



**General Assembly**

Distr.: Limited  
13 February 2024

Original: English

**United Nations Commission on  
International Trade Law  
Working Group V (Insolvency Law)  
Sixty-fourth session  
New York, 13–17 May 2023**

**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-fourth session of the Working Group ([A/CN.9/WG.V/WP.191](#)) 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.<sup>1</sup> This note contains in an annex the third draft of a descriptive, informational and educational text on ATR that builds on the first and second drafts considered by the Working Group at its sixty-second ([A/CN.9/WG.V/WP.186](#)) and sixty-third sessions ([A/CN.9/WG.V/WP.189](#)) and incorporates comments made on those drafts at those sessions ([A/CN.9/1133](#), chapter IV and [A/CN.9/1163](#), chapter IV).

2. Further to those comments, the draft text was restructured and made as technology-neutral and not time-bound as possible. As a result, the legal issues raised in chapter IV.A on digital assets found in document [A/CN.9/WG.V/WP.189](#) was reflected throughout the text in technology-neutral terms. The Working Group may wish to recall that no changes were suggested to that chapter in the Working Group at its sixty-third session. However, ongoing deliberations of relevant issues in other forums were noted ([A/CN.9/1163](#), paras. 22–25). Depending on the Working Group's decision, the content of that chapter, as may be further amended in the light of the outcomes of relevant deliberations in other fora, may be included in chapter V of the draft text.

3. Pursuant to the Working Group's request, the draft text is accompanied by a separate working paper ([A/CN.9/WG.V/WP.193](#)) containing a toolkit for expedited ATR.

---

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

## Annex

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

#### **Introduction**

- A. Scope of the text
- B. Origin
- C. Purpose of the text
- D. Glossary and rules of interpretation
- E. Organization of the text

#### **Chapter I**

##### **Issues arising from ATR**

- A. What triggers ATR
- B. Differences in ATR depending on the type of an insolvency proceeding
- C. Issues commonly encountered in ATR
  - 1. Funding
  - 2. Jurisdiction and applicable law
  - 3. Divergent laws
    - (a) Composition of the insolvency estate
    - (b) Divergent ATR measures
    - (c) Access to ATR
  - 4. Cross-border coordination and cooperation
  - 5. Digital aspects

#### **Chapter II**

##### **ATR-related provisions in a law relating to insolvency**

- A. Domestic context
  - 1. Preventive measures
  - 2. Provisional measures
  - 3. Standards for commencement of insolvency proceedings
  - 4. Notice of commencement
  - 5. Other measures upon commencement
    - (a) Stay of proceedings
    - (b) Constitution of the insolvency estate
    - (c) Controls over the insolvency estate
    - (d) Treatment of unauthorized transactions
    - (e) Additional measures
  - 6. Obligations of the debtor
  - 7. Obligations of third parties
    - (a) General
    - (b) Government agencies
    - (c) Registers
  - 8. Duties and powers of the insolvency representative
  - 9. Avoidance
  - 10. Actions against directors, equity holders and other persons
    - (a) Cases of embezzlement, misappropriation and other similar acts
    - (b) Verification of claims
    - (c) Extension of liability (piercing the corporate veil)
    - (d) Contribution orders
    - (e) Substantive consolidation
    - (f) Procedural consolidation or coordination
  - 11. Post-closure measures
- B. Cross-border context
  - 1. Initiation of a cross-border ATR action
  - 2. ATR actions in the receiving State
    - (a) Provisional measures
    - (b) Recognition and enforcement of insolvency-related judgments

- (c) Recognition of foreign proceedings
  - (d) Powers of the foreign representative
  - (e) Domestic relief
  - (f) Coordination of relief in concurrent proceedings
- 3. Cross-border communication, cooperation and coordination

### **Chapter III**

#### **Civil proceedings**

- A. Introduction
- B. Disclosure measures
  - 1. Types of measures
  - 2. Conditions for use
- C. Asset protection measures
  - 1. Types of measures
  - 2. Conditions for use
- D. Generally applicable safeguards
- E. Cross-border aspects
  - 1. Jurisdiction
  - 2. Service abroad
  - 3. Evidence taking abroad
  - 4. Cross-border recognition and enforcement

### **Chapter IV**

#### **Criminal proceedings**

- A. Introduction
- B. Compensation for damages
- C. Access to criminal case files
- D. Joining criminal proceedings as a “civil party”
- E. Cross-border aspects

### **Chapter V**

#### **Other supporting frameworks**

- A. Restrictions on disclosure
- B. Compliance requirements
- C. Other laws
  - 1. Secured transactions law
  - 2. Asset-specific laws
  - 3. Electronic commerce law
    - (a) Retention and preservation of data
    - (b) Data as evidence
    - (c) Identity management (IdM) and trust services
- D. Effective enforcement and institutional framework

#### **Annexed table**

ATR-relevant registers

## Introduction

### A. Scope of the text

1. Asset tracing and recovery takes place in different contexts, for example, tax collection, settlement of insurance, family, inheritance and succession claims, enforcement of contracts and criminal proceedings. This text addresses issues arising from asset tracing and recovery only in the context of insolvency proceedings, which has its specifics arising from the nature and objectives of insolvency proceedings as collective enforcement proceedings.

2. “Asset tracing” in insolvency proceedings is a process of identifying and locating assets that should be subject to the insolvency proceedings, i.e. belong to the insolvency estate. Such assets comprise property, rights and interests of the debtor, including the debtor’s interests in encumbered assets and third-party owned assets (regardless of whether the debtor disclosed and made them available for the insolvency estate); assets acquired after commencement of the insolvency proceedings; and assets recovered through avoidance and other actions.<sup>1</sup> “Asset recovery” follows the asset tracing process and can be understood as the process of returning to the insolvency estate the assets that belong to the insolvency estate.

3. For the purpose of this text and in line with other UNCITRAL insolvency texts, a proceeding is an “insolvency proceeding” if it is cumulatively a collective proceeding (judicial or administrative), commenced pursuant to a law relating to insolvency (which includes company law), under control or supervision by a court (which includes the debtor-in-possession), with respect to a debtor (natural or legal person) that is in severe financial distress or insolvent, and with the goal of liquidating or reorganizing that debtor as a commercial entity.<sup>2</sup> Any other proceedings that do not meet those cumulative requisites fall outside the scope of this text.<sup>3</sup> In addition, in line with other UNCITRAL insolvency texts, this text does not cover particularities of tracing and recovering assets for the insolvency estate of financial, insurance and reinsurance institutions and other entities that are subject to a special insolvency regime (e.g. entities operating under public law) as well as consumer insolvencies.

### B. Origin

4. The project originated from proposals to UNCITRAL to provide a set of options to choose from for enactment as domestic law in jurisdictions that are interested in enhancing cross-border cooperation on civil asset tracing and recovery in insolvency

<sup>1</sup> See the UNCITRAL Legislative Guide on Insolvency Law (the Guide), recommendation 35.

