evidence Convention (article 1; in addition, several Contracting Parties 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); the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (article 3.1 (b)); and the definition of “judgment” in article 2 (c) of the MLIJ.

E. Ancillary measures

1. Restrictions on disclosure of information related to ATR²⁰³

216. Most jurisdictions allow courts, under certain circumstances, to restrict disclosure of information about the case and pending or imposed court measures. Those circumstances usually include the need to avoid interference with investigation or dissemination of biased or inaccurate information that may shape the public opinion and negatively affect fair trial. As relevant to ATR, they also include the need to ensure a “surprise” effect and effectiveness of court measures. For example, a bank may be prohibited from revealing to its client that it was ordered to provide information about the client to the court or the insolvency representative. All concerned may be prohibited from discussing details of the case, including any imposed restrictions on disclosure of information about the case, outside the courtroom (e.g. making statements to the media or sharing information on social media). In addition, access to the entire case file or specific documents or evidence there (e.g. commercially or personally sensitive information, including identity of witnesses or other persons²⁰⁴) may be prohibited. Such restrictions often accompany *ex parte* (without notice) and in-camera court hearings. The breach of those restrictions leads to liability, including imprisonment.

217. The availability and scope of those restrictions and the specific requirements and conditions for issuing them vary among jurisdictions. Where they are allowed, they may be ordered by the court itself or upon request of an interested person. The latter could be expected to outline reasons for the restriction and the specific information or subject matter to be protected.

218. Courts usually require a strong evidentiary basis for imposing such restrictions and subject them to strict requirements of necessity and proportionality. Where courts impose them, they limit their operation in time, and narrowly define them, tailoring them to the specific circumstances of the case. For example, where a “surprise” effect is vital, the scope of restrictions may end up being comprehensive.

219. Those safeguards aim at balancing the need for issuing such restrictions with competing interests and fundamental principles of open justice, transparency and freedom of speech and expression. The imposed restrictions may be subject to review and variation.

2. Criminal proceedings in aid of ATR²⁰⁵

(a) Domestic context

220. Criminal proceedings may aid ATR in several respects.

221. First, entities and persons who have suffered damage as a result of a criminal act, such as the general body of creditors and the insolvency estate in an insolvency-related crime,²⁰⁶ have **the right to initiate or join legal proceedings against those responsible for that damage in order to obtain compensation**. While multiple aggrieved persons can initiate or join such proceedings, each asserting their individual claims for compensation, the cause of action on behalf of the general body of creditors and the insolvency estate belongs to the insolvency estate (see above in the context of avoidance actions and actions against directors). Therefore, the insolvency representative would have the primary responsibility to initiate or join such proceedings. The law may also permit a creditor or any other party in interest to

²⁰³ Known in some jurisdictions as “gag” and “seal” orders.

²⁰⁴ E.g. because of increased risks of cyberattacks and other negative consequences, the courts usually preserve the anonymity of traders on crypto exchanges.

²⁰⁵ **This section has been revised further to the comments made at the sixty-second session of the Working Group (see e.g. A/CN.9/1133, paras. 13 (x) and (y)).**

²⁰⁶ E.g. embezzlement, misappropriation and other similar actions with respect to the debtor’s assets (see the relevant section above) or the debtor was the victim of fraud by third parties that led to its insolvency.

commence or join such proceedings, with the agreement of the insolvency representative or, where the insolvency representative does not agree, with leave of the court.

222. Claims for damages may be filed either with the criminal or civil court or both (for example, the insolvency representative may claim material damages in a criminal court and moral damages in a civil court),²⁰⁷ and it may be allowed to switch between the available options. Pursuing them in a criminal court may have certain advantages. In particular, the insolvency representative will be expected to obtain and file all the required evidence itself in civil proceedings to substantiate its claims for damages. In comparison, the insolvency representative's civil claims for damages before criminal courts would be treated according to the criminal procedure rules. Those rules may enable the insolvency representative to use all the evidence compiled by the prosecutor and the police during the criminal investigations.

223. Damages may be compensated from the forfeited or confiscated assets.²⁰⁸ The disposal of those assets by the court may include return of an asset to its legitimate owner, e.g. the insolvency estate, or sale of the assets to compensate for damages and pay fines associated with the crime. Certain conditions may be imposed, such as protection of bona fide third parties. Different rules may apply to the calculation and awarding of damages, including the types of losses or harm that can be claimed, the burden of proof, and the methods for quantifying and assessing the damages. Multiple victim compensation orders may be issued in a single case. The interests of the State or a particular victim (e.g. environment, another State Party to an applicable international convention) may prevail over interests of the insolvency estate. Although, under those conditions, the insolvency representative may be able to recover only some assets and be compensated for damages only partly, if at all, ATR through criminal proceedings may be useful not only for the recovery of assets and damages but for other reasons, some of which are discussed below. In addition, reaching a settlement with the perpetrator is possible in some jurisdictions, subject to verification of the conditions of settlement (e.g. proportionality). Under the terms of a settlement agreement, the perpetrator may agree to pay the settlement amount to the insolvency estate outright or in instalments in accordance with the agreed plan. Settlements would constitute irrefutable presumption of liability, which the insolvency representative could then use in other proceedings and other ATR actions.

224. Second, in some jurisdictions it is possible for the insolvency representative **to obtain access to the entire file of criminal investigations or some information or evidence contained therein** ex officio, by a special court order or if the insolvency representative joins criminal proceeding as a "civil party" (see below). If obtaining a special court order is required, the insolvency representative may have to demonstrate

²⁰⁷ In some jurisdictions, when both proceedings are pending regarding the same facts, civil proceedings are suspended until a final judgment has been reached in the criminal proceedings in order to avoid any conflict; in other jurisdictions, this is not the case.

²⁰⁸ Forfeiture is a civil procedure involving the legal process of permanently depriving an individual or entity involved in a crime of assets directly linked to the crime, such as proceeds from fraud. In comparison, confiscation is a criminal procedure involving the act of taking possession of assets of the convicted as punishment for the committed crime. The burden of proof in forfeiture cases is lower than in confiscation. Demonstrating that the assets are associated with illegal activities or were obtained through illegal means may be sufficient in forfeiture cases whereas proving the guilt and conviction may be required for confiscation (although some international instruments envisage possibility of confiscation without a criminal conviction where the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases (see e.g. article 54 (1) (c) of UNCAC)). Confiscation may apply to a broader range of assets, including those acquired legally but used in the commission of a crime or linked to criminal activities. They usually include: (a) the object of the crime and other objects that have served the crime or were intended to be used for the crime when they belong to the convicted; (b) goods or assets produced by the crime; and (c) property benefits resulting directly from the crime, the assets and the value that replaced such benefits and the financial gains of the benefits that have been invested. Where those assets cannot be identified among other assets of the convicted or where they are mixed up with lawfully obtained assets, other assets of the same value may be confiscated.

that the records in question are expected to have an intrinsic value for ATR in the same or other proceedings and that the need for disclosure outweighs the need for continued secrecy of, for example, criminal investigations or grand jury deliberations. Other safeguards to protect the interest of the criminal investigation and the rights of the accused may apply.