<sup>2</sup> See the Glossary in the Introduction to the Guide, 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. The Guide to Enactment and Interpretation of the MLCBI, paras. 69–78, explain each requisite in detail.

<sup>3</sup> For example, the following proceedings are excluded from the scope of this text: (a) a debt collection proceeding or receivership initiated by a particular creditor or group of creditors or gathering up assets in winding-up or conservation proceedings that do not also include provision for addressing the claims of other creditors; (b) a judicial or administrative proceeding for a solvent entity that does not seek to restructure its financial affairs but rather to dissolve its legal status; (c) financial adjustment measures or arrangements undertaken between the debtor and some of its creditors on a purely contractual basis concerning some debt, where the negotiations do not lead to the commencement of an insolvency proceeding conducted under the insolvency law; and (d) proceedings that are designed solely to prevent dissipation and waste of assets, rather than to liquidate or reorganize the insolvency estate, as well as proceedings designed to prevent detriment to investors rather than to all creditors (e.g. liquidation for just and equitable grounds and other insolvency proceedings commenced in some jurisdictions as a corporate governance or fraud remediation action).

proceedings.<sup>4</sup> The proposals were discussed at the International Colloquium (Vienna, 6 December 2019)<sup>5</sup> and in the Commission<sup>6</sup> before being referred by the Commission to its Working Group V (Insolvency Law) in 2021. During those discussions, it was acknowledged that adequate tools for tracing and recovering assets for the insolvency estate might not be available in all States, while access to existing ones, in particular by foreigners, might not be effective and efficient. Complexities arising from asset tracing and recovery in the digital environment, due to the ease of movement of digital assets and the instantaneous conclusion of multiple and numerous transactions whose parties might not be (immediately or easily) identifiable, were also acknowledged.

5. The Working Group worked on the project during its fifty-ninth to ... sessions, from 2021 to ....<sup>7</sup> The results of that work are this text and accompanying toolkit. The Commission considered and adopted them at its [*to be completed*] session.

### C. Purpose of the text

6. Being non-prescriptive, this text and accompanying toolkit aim at increasing awareness of available measures for civil asset tracing and recovery in insolvency proceedings, of provisions of law that enable and facilitate the use of those measures and of tools that could expedite those processes and make them more effective and efficient domestically and across borders. The enhanced awareness of those measures, provisions and tools is conducive to achieving the objectives of an insolvency law, such as protecting, preserving and maximizing the value of the insolvency estate for the benefit of all creditors and other parties in interest, including the debtor and its employees, which in turn contributes to the achievement of broader socioeconomic objectives, including those of the rule of law, good governance, encouragement of investment and putting in place an enabling trade and business environment.

7. States may find the text and accompanying toolkit informative when they assess availability, accessibility, effectiveness and efficiency of their legal and institutional framework for civil asset tracing and recovery tools in insolvency proceedings. On the basis of that assessment, they may decide to introduce changes in response to evolving challenges and opportunities in the physical and digital worlds. References in the text to relevant provisions of law, measures and tools found across various States may inform their choices. The text may also be informative for judges and practitioners.

8. As acknowledged by the Commission when the project was referred to the Working Group,<sup>8</sup> the results of its work on the project might turn out to be helpful in other areas of law where asset tracing and recovery takes place.

<sup>4</sup> A/CN.9/WG.V/WP.154 and A/CN.9/996.

<sup>5</sup> A/CN.9/1008.

<sup>6</sup> *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.

<sup>7</sup> 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, A/CN.9/1163, [*to be added*].

<sup>8</sup> *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17 (A/76/17)*, para. 217.

## D. Glossary and rules of interpretation

9. The following terms, which drew from or build on the corresponding terms used in the other UNCITRAL insolvency texts, have the following meaning in this text and accompanying toolkit:

<b>Assets of the debtor</b>	Property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor's interests in encumbered assets or in third party-owned assets.
<b>Avoidance</b>	Actions undertaken under 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.
<b>Claim</b>	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 States recognize the ability or right, where permitted by applicable law, to recover assets from the debtor as a claim.
<b>Centre of the debtor's main interests (COMI)</b>	The location (a) where the central administration of the debtor takes place and (b) which is readily ascertainable by creditors.
<b>Commencement of insolvency proceedings</b>	The effective date of insolvency proceedings whether established by statute or a judicial decision.
<b>Court</b>	Depending on the context, the term may refer to a judicial or other authority: (a) competent to control or supervise an insolvency proceeding; (b) responsible for conduct or oversight of simplified insolvency proceedings; or (c) that has adjudicative or other functions over a particular action (e.g. adjudication of disputed claims, administration of avoidance proceedings or recognition and enforcement). Where the context so requires, an appropriate qualifier is used.
<b>Creditor</b>	A natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceeding. As a general rule, the term includes the creditors in the forum State and foreign creditors.
<b>Creditor committee</b>	Representative body of creditors appointed in accordance with the insolvency law, having consultative and other powers as specified in the insolvency law.
<b>Debtor-in-possession</b>	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 or appoints it for limited functions specified by the court (e.g. to assist or supervise the debtor-in-possession).
<b>Directors</b>	Any person in factual control of the debtor, including formally appointed directors as well as de facto and shadow directors.
<b>Discharge</b>	Release in accordance with applicable law of a debtor from claims addressed in the insolvency proceedings.
<b>Disposal of assets</b>	Every means of transferring or parting with an asset or an interest in an asset, whether in whole or in part.
<b>Encumbered asset</b>	An asset in respect of which a creditor has a security interest.

<b>Enterprise</b>	Any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law.
<b>Enterprise group</b>	Two or more enterprises that are interconnected by control or significant ownership. Control in this context means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise.
<b>Enterprise group member</b>	An enterprise that forms part of an enterprise group.
<b>Equity holder</b>	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.
<b>Foreign proceeding</b>	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.
<b>Foreign representative</b>	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. The definition is sufficiently broad to include the debtor-in-possession (see above). Reporting and other obligations may be imposed on the debtor-in-possession to mitigate the risk of conflict between the debtor's own interests and its duties as a foreign representative.
<b>Group insolvency solution</b>	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.
<b>Group representative</b>	A person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding.
<b>Insolvency estate</b>	Assets of the debtor that are subject to the insolvency proceedings.
<b>Insolvency proceeding</b>	Collective proceedings, subject to court supervision, either for reorganization or liquidation.
<b>Insolvency representative</b>	Depending on the context, the term may refer to: (a) 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; or (b) any independent professional, an individual or entity, of appropriate qualifications, independent from the debtor, creditors and other parties in interest, appointed by the court to perform one or more tasks related to an insolvency proceeding.
<b>Insolvency-related judgment</b>	A judgment that arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed.
<b>Judgment</b>	Any decision, whatever it may be called (a decree or order, and a determination of costs and expenses, but excluding an interim measure of protection), issued by a court or administrative authority, provided an administrative decision has the same effect as a court decision.
<b>Lex fori concursus</b>	The law of the State in which the insolvency proceedings are commenced.
<b>Limitation period</b>	A period of time defined in law beyond which the right to pursue a claim discontinues.



<b>Liquidation</b>	Proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law.
<b>Main proceeding</b>	An insolvency proceeding taking place in the State where the debtor has its COMI (see above).
<b>Non-main proceeding</b>	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).
<b>Ordinary course of business</b>	Transactions consistent with both: (a) the operation of the debtor's business prior to insolvency proceedings; and (b) ordinary business terms.
<b>Party in interest</b>	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.
<b>Planning proceeding</b>	A main proceeding commenced in respect of an enterprise group member provided: (a) one or more other enterprise group members are participating in that main proceeding for the purpose of developing and implementing a group insolvency solution; (b) the enterprise group member subject to the main proceeding is likely to be a necessary and integral participant in that group insolvency solution; and (c) a group representative has been appointed. Subject to those requirements, 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.
<b>Preference</b>	A transaction which results in a creditor obtaining an advantage or irregular payment.
<b>Provisional insolvency representative</b>	A person designated by the court to perform certain functions with respect to the debtor, its assets and affairs in the period between application for commencement of insolvency proceedings and commencement of insolvency proceedings. In some States, it may be appointed, under certain circumstances, before application for commencement of insolvency proceedings.
<b>Provisional measures</b>	Measures granted by the court between the time of application for commencement of insolvency proceedings and the commencement of the proceedings. In some States, they may be granted, under certain circumstances, before application for commencement of insolvency proceedings.
<b>Register</b>	The record in which particulars are recorded.
<b>Registrar</b>	The person who administers the registry.
<b>Registry</b>	The entity that maintains the register.
<b>Related persons</b>	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 an individual entrepreneur, a related person would include persons who are related to the debtor by consanguinity or affinity. The court may consider other persons or a group of persons in any combination as related persons, e.g. any accomplice in concealing assets.

<b>Reorganization</b>	The process by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern.
<b>Restrictions on disclosure</b>	Measures imposed by courts to restrict disclosure of information about the case, proceedings and pending or imposed court measures.
<b>Secured claim</b>	A claim assisted by a security interest taken as a guarantee for a debt enforceable in case of the debtor's default.
<b>Secured creditor</b>	A creditor holding a secured claim.
<b>Security interest</b>	A right in an asset to secure payment or other performance of one or more obligations.
<b>Stay of proceedings</b>	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.
<b>Substantive consolidation</b>	The treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate.
<b>Suspect period</b>	The period of time by reference to which certain transactions may be subject to avoidance. It is calculated retroactively either from the date of application for or the commencement of the insolvency proceedings, from the date of discovery of a concealed transaction or from the date of an avoidable transaction in public records. Special rules may apply for calculating the suspect period in cases of substantive consolidation. The duration of the suspect period varies across States and is usually longer for transactions with related persons.

10. The following abbreviations are used in this text and accompanying toolkit:

<b>ATR</b>	Civil asset tracing and recovery in insolvency proceedings
<b>COMI</b>	Centre of the debtor's main interests (see above)
<b>EU</b>	European Union
<b>FATF</b>	Financial Action Task Force
<b>GEI</b>	Guide to Enactment and Interpretation of the MLCBI (see below)
<b>Glossary</b>	Glossary found in different parts of the Guide (see below)
<b>MAL</b>	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 <sup>9</sup>
<b>MLAT</b>	Mutual legal assistance treaty
<b>MLCBI</b>	UNCITRAL Model Law on Cross-Border Insolvency (1997) <sup>10</sup>
<b>MLEGI</b>	UNCITRAL Model Law on Enterprise Group Insolvency (2019) <sup>11</sup>

<sup>9</sup> United Nations publication, Sales No. E.08.V.4. Available at [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration).

<sup>10</sup> United Nations publication, Sales No. E.14.V.2. Available at [https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency).

<sup>11</sup> United Nations publication, Sales No. E.20.V.3. Available at <https://uncitral.un.org/en/MLEGI>.

<b>MLIJ</b>	UNCITRAL Model Law on Recognition and Enforcement of Insolvency-related Judgments (2018) <sup>12</sup>
<b>MSEs</b>	Micro- and small enterprises, including individual entrepreneurs
<b>Toolkit</b>	The toolkit for expedited ATR accompanying this text
<b>The Guide</b>	UNCITRAL Legislative Guide on Insolvency Law <sup>13</sup>
<b>UBO</b>	Ultimate beneficial ownership

11. The following 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. References to recommendations and parts one to five in footnotes should be understood as references to recommendations and parts of the Guide unless otherwise noted.

## E. Organization of the text

12. This text is organized as follows:

- (a) Chapter I discusses issues arising from ATR;
- (b) Chapter II discusses provisions of a law relating to insolvency of relevance to ATR;
- (c) Chapter III discusses measures in civil proceedings of relevance to ATR;
- (d) Chapter IV discusses measures in criminal proceedings of relevance to ATR;
- (e) Chapter V concludes with a brief overview of other ATR supporting measures.

13. The toolkit found in [*to be completed*] supplements this text.

<sup>12</sup> United Nations publication, Sales No. E.19.V.8. Available at <https://uncitral.un.org/en/texts/insolvency/modellaw/mlij>.

<sup>13</sup> Parts one and two (2004), United Nations publication, Sales No. E.05.V.10; part three on the treatment of enterprise groups in insolvency (2010), United Nations publication, Sales No. E.12.V.16; part four on directors’ obligations in the period approaching insolvency (including in enterprise groups) (2019), United Nations publication, Sales No. E.13.V.10; part five on insolvency law for micro- and small enterprises (2021), United Nations publication, Sales No. E.22.V.19. Available at [https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency\\_law](https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law).

## Chapter I

### Issues arising from ATR

#### A. What triggers ATR

14. 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, insolvency proceedings provide mechanisms for addressing claims against the insolvency estate collectively. Recognition of existing creditor rights and equitable treatment of similarly situated creditors so that they receive distribution on their claims in accordance with their relative ranking and interests are the main principles underpinning insolvency proceedings. In insolvency proceedings, creditors have strong incentives to protect, preserve and maximize the value of the insolvency estate to ensure higher distributions.

15. ATR is a means of achieving those objectives. Its goal is to identify, collect and recover as many insolvency estate assets as fast and with as low costs as possible. Together with effective enforcement and sanctions regimes, ATR deters acts detrimental to the collective interests of the creditors in the period approaching insolvency and during insolvency proceedings. Where such acts occur, ATR is a means of discovering and addressing them and reconstituting the integrity of the insolvency estate.

#### B. Differences in ATR depending on the type of an insolvency proceeding

16. Insolvency proceedings usually take the form of liquidation or reorganization. There could be variations of those proceedings, for example reorganization on an expedited basis or simplified insolvency proceedings for MSEs. Each of them raises particularities for ATR although there are many similarities.