225. Gaining access to criminal records may be useful because investigating organs have more far-reaching investigative powers than the insolvency representative and may employ a wide range of evidence-gathering tools (e.g. search warrants, arrest warrants, interception of mails, wiretapping). The files of criminal investigations may thus contain information and evidence that would be very difficult or impossible to obtain in other proceedings. The obtained information may inform the need for ATR. In addition, it may help the insolvency representative to demonstrate appropriateness and urgency of a particular ATR action, such as a request for attachment, freezing or other relief, domestically or abroad. It may also help to substantiate a request for assistance under MLATs or another applicable mutual legal assistance framework (see below) as well as an application for recognition and enforcement of domestic proceedings and measures or the commencement of foreign proceedings or imposition of measures by foreign courts.

226. Third, some jurisdictions permit a victim of the crime or, sometimes, more generally an interested person, **to participate in the criminal proceedings as a “civil party”**. The extent of rights and powers granted to a “civil party” vary from jurisdiction to jurisdiction. In some jurisdictions, the role of a “civil party” may be limited to seeking compensation for damages (see above). In other jurisdictions, a “civil party” is allowed to play a more active role in criminal investigations and during trials before the court. In addition to access to criminal records, a “civil party” may seek, for example, additional investigating measures (e.g. house searches) and attachment²⁰⁹ and freezing orders. During trial, a “civil party” may be allowed by the presiding judge to question the accused and witnesses. “Civil parties” may have the right to appeal, including dismissal of their requests.

227. Some jurisdictions allow only the direct victim of an (alleged) crime to join criminal proceedings as a “civil party”. In other jurisdictions, indirect victims may also join in that capacity. The general body of creditors may be the direct in some cases, e.g. the debtor’s Ponzi scheme, or the indirect victim in other cases, for example, corruption committed by the debtor or its directors. To join the proceedings as a “civil party”, the insolvency representative would be required to file, depending on the jurisdiction, either a written complaint clearly stating why it should be considered the victim or a written self-declaration, expressing intention to join the proceedings and requesting a “civil party” status. Depending on the stage of criminal proceedings, the request to join as a “civil party” is filed either with the authority in charge of investigations (e.g. the public prosecutor, the police or the investigating judge) or with the court if the trial has commenced.

228. In many jurisdictions, the insolvency representative would be expected to bear legal costs and expenses, including attorney fees, which would normally be paid as administrative expenses unless alternative arrangements are in place (see para. 20 above). In some jurisdictions, the costs of the successful party are to be reimbursed by the convicted person or the State.

(b) Cross-border context

229. In cases where criminal activities and insolvency proceedings span multiple jurisdictions, coordination and cooperation between law enforcement agencies and

²⁰⁹ Attachments are of a conservatory and temporary nature allowing the investigating authorities to keep assets under their control. They are usually granted under certain conditions, for example that the attachment is necessary for investigation (e.g. the attachment of a piece of evidence that risks disappearing), or with respect to the assets that are able to be subject of a forfeiture. Being provisional measures, the attachment proceedings and orders are not suspended pending the completion of criminal proceedings.

specialized agencies, such as those investigating fraud, financial crimes or transnational organized crimes, which often intersect with insolvency proceedings, become crucial. Mutual legal assistance frameworks on criminal matters, such as those found in MLATs or UNCAC,²¹⁰ may support international cooperation in those cases, although their effectiveness and speed may depend on the complexity of the case, the level of cooperation between and among the jurisdictions involved, their legal systems and other factors.

230. The mutual legal assistance framework usually involves the following steps:

(i) Each State participating in the framework designates a central authority that acts as the point of contact and facilitates communication between the requesting and requested States. That authority is in particular responsible for coordinating and processing incoming and outgoing requests for assistance;

(ii) The competent authority in the requesting State would be expected to review any request for assistance, which may originate, for example, from the insolvency representative, and determine its compliance with the framework in question. Certain requirements may be imposed for approving requests, for example, that the execution of the request would not interfere with or disrupt the pending or ongoing criminal proceeding;

(iii) The request is expected to specify information about the case, the assistance sought, any assets, evidence, information or persons concerned, details of any particular procedure that the requesting State wishes to be followed and the purpose for which the evidence, information or action is sought (e.g. for the purpose of confiscation of assets). It may also specify that the fact and substance of the request should be kept confidential, except to the extent necessary to execute the request, and suggest deadlines. Where the request is to freeze or seize assets, either in order to give effect to a freezing or seizure order issued by a court or competent authority of a requesting State or without such order, the requesting State may be required to provide a reasonable basis for the requested State to believe that there are sufficient grounds for taking those steps. Where assistance is sought to give effect to confiscation orders issued by a court in the requesting State, the request may need to include a legal admissible copy of an order of confiscation upon which the request is based, a statement specifying the measures taken by the requesting State to provide adequate notification to bona fide third parties and to ensure due process, and a statement that the confiscation order is final;

(iv) An approved formal request for assistance is transmitted in writing (or in urgent circumstances, orally but confirmed subsequently in writing) to the requested State in a language acceptable to the requested State and under conditions allowing that State to establish authenticity;

(v) The central authority of the requested State determines the admissibility and compatibility of the request with the applicable mutual legal assistance framework. It would be expected to complete that stage as soon as possible. Grounds to refuse mutual legal assistance are usually limited, such as that executing the request would prejudice the public order, sovereignty and security of the requested State. Some frameworks explicitly state that mutual legal assistance cannot be declined on the ground of bank secrecy²¹¹ or on the sole ground that the offence is also considered to involve fiscal matters;²¹²

(vi) If admitted for execution, the request is executed by the requested State as soon as possible in accordance with its domestic laws and, where applicable and possible, also in accordance with the procedure and by the deadlines specified in the

²¹⁰ See e.g. chapters IV and V of UNCAC. UNCAC enables mutual legal assistance with or without prior request for assistance. See e.g. *ibid.*, articles 46 (4) and (5) and 56.

²¹¹ See e.g. *ibid.*, article 46 (8).

²¹² See e.g. *ibid.*, article 46 (22).

request.²¹³ Actions in the requested State may include: taking evidence or statements from persons; executing searches; examining objects and sites; providing information, evidentiary items and expert evaluations, including originals or certified copies of relevant documents and records, such as government, bank, financial, corporate or business records; identifying, tracing, freezing or seizing assets and preserving them for confiscation (including on the basis of a foreign arrest or criminal charge related to the acquisition of such assets); initiating local proceedings (criminal or civil, e.g. to establish the ownership of the assets in case of disputed claims); and eventually, upon court orders, confiscating the assets and, where applicable and appropriate and subject to certain conditions, such as protection of bona fide third parties, returning them to the requesting State;

(vii) Cooperation may be refused, or provisional measures lifted, if the requested State does not receive sufficient and timely evidence or if the assets concerned are of a *de minimis* value. The requested State may be required, before lifting any provisional measure, to give the requesting State an opportunity to present its reasons in favour of continuing the provisional measure.