17. For example, the types of assets that are usually excluded from the insolvency estate of an individual entrepreneur and hence from ATR, including under applicable international treaties, include: (a) assets that are necessary for the debtor to earn a living; (b) post-application earnings from the provision of personal services; (c) personal and household items necessary to satisfy the basic domestic needs of the debtor and his or her family; (d) joint matrimonial property; and (e) tort claims of personal nature (e.g. arising from bodily injury, defamation, damage to reputation). In some States, unless creditors object, all assets of the MSE debtor or assets of a certain category or whose value is below an established ceiling may be excluded from the insolvency estate. In comparison, those exclusions are not usually applicable to other debtors.

18. While ATR in liquidation and reorganization share many similarities, there are also several significant differences, especially if reorganization is commenced for a solvent entity. Similarities include that, in both proceedings, ATR: (a) pursues the same objectives of insolvency law and broader objectives, such as the rule of law; (b) may be equally urgent (see below); (c) may need to be authorized by the same organ (e.g. the court, the insolvency representative, creditors or the creditor committee, as the case may be); and (d) is pursued on behalf of the insolvency estate, as a rule, by the insolvency representative. Nevertheless, ATR in each type of proceeding pursues also specific objectives of that proceeding.

19. The goal of liquidation is to dissolve an insolvent business and sell and dispose the insolvency estate assets for distribution to creditors as expeditiously as possible. As a consequence, the scope of ATR and related measures, such as the stay of proceedings, is, as a rule, comprehensive in liquidation unless some considerations, such as the lack of funding, necessitate limiting its scope to particular assets. In reorganization, the goal is to restore the financial well-being and viability of a

debtor's business so that it can continue to operate. This can be achieved through debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business or parts thereof as a going concern. As a consequence, ATR in reorganization and related measures, such as the scope of the stay of proceedings, may have a limited scope, especially if the debtor is solvent, and may be designed with the perspectives of timely and successful reorganization in mind, in particular acceptance of a reorganization plan by all affected creditors, which in turn may depend on the success of a specific ATR action. As a result, ATR in reorganization may target only fraudulent transactions, transactions with related persons or an avoidable transaction involving a specific asset essential for continued viability of business (e.g. for raising post-commencement finance). Where the debtor-in-possession regime is in place, an insolvency representative may be appointed for those actions to eliminate conflicts of interest, or ATR actions may be assigned to a trust.

20. The need for a specific ATR action, or the results of ATR, at an early stage may inform the court's decision on whether to commence liquidation or reorganization and whether to put in place the debtor-in-possession or another regime. At later stages of insolvency proceedings, the need for a specific ATR action or the results of ATR may lead to conversion of proceedings (e.g. a simplified insolvency proceeding to a standard insolvency proceeding, a reorganization to liquidation or vice versa) or a change in the regime originally put in place (e.g. replacement of the debtor-in-possession regime with the full displacement of the debtor if, for example, fraudulent transactions are discovered).

### **C. Issues commonly encountered in ATR**

21. Challenges arising from ATR are similar across the world. They include increasingly sophisticated fraudsters, the use of more complex asset holding structures, unsettled matters of law and bureaucratic hurdles and inertia. Cross-border ATR raises additional challenges, such as divergent laws. The sections below list legal issues commonly encountered in ATR. Where UNCITRAL recommends approaches to addressing them, they are highlighted.

#### **1. Funding**

22. 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 that do not exist outside insolvency proceedings. Therefore, the policy question that States face is whether there should be at least a base level of investigation into the reasons for the failure of businesses in all cases. Otherwise, fraudulent dissipation of assets and other wrongful reasons that led to insolvency, including possibly the fault of directors, may become unaddressed, and no avoidance and other insolvency law remedies will be used. As a result, assets that should be part of the insolvency estate may not be discovered and recovered.

23. UNCITRAL recommends that insolvency law should govern insolvency proceedings against all debtors that engage in economic activities<sup>14</sup> and that should provide mechanisms to cover the costs of administering insolvency proceedings where assets and sources of the revenue of the debtor are insufficient to meet those costs.<sup>15</sup>

24. The insolvency law may provide alternative approaches to address the funding of ATR, for example levying a surcharge on creditors to fund ATR, establishing a public office or utilizing an existing office to pursue ATR and establishing a fund out of which the costs of ATR may be met. In addition, it may permit a creditor or group of creditors to advance the approximate costs of ATR subject to authorization by the court or the insolvency representative. Creditors are usually willing to do so when

<sup>14</sup> Recommendations 8 and 9.

<sup>15</sup> Recommendations 26, 95, 125, 280 and 316.

they believe that there are avoidable transactions or concealed assets of a significant value. Where creditors are unwilling to invest time and resources in ATR, the law may allow raising funding from other sources, subject to authorization by the court and other safeguards. To incentivize the provision of the alternative funding for ATR, some States provide that the recovered assets or value can be used first to satisfy the claim of the funder, with only the remainder going to the insolvency estate, subject to a duty of detailed accounting. Another approach is to reimburse from the insolvency state on a priority basis only expenses and costs of successful ATR, up to any limit established by law.

25. Before authorizing alternative funding arrangements, the court may be required to assess their impact on the equal treatment of similarly situated creditors, protection of all parties in interest, other aspects related to the conduct of the insolvency proceeding and its outcomes. The court may refuse authorization if, for example, challenges, delays and other hindrances to the effective and efficient administration of the proceeding may arise. Other safeguards include: (a) full disclosure of the planned alternative funding arrangement and actions and expenses expected to be financed from that alternative source; (b) the requirement to approach other potential funders, including other creditors; (c) oversight over the actual actions taken and expenses incurred under the provided funding, including assessment of their reasonableness and necessity; and (d) imposition of the code of conduct on the funders. Broader public interests in encouraging creditors or outsiders to provide funding for ATR are considered as well.

26. The insolvency law may authorize other approaches to the pursuit of ATR, for example, subject to advance notification of the creditors, selling or assigning claims to third parties for those parties to take actions in their own name. The latter options may produce multiple benefits for the insolvency estate. It may provide an immediate payment to the insolvency estate, avoid costs of ATR and eliminate the need to wait for ATR outcomes before distribution of proceeds to creditors and closure of insolvency proceedings.

## 2. Jurisdiction and applicable law

27. The debtor may become subject to the insolvency law of more than one State, with the result that more than one insolvency proceeding with respect to the same debtor may be opened. Each such concurrent proceeding will have its own rules for ATR-related matters, such as the composition of the insolvency estate and avoidance. In addition, as a result of application of different connecting factors,<sup>16</sup> several courts may claim jurisdiction over a particular ATR action. Some States may assert exclusive or extraterritorial jurisdiction over a particular ATR action.<sup>17</sup>

28. UNCITRAL 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,<sup>18</sup> 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 may be the connecting factors.<sup>19</sup>

29. According to the UNCITRAL insolvency framework, the *lex fori concursus* is the law that governs all aspects of the commencement, conduct, administration and

<sup>16</sup> E.g. the location of the debtor, other persons, evidence, assets, the act or its effect or choice-of-law and choice-of-forum provisions.

<sup>17</sup> E.g. article 9 of the United Nations Convention on the International Effects of Judicial Sales of Ships 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.

<sup>18</sup> Recommendation 13.

<sup>19</sup> Recommendation 10 and accompanying footnote.

conclusion of insolvency proceedings and their effects, with a few exceptions.<sup>20</sup> 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 subject of ATR); (c) measures for protection and preservation of the insolvency estate; (d) rules for the use and disposal of assets during insolvency proceedings; (e) avoidance; (f) treatment of secured creditors and 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; and (j) costs and expenses relating to the insolvency proceedings.<sup>21</sup> The preceding does not displace the general private international law rules of the State where the insolvency proceedings are commenced. They determine the law applicable to ownership and property rights of the debtor to assets and to the validity and effectiveness of the rights and claims existing before the commencement of insolvency proceedings.<sup>22</sup>

### 3. Divergent laws

#### (a) Composition of the insolvency estate

30. The scope of ATR is limited to the assets that under insolvency law are included in the insolvency estate. States provide for different exclusions from the insolvency estate, in particular as regards encumbered assets. UNCITRAL recommends that the insolvency law should specify excluded assets.<sup>23</sup> In addition, in some States, certain assets may not be susceptible to being the subject of proprietary rights and thus capable of being part of the insolvency estate.

31. Some States include in the insolvency estate all assets of the debtor regardless of their location. Other States include in the insolvency estate only those assets of the debtor that are located within the boundaries of that jurisdiction. Yet some other States provide that the insolvency estate in the main proceeding should include all assets of the debtor wherever located. This is the approach recommended by UNCITRAL,<sup>24</sup> which also recommends that the insolvency law should include a modern, harmonized and fair framework to address effectively instances of cross-border insolvency.<sup>25</sup> The UNCITRAL cross-border insolvency framework envisages that certain assets of the debtor may be administered in another proceeding (e.g. a non-main proceeding or proceeding at the place of the location of the assets).<sup>26</sup>

#### (b) Divergent ATR measures

32. ATR measures known and widely used in some States may be unknown, or their use could create tension with public policies, in other States. As a result, some ATR measures might be effective in the domestic context or across only some States and less effective in other settings. Examples include discovery, interception of correspondence, restrictions on disclosure, *actio pauliana* and constructive trust.

33. The same ATR action may be classified or characterized differently across States, raising jurisdictional, recognition, enforcement and other issues. For example, cross-border transmission of judicial documents may be characterised differently in the forum and destination State (service or notice) resulting in the unsuccessful service and negative consequences for ATR (e.g. the failure to assert jurisdiction over the defendant). Another example is that, in some States, the insolvency estate may claim the misappropriated property and any subsequent assets into which the original property was converted. In other States, only the original asset may be claimed via a

<sup>20</sup> E.g. for payment and settlement systems and regulated financial markets. [*to be updated*]

<sup>21</sup> Recommendations 30 and 31. [*to be updated*]

<sup>22</sup> Footnote to recommendation 35 (a).

<sup>23</sup> Recommendations 38, 109 and 313.

<sup>24</sup> Recommendation 36.

<sup>25</sup> Recommendation 5.

<sup>26</sup> E.g. MLCBI, articles 21 (3) and 28.

proprietary claim, while any subsequent assets into which the original property was converted may only be recovered through personal claims.

34. Some ATR measures, such as avoidance, may be known and widely used across most States but divergent regulation of those measures may make them complex, lengthy and unpredictable. For example, some States use objective criteria by avoiding all transactions that took place during the suspect period, gratuitous transactions and transactions with related persons, while other States use subjective criteria necessitating proof of intent and knowledge. Some other States use a combination of both. Within the same State, 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.

#### **(c) Access to ATR**

35. Access to ATR measures across borders may be refused on grounds of public policy, sanctions and other considerations. It may be hindered by different rules for standing, duration and calculation of the limitation period and a stay of proceedings as well as the absence of any or adequate regime for recognition and enforcement of foreign judgments and provision of assistance to foreign proceedings.

36. The UNCITRAL cross-border insolvency framework envisages: (a) direct and expeditious access of the foreign representative and foreign creditors to courts; (b) a broad range of assistance and relief to the foreign proceeding; and (c) tools that expedite consideration of applications for recognition, enforcement and relief, including the tools found in the toolkit.

#### **4. Cross-border coordination and cooperation**

37. A cross-border ATR may involve: (a) the debtor in one State; (b) a wrongdoer (e.g. a former director liable for dissipation of assets) in another State; (c) other wrongdoers or witnesses in various other States; and (d) the concealed or dissipated assets in one of those States or held through structures involving a chain of companies and trusts in several States. Coordinated actions of courts and insolvency representatives are essential in those situations to prevent further concealment or dissipation of assets, especially when urgent relief is needed, including simultaneously in several States in order to cover all possible layers in the asset holding structure. However, an enabling framework to ensure the necessary coordination is often absent.

38. Some States have traditionally taken a relatively liberal approach to communication, cooperation and coordination of their judges with their foreign counterparts. In other States, in the absence of the specific requirement or authorization, courts may not be allowed to be in direct communication with foreign courts or may be reluctant to provide ATR-related assistance, especially when the request for assistance does not relate to any pending or existing proceeding before them. A general duty of cooperation may arise in some States only after recognition of a foreign proceeding or judgment and in some cases only in relation to the foreign main proceeding. The same, similar or stricter restrictions as regards cross-border cooperation may apply to insolvency representatives.

39. The UNCITRAL cross-border insolvency framework envisages direct communication and cooperation of courts and insolvency representatives and coordination of concurrent proceedings and relief.<sup>27</sup>

<sup>27</sup> See e.g. MLCBI, chapters IV and V; and MLEGI, chapter 2.



## 5. Digital aspects

40. ATR of digital assets may raise additional complexities because of very high transmissibility, volatility and vulnerability of those assets. ATR of assets that perform several functions (e.g. means of payment, financial instrument, so called “hybrid assets”), digital assets that change their characteristics and functions in the chain of operations or transactions and digital assets linked to a physical asset or another digital asset (so called “linked assets”) may raise particular difficulties. Complexities also arise from peculiar characteristics of the environment where digital assets circulate (often decentralized, (pseudo)anonymous and autonomous) and from different types of “persons unknown” involved in transfers of digital assets, such as unidentified but identifiable and unidentified and non-identifiable. Technological, legal and regulatory solutions are evolving in response to those challenges and also to more sophisticated fraudulent schemes enabled by technologies, necessitating adjustments also in ATR.