231. The requesting State is usually expected to bear the costs of the mutual legal assistance request. Some States expect the requesting party to bear them. Different arrangements to alleviate the financial burden of the requests on the requesting party may be in place, including full or partial reimbursement, cost-sharing with the requesting and requested States, and involvement of assistance from specialized international organizations. They would depend, *inter alia*, on the case involved, the assistance sought and the resources required to fulfil the request.

232. The requesting party may be entitled to a copy of the entire file (information and documents) transmitted by the requested State to the requesting State in response to the mutual legal assistance request. Some restrictions may be imposed on the use of information or evidence contained in that file. In particular, it may not be used for purposes other than those stated in the request without the prior consent of the requested State. Other usual safeguards apply, such as the presumption of innocence, the rights of defence of third parties and the right to privacy and protection of personal information. Penalties, including in the form of imprisonment, may be imposed for improper use of the obtained information (e.g. for obstructing the criminal investigation or infringing upon assets, privacy or the personal or moral integrity of persons mentioned in the file). However, disclosing information or evidence that is exculpatory to an accused person is usually allowed.

(c) Additional considerations

233. Insolvency-related criminal investigations or proceedings may commence before, in parallel or after commencement of insolvency proceedings. For example, a tax inspector, an accountant, a creditor or a whistle-blower from among the debtor's employees might have reported a suspected criminal activity by the debtor or its directors (e.g. embezzlement or misappropriation of funds) to a competent State authority with the result that criminal investigations were opened. At the same time, an application for commencement of insolvency proceedings might have been filed. In other cases, the insolvency representative, creditors or other parties in interest might trigger criminal investigations and proceedings after commencement of insolvency proceedings by reporting suspected criminal activities committed by or impacting or implicating the debtor that might have taken place before or during insolvency proceedings.

234. The court overseeing the insolvency proceedings and the insolvency representative would be required to cooperate and share information with the law

²¹³ See e.g. UNCAC, article 46 (17) and (24). In addition, UNCAC requires that central authorities must ensure the speedy and proper execution or transmission of the requests received or, where central authorities transmit the request for assistance to a competent authority for execution, they must encourage the speedy and proper execution of the request by that authority (article 46 (13)).

enforcement agencies and criminal justice system to support criminal investigations and proceedings.

235. The criminal proceedings can impact the insolvency proceedings in other ways. For example, the stay of proceedings imposed under insolvency law would not have effect on criminal proceedings. The reverse may be true: in some jurisdictions, insolvency proceedings could be stayed until criminal proceedings are completed, although in many jurisdictions this is no longer the case. The criminal proceedings may influence the decisions regarding the reorganization or liquidation of the debtor: the insolvency court may be ordered by the criminal court to liquidate the debtor, for example for just and equitable grounds. Investigations and prosecutions may require the freezing of assets, which can postpone the distribution of proceeds from realization of the insolvency estate assets to creditors in insolvency proceedings. The outcomes of the criminal proceedings may affect the pool of assets left for distribution among creditors in insolvency proceedings. Rules on the treatment of victims and victim compensation orders in criminal proceedings may intersect with insolvency proceedings where one or more creditors, rather than the general body of creditors, are recognized as the victims of the crime²¹⁴ and compensated in that capacity.

[IV. Assets raising specific issues for ATR

A. Digital assets

236. There are different types of digital assets. All or some of them may or may not be susceptible to being the subject of proprietary rights and thus capable of being part of the insolvency estate.²¹⁵ This text does not regulate those aspects. They will be addressed in applicable law. [The UNCITRAL texts on applicable law in insolvency proceedings defer issues related to the composition and scope of the insolvency estate to the *lex fori concursus*.]²¹⁶

237. Where digital assets are recognized as susceptible to being the subject of proprietary rights and thus capable of being part of the insolvency estate, they may be categorized differently in different jurisdictions or a specific case. For example, some digital assets used for investment or financing may be characterized as financial instruments and hence fall under domestic and international regulations that address those instruments, including specifics of their tracing and recovery in case of insolvency. Others may be treated as commodity, money or intellectual property. Some digital assets may perform several functions (hybrid assets), or change their characteristics in the chain of operations or transactions, or they may be linked assets,²¹⁷ which may raise additional issues for ATR.

²¹⁴ E.g. fraud committed by the debtor with respect to only one or some creditors as opposed to all creditors, which would be the case where there was no business but sham, for example a Ponzi scheme.

²¹⁵ See, e.g. *Ruscoe v. Cryptopia Ltd (in Liquidation)* [2020] NZHC 728. See also *Philip Smith and Jason Kardachi (in their capacity as joint liquidators) v. Torque Group Holdings Ltd.* [2021] ESCJ No. 627 (British Virgin Islands), where the court recognized that cryptocurrencies are a form of property in the context of liquidation. See also *Mr. Tsarkov* (personal insolvency), Case No. A40-124668/2017, Ninth Appellate Court, Moscow (Russian Federation), where the court held that cryptocurrencies fall under the category of “other assets” pursuant to domestic civil law (article 128 of the Civil Code) for the purposes of their inclusion to the insolvency estate. In *BG Services – Società a Responsabilità Limitata (BitGrail S.R.L.)*, Case No. 18/2019 (21 January 2019), Court of Florence (Bankruptcy division) (Italy), an Italian court considered cryptocurrencies as “assets” by application of article 810 of the Italian Civil Code. In contrast, see *MtGox Co. Ltd.*, Tokyo District Court of 2015, ref. number: 25541521, where the court in Japan refused the exercise of a right of segregation to the plaintiff as Bitcoin did not fulfil the requirements of corporeality and exclusive control to be the object of ownership.

²¹⁶ See e.g. recs. 3, 30 and 31 of the Guide and [A/CN.9/WG.V/WP.190].

²¹⁷ See Principle 4 and its commentary in the UNIDROIT Principles on Digital Assets and Private Law (the DAPL Principles).

238. Some digital assets may be held directly²¹⁸ while others may be held via intermediaries,²¹⁹ and these holding arrangements may change. Case- and fact-specific analysis would indicate whether a digital asset is part of the insolvency estate of an intermediary or a client in case of insolvency of either, and the type of a claim that a claimant would have on behalf of or against the insolvency estate (i.e. a claim to the asset itself or a personal or contractual claim against the holder of the asset).²²⁰ In addition, for ATR, it may matter whether a digital asset is identifiable as a separate object or as a share in the mixed assets held by the intermediary for all its clients.²²¹

239. Different reasons may arise, as with any other assets, for tracing and recovering digital assets. The primary business of the debtor may be trading in digital assets. In such case, the digital assets may be located in different places, not necessarily all under the debtor's control. Alternatively, the debtor might have invested in digital assets. Considerations such as the type of a digital asset, the way it was created and is held and ATR triggers (e.g. the debtor may conceal the existence, value and location of any or all digital assets, or the debtor's digital assets may be stolen) may affect their tracing and recovery.