## Chapter II

### ATR-related provisions in a law relating to insolvency

#### A. Domestic context

##### 1. Preventive measures

41. An effective preventive measure against dissipation of insolvency estate assets is to impose liability<sup>28</sup> on the debtor and its directors for breach of their duties in the period approaching insolvency. Such duties include: (a) to have due regard to the interests of creditors and other stakeholders; (b) to take reasonable steps to avoid insolvency; and (c) where it is unavoidable, to minimize the extent of insolvency.<sup>29</sup>

42. The recommended reasonable steps go beyond those expected under normal business conditions and include: (a) ensuring that proper accounts are being maintained and that they are up to date, which presupposes keeping track of assets and maintaining transparency within business books and records; (b) protecting the assets so as to maximize their value and avoid loss of key assets;<sup>30</sup> (c) not committing the business to the types of transaction that might be subject to avoidance unless there is an appropriate business justification; (d) keeping a detailed list of preferential transfers with relevant justifications; (e) seeking professional advice, including insolvency or legal advice (special support may be available for MSEs<sup>31</sup>). Taking these steps considerably facilitates ATR before and during insolvency proceeding by providing readily available and accurate information about the debtor's assets and affairs, informing about the need for any or specific ATR action or eliminating or reducing the need for any ATR, thereby saving costs of administration of insolvency proceedings and maximizing the value of the insolvency estate.

##### 2. Provisional measures

43. Application for commencement of insolvency proceedings does not lead to the automatic commencement of insolvency proceedings in all cases.<sup>32</sup> Between the time an application for commencement of insolvency proceedings is made and commencement of those proceedings, the debtor is entitled to continue to operate its business and to use and dispose of assets in the ordinary course of business, except to the extent restricted by the court.<sup>33</sup> Therefore, unless restrictions have been applied by the court upon application, the debtor as well as creditors or other persons are free to transfer the debtor's assets, and they may be tempted to do so inappropriately, complicating subsequent ATR. The ability of the court to impose provisional measures at its own motion or at the request of the debtor, creditors, or third parties<sup>34</sup> may mitigate those risks and is hence of critical importance to ATR.

44. Provisional measures may take the form of any measure (or their combination) that is applicable under insolvency law upon commencement of insolvency proceedings. They may include:

(a) Appointment of a provisional insolvency representative that may be entrusted with (i) the assessment of the debtor's economic and financial situation and the need for a more rigorous intervention, such as displacement of the debtor from the operation of business, (ii) the immediate drawing-up of a detailed inventory of

<sup>28</sup> The liability may be civil, administrative and criminal, including compensation to the insolvency estate for losses and damages.

<sup>29</sup> Recommendation 372.

<sup>30</sup> In some States, the debtor's representatives (e.g. an attorney-at-law) may be required to preserve the debtor's property until the voluntary petition for commencement of insolvency proceedings is filed.

<sup>31</sup> Recommendations 275–279 and accompanying commentary.

<sup>32</sup> Recommendations 18, 19, 296 and 297 and accompanying commentary.

<sup>33</sup> Recommendation 41.

<sup>34</sup> Recommendation 39.

debtor's assets, site visits, search of premises and other measures aimed at the urgent conservation of the value of the debtor's assets, (iii) the administration or supervision of the debtor's business, and (iv) the realization of all or part of the assets of the debtor;

(b) Provisional freeze, seizure, sealing, attachments, embargoes and other restraining orders with respect to the debtor and its assets and affairs, including for the purpose of securing avoidance;

(c) Issuing disclosure orders, and taking and securing evidence, concerning the debtor's assets and affairs from the debtor, its directors and third parties, such as banks or registries, including information on the debtor's bank accounts, contracts and movable and immovable property;<sup>35</sup> and

(d) Staying execution against the assets of the debtor.

45. The usual safeguards include: (a) requiring the applicant to demonstrate that the provisional measure is urgent and outweighs any potential harm that may result from granting it, and informing the court of all material changes that may necessitate modification or termination of the requested measure; (b) requiring the applicant to provide indemnification for the requested measure, and, if appropriate, paying costs or fees;<sup>36</sup> and (c) imposing sanctions in connection with an application for the provisional measure, including on the applicant where the measure was improperly obtained.<sup>37</sup>

46. Additional safeguards may be imposed in connection with specific provisional measures, for example appointment of a provisional insolvency representative. In some States, that provisional measure is not easily granted, particularly if other provisional 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. Unlike the insolvency representative, a provisional insolvency representative is usually appointed for limited purposes. UNCITRAL recommends that the balance of rights and obligations between the debtor and any appointed provisional insolvency representative should be clearly specified.<sup>38</sup> The need for the full displacement of the debtor from operation of business by a provisional insolvency representative may arise, for example, where it is established that the debtor is removing or dissipating assets, manages the business without appropriate care or its business is fraud.

47. Unless the court limits or dispenses with the need to provide notice, appropriate notice of an application or court order for provisional measures is to be given to affected persons.<sup>39</sup> They have the right to challenge provisional measures and to seek relief from them. Where a provisional measure has been ordered *ex parte* without a prior notice to an affected party, the affected parties have the right, upon urgent application, to be heard promptly on whether the relief should be continued.<sup>40</sup>

48. The law may require provisional measures to be regularly reviewed, or it may specify that the court may review and modify or terminate provisional measures at its own motion or at the request of the applicant, an affected person or other parties in interest.<sup>41</sup> Circumstances that justify termination of provisional measures usually include when: (a) an application for commencement is denied or withdrawn; (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

<sup>35</sup> In some States, a provisional insolvency representative and creditors may be able to request information about the debtor and its assets and affairs without court orders.

<sup>36</sup> Recommendation 40 and accompanying commentary.

<sup>37</sup> Ibid.

<sup>38</sup> Recommendation 41.

<sup>39</sup> Recommendation 42.

<sup>40</sup> Recommendation 43.

<sup>41</sup> Recommendation 44.

provisional measures. Some States limit the duration of provisional measures to a specified time period, or to steps to be fulfilled by the applicant or other persons.

49. Some States take a step further and provide in the insolvency law that, upon application for commencement of insolvency proceedings, an automatic stay on the realization of movable or immovable assets of the debtor applies. That statutory stay is in addition to any provisional measures that the court may order at its own motion or upon application of interested persons.

### **3. Standards for commencement of insolvency proceedings**

50. Delays with the commencement of insolvency proceedings may delay ATR and cause (further) dissipation of assets and complications in subsequent ATR. For example, they may hinder access by a foreign representative or foreign creditors to local ATR measures in States where such access is conditioned upon commencement of local insolvency proceedings. Different mechanisms exist to avoid such delays, including: (a) automatic commencement upon application or keeping formalities for commencement to the minimum,<sup>42</sup> subject to appropriate safeguards and appropriate measures at subsequent stages of proceedings;<sup>43</sup> (b) presumptions of insolvency;<sup>44</sup> (c) allowing the debtor facing not only insolvency but also financial distress to commence insolvency proceedings;<sup>45</sup> (d) permitting also creditors to apply for commencement of insolvency proceedings under certain conditions;<sup>46</sup> and (e) prioritizing the cessation of payments test over the balance sheet test.<sup>47</sup>

### **4. Notice of commencement**

51. The notice of commencement of insolvency proceedings can assist ATR in several respects. Among others, it advises about the regime in place in insolvency proceedings, i.e. whether that regime is the debtor-in-possession regime or the full or partial displacement of the debtor from the operation of business. It therefore informs whether further transactions with the debtor and the insolvency estate assets are to be made with the debtor or the insolvency representative. In some States, a notice of commencement obligates all who have custody of the debtor's assets and business records to make them, under penalty of law, available to the court or the insolvency representative.

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

<sup>42</sup> E.g. for MSEs, proving insolvency is not required, and disclosure obligations at the stage of application are kept to the minimum. See recommendations 294 and 295.

<sup>43</sup> E.g. dismissal of proceedings, orders for compensation of costs and damages and sanctions and other negative consequences for the applicant acting in bad faith. Recommendations 20, 28, 301 and 309 and accompanying commentary.

<sup>44</sup> E.g. insolvency may be presumed upon: closure of the business (e.g. administrative headquarters) and 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; failure to present (audited) annual financial reports for a number of subsequent years fixed in the law; failure to pay a mature debt that is not subject to a legitimate dispute or offset (recommendation 17); and recognition of a foreign main proceeding commenced with respect to the debtor elsewhere (MLCBI, article 31).

<sup>45</sup> Recommendations 15 and 294.

<sup>46</sup> Recommendations 16, 19, 292 and 297.

<sup>47</sup> Footnote and commentary to recommendation 15.

## 5. Other measures upon commencement

### (a) Stay of proceedings<sup>48</sup>

53. The stay of proceedings upon commencement of insolvency proceedings may be automatic or ordered by the court at its own motion or upon application of the insolvency representative or other party in interest. The insolvency law usually specifies: (i) the duration of the stay; (ii) exclusions and other limitations to the stay; (iii) conditions for granting relief from the stay; and (iv) conditions for making other modifications to the stay or its termination by the court. The usual exclusions from the stay include: (i) transactions in the ordinary course of the debtor's business; (ii) the right to commence or continue the individual action or the proceeding necessary to preserve a claim against the debtor;<sup>49</sup> (iii) any action that intends to increase the value of the estate; (iv) an *actio pauliana*; and (v) actions against the insolvency representative or the debtor-in-possession.

54. Safeguards include the possibility to request relief from the stay and protection from diminution of the value of encumbered assets or third-party owned assets affected by the stay. In particular, secured creditors may request the court to grant relief from the stay if the encumbered asset is not necessary for the reorganization or sale of the debtor's business or if a reorganization plan is not approved within any applicable time limit.

### (b) Constitution of the insolvency estate<sup>50</sup>

55. Many insolvency laws require the court or, immediately upon appointment, the insolvency representative to: (i) establish which assets belong to the insolvency estate; (ii) draw up a detailed inventory of the insolvency estate assets, broken down into groups and line items and with all the supporting documents itemized; (iii) estimate the value of each asset, with the assistance of experts where required; and (iv) take books, records and other evidence into custody, itemizing and closing them for further entries in liquidation.

56. The presence of the debtor and supervision by the court or a public certifying officer may be required for drawing up an inventory by the insolvency representative. Site visits may take place under similar safeguards.

57. Specific information may be required to be included in the inventory for proper itemization of certain assets, for example: (i) for movable assets, their kind, quantity, quality, condition and any other background information or specification; (ii) for cash, the quantity, amount and currency; (iii) for money held in bank accounts, the name of the bank, the account number and balance; (iv) for motor vehicles, details of registration with a relevant register; and (v) for immovable assets, their location, property registration number and other details from the relevant immovable property register.

58. Notwithstanding these measures, the debtor remains under obligation to provide accurate, reliable and complete information relating to its assets and affairs (see the relevant section below).

59. In some States, 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, or a cause of action, is known to exist but is missing or has not been disclosed.

### (c) Controls over the insolvency estate

60. Insolvency laws differ as regards requirements to seize, seal, or simply mark the assets over which the debtor has no longer control. This may depend on the type of

<sup>48</sup> Recommendations 46–51 and 317–318 and accompanying commentary.

<sup>49</sup> Recommendation 47; and MLCBI, article 20 (3).

<sup>50</sup> Recommendations 35–38 and 313–315 and accompanying commentary.

asset, the probability of dissipation of an asset in the absence of such a measure, whether liquidation or reorganization of the business takes place and whether the full or partial displacement of the debtor from the operation of the business is in effect.

61. 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 assumes control and responsibility over all assets, records and documents in the inventory, including their preservation and realization. The insolvency representative may be 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.

62. In the debtor-in-possession regime, which is usually the case in reorganization, use and disposal of assets and conclusion of transactions in the ordinary course of the debtor's business are permitted. They include routine payments and contracts for rent, utilities and essential trade supplies but exclude illegal and inappropriate activities.

63. The court's authorization is required for disposal of assets or conclusion of transactions outside the ordinary course of business. Examples of such transactions include transfer of ownership or encumbrance of significant insolvency estate assets. Where the insolvency representative has been appointed to supervise the debtor-in-possession in the day-to-day operation of business, the insolvency representative may have the power to authorize such transactions.

64. UNCITRAL recommends achieving clarity as regards rights and obligations with respect to the use, disposal or realization of the debtor's assets and management of the debtor's affairs during insolvency proceedings.<sup>51</sup> Specifically it 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 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;<sup>52</sup> (v) a special regime should be in place for the use and disposal of cash proceeds from the realization of encumbered assets, to protect interests of secured creditors in such proceeds; (vi) to prevent fraud and collusion, disposal of assets to related persons is subject to scrutiny before it is allowed to proceed; and (vii) 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 than the value of a secured claim and where the encumbered asset is not required for reorganization.

#### **(d) Treatment of unauthorized transactions**

65. Some insolvency laws treat unauthorized transactions as invalid and unenforceable against the insolvency estate. In such case, assets transferred may be reclaimed and returned to the insolvency estate and any rights and obligations created declared unenforceable against the insolvency estate. Exceptions may include 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 States, some unauthorized transactions are automatically void while others may be subject to avoidance by the insolvency representative. In some States, the insolvency representative may authorize any transaction that has led to an increase in the value of, or has produced other positive effect for, the insolvency estate.

<sup>51</sup> See e.g. recommendations 41, 112 and 284–287.

<sup>52</sup> In particular, measures directed at maintaining the economic value of encumbered assets and third-party owned assets during the insolvency proceedings (in some States referred to as “adequate protection”) may be put in place, including cash payments or provision of security interests over alternative or additional assets.

**(e) Additional measures**

66. Additional measures imposed by law upon commencement of insolvency proceedings may include special treatment of contracts not fully performed and termination or suspension of contract clauses that automatically terminate or accelerate a contract upon an application for commencement, or commencement, of insolvency proceedings, the appointment of an insolvency representative or similar events (ipso facto clauses).<sup>53</sup> Some measures may be imposed by the court within the limits established by law (e.g. measures against the former directors or other legal representatives of the debtor).