240. While many practical considerations for assessing feasibility and desirability of tracing and recovering digital assets for the benefit of all the creditors in insolvency proceedings will be the same as for other assets, tracing and recovering digital assets, because of inherent features of those assets²²² and the characteristics of the environment where they circulate,²²³ raise distinct issues. Some of those features and characteristics may facilitate ATR,²²⁴ others may considerably complicate them. For example, digital assets may be traded using different techniques to obfuscate the origin and final destination of the assets (e.g. combining on-ramping²²⁵ and off-ramping²²⁶ or using ring signatures,²²⁷ stealth addresses²²⁸ and tumbler services²²⁹). Some techniques may lead

²¹⁸ E.g. through a software wallet or hardware wallet. A software wallet usually refers to non-custodial wallets (i.e. held directly by a person without the involvement of any intermediary) that store the private keys on a certain type of software connected to the Internet (they are called "hot" wallets). Where the keys are stored in physical devices not linked to the Internet, such as a USB-like drive, they are called hardware or "cold" wallets. There are also "warm" or hybrid wallets that combine features of the two.

²¹⁹ E.g. a crypto exchange that may hold the client's public and private keys in a way that prevents the client from having full control over their assets.

²²⁰ See in that respect Principle 13 and accompanying commentary of the DAPL Principles.

²²¹ Shortfall allocation rules, whether pro rata or otherwise, may apply. See, in this regard, Principle 11 and accompanying commentary of the DAPL Principles.

²²² E.g. their very high transmissibility, volatility and vulnerability.

²²³ E.g. often decentralized, (pseudo)anonymous and autonomous, combining social participation, game theory and network effects, powers and incentives.

²²⁴ In particular, often almost irreversible, irrevocable and highly traceable processes even where mixing and tumbling services are involved. This is because DLT create a permanent public record of transactions and represent pseudonymous systems. That is, digital assets and transactions with them, which are visible to any network participant, can each be assigned to a public key that serves as the pseudonym of a particular network participant and are thus visible to anyone. Although the matching private key is (or should be) known only to the relevant network participant, by comparing the public key with known accounts, email or other addresses or other identifying features, it may be possible to assign particular tokens and transactions to a specific account or email.

²²⁵ The process by which economic value (i.e. fiat currency) is converted into digital assets in a certain system (e.g. cryptocurrency exchange).

²²⁶ The process by which digital assets are converted into fiat currency and/or services and goods.

²²⁷ A digital signature created by members of a group, each with own keys, making it impossible to determine the member that created the signature.

²²⁸ One-time addresses for each transaction.

²²⁹ Also called "crypto mixing" and "crypto blending," the tumbler service can hide the sender's address and split up a single trade in a large number of machine-executed random trades, which in turn may be split up into smaller trades.

to a digital asset being irrevocably lost.²³⁰ Particular challenges arise from pseudonymous, and at times close to anonymous, systems as well as from the speed with which digital assets can be traded without regard to national boundaries and without attachment to national, government-issued currencies or physical assets. Other challenges arise from the much higher volatility of some digital assets (e.g. cryptocurrencies), the uncertain value of some other digital assets (e.g. data) and the unpredictable scale and impact of insolvencies involving digital assets, in particular because creditors may prefer staying anonymous and not involved in proceedings for legitimate or illegitimate reasons. All of that may make the cost-benefit analysis for assessing desirability of ATR with respect to digital assets and tracing and recovering digital assets notoriously complex.

241. Courts have used the ATR tools surveyed in this text for tracing and recovering digital assets, combining²³¹ and adjusting them to the digital environment and the needs at hand and employing also coercive measures to force compliance.²³² Where necessary and as appropriate, courts preserved anonymity of online traders and confidentiality of their online identification credentials.²³³ Where digital assets were traded through known intermediaries,²³⁴ the intermediaries were ordered to facilitate ATR, from a simple search and provision of information to freezing, seizing and recovering the digital assets or evidence. For example, where the stolen digital assets belonging to the insolvency estate have been traced to an account that remains on a digital platform, an intermediary was ordered to lock or disable the account, or to transfer the assets held on that account to another account to prevent dissipation of their value, or to transfer the account to the name of the insolvency representative, or to disclose the identity of the account holder.²³⁵ Where the respondent was unknown, courts issued worldwide freezing and disclosure orders against “persons unknown”.^{236]}

²³⁰ E.g. the practice of “burning” tokens or NFTs for different reasons (e.g. to adjust supply and demand and hence the value of those assets or to increase the mining speed), which consists in their removal by a developer from circulation, on an automatic or manual basis, after being transferred to a “burn” address (a crypto-token public address the private key to which is unknown).

²³¹ Combination of enforcement measures could involve both measures in rem (e.g. taking possession of the device giving access to a cold wallet) and in personam (e.g. requesting the debtor to cooperate in the provision of passwords). See, *Mr. Tsarkov* (personal insolvency), Case No. A40-124668/2017, Ninth Appellate Court, Moscow (Russian Federation); *PlexCoin*, Case No. 200-11-025040-182, Superior Court – Commercial Chamber (29 October 2020). Also, *in Re Quadriga Fintech Solutions Corp et al.* (1 March 2021), Toronto CV-19-627184-00CL (31-2560674), CV-19-627185-00CL (31-2560984) and CV-19-627186-00CL (31-2560986) (Ont Sup Ct [Comm List]), where a massive cryptocurrency recovery was sought as cryptocurrencies were being held in cold wallets and were inaccessible following the founder’s death.

²³² E.g. where digital assets have been held directly by the debtor that refuses to transfer control over them to the insolvency estate. Practical solutions of recovering access to digital assets in the event that the private key is inaccessible evolve (e.g. account abstraction involves programming a user account with smart contracts coded to substitute a “lost” key with a different one after a given period of time. In addition, social recovery wallets provide for a set of “guardians”, of which a majority can cooperate to change the signing key of the account).

²³³ See, *FTX Trading Ltd., et al.*, Case No. 22-11068-JTD (“*Verification of Creditor Matrix*”), where the court granted a motion to redact the names of customers, and previously of creditors as well, on an interim basis, in view of protecting and preserving assets of individuals seeking to participate in the bankruptcy process. Considerations that guided the judge in that case included protection of confidential information (e.g. trade secrets), cybersecurity risks and privacy matters. Sometimes, consideration of protection of third-party rights (such as consumers or data subjects) may justify similar measures.

²³⁴ Data analytics software and forensic analysis engaged by the insolvency representative may reveal the transactional history of any given DLT platform, including the servers and the identity of any digital market operator, wallet service provider or other intermediary.

²³⁵ See *LMN v Bitflyer Holdings Inc* [2022] EWHC 2954 (Comm) [the case does not involve insolvency proceedings]. Intermediaries subject to KYC rules may be in a position to identify account holders and owners with more ease. They may also be expected to freeze accounts upon determination of suspicious activities and report such activities to the competent authorities.

²³⁶ See, e.g. *AA v Persons Unknown who demanded Bitcoin on 10 and 11 October 2019 and others* [2019] EWHC 3556 (Com.) (United Kingdom) [the case does not involve insolvency proceedings].

Appendix I

A toolkit of measures to expedite ATR in cross-border insolvency cases

Introduction

1. This toolkit has been designed to supplement the relief, coordination and cooperation framework found in the UNCITRAL cross-border model laws. It assists States with addressing gaps, delays, and uncertainties as regards ATR in cross-border insolvencies, particularly where States have not adopted the UNCITRAL insolvency model laws or analogous legislation to effectively trace and recover assets; where discretionary relief provisions may be interpreted in different ways by courts; or where there is uncertainty regarding applicable law. Such uncertainties and delays can result in losses to stakeholders affected by insolvencies of different business sizes, particularly small and medium enterprises (SMEs) that typically have limited resources.
2. The toolkit is comprised of three broad types of ATR tools used across borders to aid the already commenced foreign proceedings or provisional measures imposed by foreign courts between application and commencement of foreign proceedings where such proceedings are anticipated or imminent. Those three types are: (a) measures to obtain information or evidence during, or in the period immediately prior to the commencement of, insolvency proceedings; (b) measures to “temporarily freeze” assets by prohibiting sale, transfer or other disposition for a limited period; and (c) measures to recover assets for the benefit of the insolvency estate from across borders. Although differing in name, the tools in those three broad categories do share many features across jurisdictions. The toolkit identifies those commonalities with the aim of facilitating the courts’ understanding of foreign ATR tools and giving comfort to courts to grant the same or equivalent domestic ATR relief. While the courts retain their domestic authority, the toolkit aims at facilitating making and taking decisions on those matters on an expeditious basis, which is essential to achieve effectiveness of cross-border ATR.
3. Nevertheless, the toolkit should not be treated as exhaustive. Regard must be had to other ATR tools not included in this toolkit, for example those that may be available under criminal law. In addition, international instruments may provide for particular tools, steps and safeguards, which are not addressed in the toolkit. Furthermore, related requests for ATR relief may be handled by different courts as part of, or in parallel with, insolvency proceedings, necessitating close coordination between or among related proceedings and ATR measures. The toolkit thus recognizes that, in granting an ATR relief, the courts usually consider many factors, such as public policy considerations, applicable law framework (e.g. international treaties), the status of foreign insolvency proceedings (e.g. already commenced or imminent), whether the relief sought in each particular case is fair, effective, urgent, timely, and necessary to the integrity of the process, whether the relief assists in preserving and maximizing the value of the insolvency estate for the benefit of creditors and other stakeholders, whether any concurrent insolvency or other related proceeding exist and what the expected impact of the relief sought would be on those other proceedings and parties involved.

I. Measures to obtain information or evidence during, or in the period immediately prior to the commencement of, insolvency proceedings

There is frequently a need to locate information about the debtor, its assets and affairs in foreign jurisdictions. The obtained information can facilitate identifying missing assets that should be in the insolvency estate, especially in cases of fraud, poor record-keeping, or concealment of assets. It may also inform the need for subsequent ATR steps, such as avoidance or actions against directors.

While a need to locate information about the debtor, its assets and affairs usually arises during insolvency proceedings, it may also arise in the period immediately prior to the commencement of insolvency proceedings, for example, where an application to commence insolvency proceedings does not automatically commence the proceedings. Before commencement of insolvency proceedings, the court may grant provisional measures, at the request of the debtor, creditors, or third parties. As described in paragraphs 57–66 above, provisional measures may include the appointment of an insolvency representative as a provisional measure. The court may authorize such a person to collect information, wherever located, about the debtor, its assets and affairs. An insolvency representative appointed as a provisional measure may subsequently file requests for an appropriate domestic ATR relief with foreign courts. According to the UNCITRAL cross-border insolvency framework, relief may be granted before or after recognition of foreign proceedings.

Relief that the receiving court may grant in response to a request for an ATR relief to obtain information or evidence in relation to the debtor, its assets and affairs may include: (a) production of any materials related to the debtor, its assets and affairs located in the receiving State; (b) disclosure by banks, government agencies and other persons located in the receiving State of information concerning the debtor, its assets and affairs; and (c) examination of directors or other individuals residing in the receiving State about the debtor, its assets and affairs.

<i>Objectives of the measure(s) sought</i>	<i>Features of ATR expedited proceedings in the receiving State</i>	<i>Safeguards</i>
<ul style="list-style-type: none"> - To obtain information and evidence about the debtor, its assets and affairs. - To identify, and find out the location of, (missing) assets that should be in the insolvency estate. 	<ul style="list-style-type: none"> - Requests to obtain information or evidence are treated with urgency - Requests originating from the foreign main proceeding [or the planning proceeding in the enterprise group insolvency context] are given priority - The debtor and its directors, officers and other employees and related persons located in the territory of the receiving State are ordered to file complete and detailed information about the debtor, its assets and affairs wherever located (i.e. on the worldwide basis), including transfers of assets and other transactions that took place during the suspect period - Third parties (e.g. banks, cloud service providers, digital service providers, government agencies and other persons) located in the receiving State are ordered to disclose promptly to a foreign representative information relevant to the debtor, its assets and affairs, including bank accounts and data to gain access and control over the digital assets 	<ul style="list-style-type: none"> - Relief is subject to public policy protection and safeguards of adequate protection of creditors and other persons, including the debtor - The receiving court may require evidence that the debtor and its directors, officers, employees, owners and other related persons are failing to meet their obligations pursuant to insolvency or related law in the requesting State - In case of a challenge, prompt judicial review of the measure sought or ordered is made available to affected persons

<i>Objectives of the measure(s) sought</i>	<i>Features of ATR expedited proceedings in the receiving State</i>	<i>Safeguards</i>
	<ul style="list-style-type: none"> - The foreign representative has the same access rights to registers and files held by government agencies as locally appointed insolvency representatives and such access is [facilitated] [unhindered] - Prompt and ex parte (without notice) measures are ordered where sufficient evidence of concealment of information and assets, poor record-keeping and non-cooperation by the debtor or directors exists - Prompt and ex parte (without notice) proceedings and measures are enabled in other appropriate cases (e.g. to mitigate risks of further dissipation of assets) - In order not to defeat the purpose of the proceedings and measures, premature disclosure of ex parte (without notice) proceedings and measures (e.g. by the court staff and effected third parties) is effectively and appropriately prevented - Appropriate sanctions are imposed for failure to comply - Relief granted to non-main or other proceedings concerns information required in that proceeding and does not interfere with the foreign main proceeding [or the planning proceeding in the enterprise group context] - Restrictions on disclosure of certain information (e.g. confidential, privileged, private) are balanced against other considerations 	<ul style="list-style-type: none"> - Requests to a third party to disclose must relate to information that reasonably appears to be within that person's control - An applicant may be required to indemnify affected parties or post security that will cover damages in the event that the measure is wrongfully ordered or executed

II. Measures to “temporarily freeze” assets by prohibiting their sale, transfer or other disposal for a limited period

These measures involve urgent provisional relief to avoid dissipation of the debtor's assets that should be part of the insolvency estate before commencement or recognition of insolvency proceedings or during insolvency proceedings. Many jurisdictions that have enacted the UNCITRAL cross-border insolvency framework stay execution, individual proceedings and other individual actions with respect to the debtor's assets, rights, obligations or liabilities, and suspend the right to transfer, encumber, or otherwise dispose of any assets of the debtor. The scope, modification, termination and effect of the stay and suspension is subject to the law of the recognizing State. Relief may encompass other provisional measures that courts or competent authorities are authorized to grant.

<i>Objectives of the measure(s) sought</i>	<i>Features of ATR expedited proceedings in the receiving State</i>	<i>Safeguards</i>
<ul style="list-style-type: none"> - To stay execution, individual proceedings and other individual actions with respect to the debtor's assets, rights, obligations or liabilities in the receiving State - To suspend the right to transfer, encumber or otherwise dispose of any assets of the debtor in the receiving State 	<ul style="list-style-type: none"> - Requests for a stay and suspension are treated with urgency - Requests originating from the foreign main proceeding [or the planning proceeding in the enterprise group insolvency context] are given priority - Stays and suspensions are implemented, as a rule, on an ex parte (without notice) basis and without delay where there is sufficient evidence of concealment of assets, poor record-keeping and non-cooperation by the debtor or directors (i.e. they are not conditioned upon recognition of a foreign proceeding or resolution of any possible underlying dispute concerning the debtor, its assets or affairs) - Effective measures are in place to prevent premature disclosure of information about imposed measures in order not to defeat the purpose of those measures - Appropriate sanctions are imposed for failure to comply - Relief granted to non-main or other proceedings relates to assets that under the law of the receiving State should be administered in the foreign non-main proceeding and does not interfere with the foreign main proceeding [or the planning proceeding in the enterprise group context] 	<ul style="list-style-type: none"> - Relief is subject to public policy protection and safeguards of adequate protection of creditors and other persons, including the debtor - The receiving court may require the applicant to demonstrate that the assets concerned are located in the receiving State, that they belong to the insolvency estate and that, without the measure sought, there is a serious risk that the assets in question will be hidden, transferred or dissipated - In case of a challenge, prompt judicial review of the measure sought or ordered is made available to affected persons. Remedies may include lifting or adjusting the measure and compensation for damages - An applicant may be required to indemnify affected parties or post security that will cover damages in the event that the measure is wrongfully ordered or executed

III. Measures to recover assets for the benefit of the insolvency estate from across borders

<i>Objectives of the measure(s) sought</i>	<i>Features of ATR expedited proceedings in the receiving State</i>	<i>Safeguards</i>
<ul style="list-style-type: none"> - To recover assets that belong to the insolvency estate 	<ul style="list-style-type: none"> - Requests for recognition and enforcement of avoidance actions, other actions to render ineffective acts detrimental to creditors as well as other actions for recovery of assets for the benefit of the insolvency estate ordered in the requesting States are treated without delay - Upon recognition of a foreign proceeding, the foreign representative has the same rights to bring actions in the receiving State to avoid or otherwise render ineffective acts detrimental to creditors as locally appointed insolvency representatives, and they are facilitated - Requests originating from the foreign main proceeding [or the planning proceeding in the enterprise group insolvency context] are given priority 	<ul style="list-style-type: none"> - Relief is subject to public policy protection and safeguards of adequate protection of creditors and other persons, including the debtor - The right of the foreign representative to recover assets, if disputed, is enforceable after a final decision on the merits in a court of law (the requesting or receiving court) - A final decision on ownership and claims to the assets is rendered only after a hearing with notice

<i>Objectives of the measure(s) sought</i>	<i>Features of ATR expedited proceedings in the receiving State</i>	<i>Safeguards</i>
		<ul style="list-style-type: none"> - For granting relief in the enterprise group context (e.g. avoidance of a transaction that took place between enterprise group members or between an enterprise group member and other related persons), the receiving court may have regard to the circumstances in which the transaction giving rise to avoidance or other recovery actions took place¹ - For avoidance actions by the foreign representative of the foreign non-main proceeding, the receiving court must be satisfied that the action relates to the assets that, under the laws of the receiving State, should be administered in the foreign non-main proceeding.

¹ The Guide, recommendation 217, lists the following considerations: the relationship between the parties to the transaction; the degree of integration between enterprise group members that are parties to the transaction; the purpose of the transaction; whether the transaction contributed to the operations of the group as a whole; and whether the transaction granted advantages to enterprise group members or other related persons that would not normally be granted between unrelated parties.

Appendix II

ATR-relevant registers

<i>Description</i>	<i>Objectives</i>	<i>Features</i>	<i>Access conditions</i>	<i>Safeguards</i> (applicable to all registers)
Registers related to immovable property (e.g. land registers, which may be linked to, or may serve also as, cadastral registers that contain technical specifications about an immovable property (its location, size, boundaries, etc.))	<p>To register ownership and other rights in immovable property and transactions therewith, including security rights and secured transactions.</p> <p>To serve legally significant notices (e.g. notices of seizure of encumbered assets) with respect to that property.</p>	<p>Information recorded usually includes: the identity of the property; the identity of the owner(s); interests registered in the property; and legally significant facts. Registers may contain acts and contracts relating to property.</p>	<p>This type of register is usually public. Some may be maintained by notary. Registers may be accessible online or in a physical location at the registry. Access may be direct or indirect (a request to a registrar). In some jurisdictions, access may be limited or conditioned, e.g. to locally qualified lawyers, the use of local identification credentials, the authorization by a judge, payment of a fee, proving a legitimate interest in obtaining the requested information or authority to obtain it (e.g. a court decision appointing the insolvency representative). Under some circumstances, the aid of a relevant professional (e.g. cadastral expert) may be needed.</p>	<p>International best practices for registries promote electronic registries, flexible, prompt and public access and search processes without the need to provide any reasons. Promptness in updating the registry and the need for ensuring adequate archiving, retrieval and back-up of information maintained in registries are also stressed.</p> <p>Safeguards usually include those that intend to resolve possible conflicting entries and contested claims to the same property, require the demonstration of and/or check the legitimacy of searches or requests, and protect privacy, due process and other rights of the debtor/property owner and other parties (e.g. prohibitions may exist for unauthorized use of data; bank and certain criminal records may be accessible only by State authorities and/or for the purpose of criminal proceedings; the property owner may consult or be informed about the information issued to third parties regarding their property and the alleged interests and causes of action by</p>
Registers related to movable assets (e.g. security interest registers, registers of shares and other financial instruments, registers of donations, registers of cars and other motor vehicles, vessels and aircrafts, registers of other movable assets)	<p>To ensure publicity and effectiveness of rights, transactions and acts with respect to movable property before third parties (e.g. ownership, pledges, arrests, seizures).</p>	<p>Some are maintained by specialized registers, others by notary public or similar professionals. Registration may be effective upon registration of a notice or the submission of all relevant documents (e.g. a notarized lease contract). Registration involves the identification of the parties or one party to a transaction (e.g. the grantor of a security right), a description of the asset and the</p>	<p>Depending on the jurisdiction and the type of movable property, some registers may be public, some are restricted. Some registers may be maintained online, others in a physical location. The creation of an online account for access to online registers may be required. Access and search may be direct or via a registrar (in-person or via telephone, email or other remote means). Generic requests may be allowed or specifying narrow search criteria may be required.</p>	

Description	Objectives	Features	Access conditions	Safeguards (applicable to all registers)
<i>Special purpose registers for vehicles, ships, aircrafts and other similar mobile assets</i>	To register these types of assets, their owners, mortgages, charges, arrests, releases, judicial sale, other types of forced sale, transfer of ownership and other legally significant acts and particulars with respect to those assets, including deletion of entries related to the assets from the registry. Rights in rem may be registered in a different register from that of the assets. For example, the International Registry established under the Aircraft Protocol to the Cape Town Convention aims at the registration of security interests in aircraft assets as well as at performing searches of already inserted registrations and determining priority of the registered security interests.	duration (or extension) of the registration. Registration of these types of assets is compulsory. International regimes may specify in which register an asset is to be registered, by whom and other requirements for registration or deletion from registers (e.g. jointly-owned vessels may be registered where co-ownership exceeds more than a half-share; under the Aircraft Protocol to the Cape Town Convention, the registration of aircraft assets includes airframes and aircraft engines). Some assets (e.g. ships) can be registered only in one registry. Regimes for bareboat charter registration differ among States.	Standard forms may be made available for search requests and registration of notices, acts, contracts, etc. Payment of a fee may be required. Other limitations are similar to those above. Under international instruments, registers for this type of assets are usually public but may not necessarily be directly and freely accessible for searches. Where they are not, a request for searches may need to be filed with the registrar using a standard form and upon payment of a fee (e.g. for requesting an extract from the register or a copy of a registrable instrument). Where direct access is granted, it may be conditioned upon logging in using specific credentials which may not be available to foreigners. In some registries, access credentials are approved or specified by the registrar.	those parties). Data may be maintained only for a specified period of time. Where multiple registers operate in one country, safeguards are usually designed to resolve jurisdictional issues and possible conflicts between them. Quality standards and liability for not adhering to them by registrars are usually imposed. The registry may be required to provide the reasons for refusing to provide services. Limits on their liability are also common. For example, UNCITRAL texts recognize that if the system is designed to permit direct registration and search by users without the intervention of registry personnel, the responsibility of the registry for loss or damage should be limited to system malfunction. It may not be the responsibility of the registry to ensure that information provided in the notice is entered in a field designated for that type of information or is complete, accurate or legally sufficient.

<i>Description</i>	<i>Objectives</i>	<i>Features</i>	<i>Access conditions</i>	<i>Safeguards (applicable to all registers)</i>
Central registers of bank accounts/financial registers	<p>To maintain information in one central location (such central location is usually maintained by the national or central bank) on all bank accounts in a given jurisdiction.</p> <p>To identify which person has which accounts and in which bank in a given jurisdiction.</p>	<p>Generally, information available in bank registers refers to: bank accounts and payment accounts with an international bank account number (IBAN) maintained by banks, payment institutions and electronic money companies; the holders of the respective accounts and the persons authorized to dispose of the accounts; beneficial owners of account holders; and any security interest. It may also be possible to verify which bank accounts an individual entrepreneur has declared as being related to its business.</p>	<p>Upon request (usually via a standard application), persons may receive information from the central register. Payment of a fee may be required. A person may receive information about its own accounts.</p>	
Financial instruments and securities registers	<p>To record ownership, transfers, encumbrances and other transactions and acts with respect to stocks, bonds and other financial instruments.</p> <p>To record any protests filed with respect to non-payment, e.g. on promissory notes, and hence to verify whether the economic operator, as the issuer of stocks, bonds and promissory notes, fulfils its payment obligations.</p>	<p>“Book-entry” or “securities depository” registers concern investors’ book-entry accounts, book-entry securities registered in book-entry accounts and rights and obligations regarding book-entry accounts and book-entry securities. A two-tiered register usually exists consisting of a register for dematerialized securities maintained by a central securities depository and additional records kept by particular authorized entities (e.g. banks, investment firms, companies).</p>	<p>These registers are usually publicly available and accessible via an online application. With respect to book-entry registers, data may be available upon request without submitting any application (via telephone, email or registered user account). A fee may be charged for specific requests. An explanation regarding the intended use of the data may be required. The data on promissory notes protestations may include the date of the protestation, partial repayments of the bill and the amount of the liabilities of the debtor.</p>	

<i>Description</i>	<i>Objectives</i>	<i>Features</i>	<i>Access conditions</i>	<i>Safeguards (applicable to all registers)</i>
Commercial, trade or company registers	<p>To register enterprises and individual entrepreneurs, legalize the books that businesses are obliged to keep by law and register the financial statements of companies that are required to submit them.</p> <p>To record equity holding, shareholding and UBO arrangements (in some countries, separate registers exist for UBOs (see below)).</p> <p>To register trade names (in some countries, separate registers exist for such purpose).</p>	<p>Some registers may comprise data such as contact information, the directors/supervisory board members, articles of association and annual accounts. Information on foreign businesses having a local branch may also be included. Companies may also be required to record their equity holding, shareholding and UBO arrangements, comprehensively or only for major shareholders or equity owners with more than certain percentage of equity. There may be an obligation to file regular financial statements with the registrar as well.</p>	<p>Some registers are publicly available and accessible online. For others, a request for information must be submitted and payment of a fee may be demanded. In some countries, while basic company information may be freely accessible, additional specific information, such as share capital, charges, mortgages and filed documents, may be made available only upon a special request and payment of a fee.</p>	
Separate UBO registers	<p>To maintain records of owners and related persons of a business and trusts.</p> <p>To link that information to tax and other business records of a person in a given jurisdiction.</p>	<p>Such records may be included in company (or trade) registers or separate registers. The same authority maintaining the company register may be also responsible for keeping a UBO register. Separate registers may be maintained for UBOs and trusts. In addition to centrally held UBO registers, privately held UBO registers may be required to be maintained by legal entities and trustees. Information about them and related updates may be recorded in a separate section of the centrally maintained UBO register. Thresholds indicating</p>	<p>These types of registers may or may not be publicly accessible. In some countries, only limited information is made available publicly. Prior electronic registration, demonstrating a legitimate interest and payment of a fee may be required.</p>	

<i>Description</i>	<i>Objectives</i>	<i>Features</i>	<i>Access conditions</i>	<i>Safeguards (applicable to all registers)</i>
		direct or indirect control may apply to all or some UBO registers maintained in a particular State.		
Patent and trademark registers	To record information on ownership of trademarks, designs and patents.	These registers may refer to trademarks, patents, utility models as well as industrial designs. Data recorded comprise the applicant's name, the status, the expiry date and technical specificities in accordance with the type of trademark/patent/design registered. Databases including information on relevant jurisprudence and/or decisions from specialized bodies may be linked and made available in conjunction with registers.	In most cases, free access to information on holders and coverage of filed intellectual property rights is enabled. This is especially true with respect to international registers and databases. Some registers are accessible both online and in a physical location at the registry.	
Accounting registers and registers relating to tax and other similar authorities	To verify compliance with tax and similar regulations. To register pledges and other measures with respect to State budget payment arrears.	Registers may include data on tax returns, particular taxes, other State budget payments and the existence of arrears. State authorities usually supplement or substantiate that information with information on bank accounts, audits and accounting documents (e.g. balance-sheets) listing, among others, assets of payers.	These types of registers, whether operational online or physically, may be accessed usually upon request and only by persons authorized by competent State authorities (e.g. courts).	

<i>Description</i>	<i>Objectives</i>	<i>Features</i>	<i>Access conditions</i>	<i>Safeguards (applicable to all registers)</i>
Criminal records registers	To capture criminal history records of individuals. Final court judgments issued domestically or by foreign courts against nationals or foreigners living in that country may be recorded in a criminal register.	Data that can be comprised in criminal records are the defendant's name, his/her/its convictions, the type of sentence(s) as well as the relevant fines and fees.	In some jurisdictions criminal records, including those concerning other individuals, are publicly accessible either through a court clerk's office or through an official website. In other jurisdictions, persons can apply to receive information only as regards their own criminal records. Payment of a fee may apply for the provision of information from criminal records registers.	
Domain name registers	To assign an Internet domain name.	This type of register contains information on the domain name system ("DNS") structure including data on TLDs ("top-level domains") and second-level domains used. Data on subdomains may be included in separate registers/databases. Domain name registers may contain the entity's name to which a domain name is assigned, their addresses, contact details and the creation and expiry dates of the domain name.	Such registers are primarily available online either through databases or official websites.	
Insolvency registers (linked to registers of disqualified directors and company registers)	To fulfil publicity, transparency, creditor protection and other objectives of insolvency proceedings as collective enforcement procedures and broader policy objectives.	This type of register records, among others, decisions opening insolvency proceedings in a given jurisdiction, the type of the proceeding opened, the debtor's name and address, creditors involved, their claims, court orders, decisions and judgments, including as regards discharge, and insolvency restrictions on the	Usually, jurisdictions allow public access to their insolvency records free of charge. In certain cases fees may apply.	

<i>Description</i>	<i>Objectives</i>	<i>Features</i>	<i>Access conditions</i>	<i>Safeguards (applicable to all registers)</i>
		debtor. Insolvency registers may also include information on the insolvency estate assets.		
Probate registers and registers of births, marriages and deaths	To record birth, marriage and deaths as well as changes in names, additions and rectifications concerning individuals (residents and/or non-residents) of a State. Probate records (or grants of representation) include data on individuals who have been conferred the right to manage the estate of a deceased person.	Birth, marriage and death certificates usually include information on the (previous) name(s) and the date and place of the event. A probate record may comprise a will. Indications are provided in the record of the type of the probate issued. Historical data over the previous years may be also available.	Birth, marriage and death records may be available online and/or upon request. Probate records are searchable online or upon application by post. Some records may not be accessible online (very old, archived). Access to them may require an application and/or a visit to relevant authorities. A special legal interest may be required to be established to access the records. Fees are usually applicable.	
Public procurement registers/systems (linked to registers of debarred contractors)	To record information on tenders, concluded contracts and supplier data.	Such registers may include, in particular, data on the type of tender, the contract award price and the name and address of the parties to the awarded contract or a framework agreement. Data from both domestic and foreign entities may be recorded.	Public procurement registers are generally publicly accessible through online portals. Usually fees do not apply for access to information on past tenders (as opposed to participation in current procurement proceedings, for which registration and payment are often required).	
Registers of special rights/interests	Registers of weapons are usually available in jurisdictions in which registration of the relevant assets is mandatory. The establishment of registers on petroleum aims at recording acts such as, petroleum agreements, licenses and authorizations. Other types	Usually, registration is mandatory for both weapon manufacturers and weapon acquirers. Details about the type, quantity and origin are usually included. Specific weapons (e.g. those being repaired or in the process of being consigned) or components may not be recorded. Petroleum, gas, geothermal and mining (e.g. gold, silver, copper) licenses registers	Information on weapons may be requested directly by the relevant authority. Data on petroleum and mining licenses are usually publicly accessible through online sources and free of charge. Other registers, such as those concerning gold mining leases, may require a request from the respective authorities.	

<i>Description</i>	<i>Objectives</i>	<i>Features</i>	<i>Access conditions</i>	<i>Safeguards (applicable to all registers)</i>
	of registers are intended to capture data on (ongoing and/or approved) mining activities and quarries licenses. Registers dedicated to initial exploration, retention, production, pipeline and associated activities licenses and sub-licenses may be also available.	contain data on the holder, the type and number of the license, its duration, the coordinates of the area covered by the license, technical specifications and commodities produced or extracted. Oil and gas well records, including drilling permits, may be included as well.		
Enforcement registers	To register acts of seizure of property issued by enforcement officers. To ensure the preservation of evidence, a civil action, possible confiscation of property, the recovery of fines and unpaid contributions, the satisfaction of creditors' claims and the fulfilment of other claims and obligations.	Data recorded may refer to the identification number of the freezing order, the natural or legal person debtor's/owner's identification number and the identification number of the seized asset.	An indication of the purpose of using the data in the register may be required. Extracts may be requested online or by the relevant authority. Fees may apply.	