67. In some States, 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 States, that measure is automatically effective by law.

**6. Obligations of the debtor<sup>54</sup>**

68. Compliance by the debtor with its obligations under insolvency law is key to the success of ATR. This is because the debtor is best positioned to assist in ATR. Except for very limited circumstances, the debtor is required, among others:

(i) To cooperate with the court and the insolvency representative, and assist them in performing their functions relating to insolvency proceedings, including taking effective control of business records and of the insolvency estate. That obligation encompasses a duty, within a time limit set by the law or the court, to turn over assets and business records, including by permitting access to its premises and by opening containers, warehouses and other relevant places for review and itemization of their content as well as by supplying documents, information, keys and other attributes necessary to effectively claim or access an asset and take control of business records. It also encompasses the duty to facilitate or cooperate in the recovery of the assets, or the control of the assets of the insolvency estate and business records, wherever located;

(ii) To provide accurate, reliable and complete information and explanation relating to its assets, affairs and insolvency, including lists of transactions involving the debtor or its assets occurring prior to commencement;<sup>55</sup> 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;<sup>56</sup> assets, liabilities, income and disbursements, including the estimated value of its assets and liabilities;<sup>57</sup> debtors and their obligations; creditors and their claims; all active accounts and accounts closed within a preceding defined period;<sup>58</sup> professionals (auditors, business or legal advisors, etc.) retained by the debtor during a defined period preceding the commencement of insolvency proceedings;<sup>59</sup> all current officers and past officers within a defined period preceding the commencement of insolvency proceedings;<sup>60</sup>

<sup>53</sup> Recommendations 69–86 and accompanying commentary.

<sup>54</sup> Recommendations 110, 111, 284–286 and 290 and accompanying commentary.

<sup>55</sup> With respect to secured transactions, it may be required to provide information about the current location of the encumbered assets.

<sup>56</sup> This may be accompanied by a requirement to provide a complete copy of related correspondence and identification and contact information of all individuals involved.

<sup>57</sup> This includes cash or assets of any type or description that are not listed on the debtor's books or records and details about those assets, their location and identification and contact information of the individuals or companies in control of those assets.

<sup>58</sup> 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.

<sup>59</sup> Related information 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.

<sup>60</sup> Related information would include their names, positions, titles, roles, current address and contact information, with copies of employment agreements.

current insurance policies held by the debtor or its officers; dividends paid to shareholders;<sup>61</sup> beneficial owners, their address, contact information and percentage of ownership held; employees and insiders;<sup>62</sup> payments to insiders within a defined period of time prior to the commencement of insolvency proceedings; subsidiaries; locations of the debtor establishments and other business operations and identification of individuals involved in those operations; and where audit was performed or financial statements issued, a complete copy of audit reports, including any findings and recommendations by auditors, and financial statements. The listed information may refer not only to the current knowledge of the debtor but also to the need to perform all preparatory work necessary to provide the relevant information and to keep it up to date throughout insolvency proceedings. In some States, the debtor may be required to provide that information by sworn statement (affidavit). Cross-examination is enabled generally or in case of conflicting statements; and

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

69. Additional obligations and varying measures of control may be imposed on the debtor-in-possession. In particular, it may be required to periodically report to the court, creditors or any appointed insolvency representative exercising control over the debtor-in-possession about all transactions, income received and expenses paid and banking records for the prior reporting period.

70. Many States require the debtor or some of its officers or directors to remain available to assist or to respond to requests from the court and the insolvency representative, if any, for the duration of the insolvency proceedings. The individual entrepreneur debtor may be required to give notice to the court before changing its habitual residence, while the legal person debtor is usually required to obtain consent of the court before moving its headquarters. In some States, this obligation may only be imposed by a court order. In other States, it is a statutory duty that can automatically be enforced against a non-cooperative debtor.

71. The debtor may be made subject to judicial compulsion and sanctions (including criminal sanctions, e.g. fines and confiscation of the property) if it does not comply with insolvency law obligations or there are grounds to believe that it will attempt to avoid 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 are the usual sanctions under insolvency law. Directors and their accomplices may also 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. In serious cases, criminal sanctions may be applied, including imprisonment. In some States, lack of cooperation by the debtor or directors, including by concealment, disinformation or misrepresentation, is taken as presumption of guilt and may justify granting relief against them on an expedited basis, *ex parte* and with restrictions on disclosure. Adverse inferences may be drawn in related civil or criminal proceedings. Conversely, cooperation with the insolvency court and the insolvency representative may lead to a reduced sentence for the persons concerned in case of conviction for insolvency-related crimes.

72. Safeguards include special rules for handling commercially sensitive, confidential and otherwise protected information, or information subject to obligations owed to other persons. In some States, the debtor is not obliged to provide information that is not related to insolvency and is not expected to obtain documents that are in the hands of third parties.

<sup>61</sup> Related information would include amount, date, names of recipients, and the status of solvency of the debtor when dividends were paid.

<sup>62</sup> Related information would include names and contact information of those persons.



## **7. Obligations of third parties**

### **(a) General**

73. Upon commencement of insolvency proceedings, third parties that have had dealings with the debtor, have knowledge about the debtor, its assets or business records or are in possession or control of those assets or records, may have statutory obligations, within a short period of time and free of charge: (i) to provide the court or the insolvency representative with information and documents in their possession or control about the debtor's assets and affairs, including the debtor bank accounts<sup>63</sup> and counterparties to debtor transactions; (ii) to open rooms and containers where the debtor assets or business records may be found for inspection by authorized officials; (iii) to turn over the debtor assets and business records, or supply documents, information, keys and other attributes necessary to effectively access and take control of the debtor assets and business records; and (iv) not to enter into any further transactions in respect of the debtor assets (e.g. leased, borrowed, kept under custody or otherwise used or possessed by them).

74. In some States, the insolvency representative may demand performance of those obligations under law. Limitations to that statutory power may 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 limitations do not usually apply where the insolvency representative becomes the debtor's representative (see below); (ii) depending on the type of information obtained, restrictions on subsequent disclosure and use of information (e.g. the insolvency representative may be obligated not to reveal the obtained information to other persons or it may be obligated to make sure that the information is not used for purposes outside the insolvency proceeding); and (iii) exemptions for assets used for public purposes (e.g. impoundment in a criminal proceeding). In other States, a separate court order may be required to compel third parties to fulfil those obligations. A penalty may be imposed on any person in control or possession of debtor's assets or business records for each day of delay to deliver them to the court or the insolvency representative.

### **(b) Government agencies**

75. In some States, the obligations set out above apply also to government agencies, such as tax and social insurance authorities and authorities in charge of granting licences for certain types of activities. The files of those agencies may be a valuable source of information about the debtor's assets and affairs, including about the debtor's counterparties to avoidable transactions.

76. Some information from government files may be publicly available, such as information that must be disclosed to investors or the public at large. Access to more restricted information may nevertheless be enabled upon request of an interested person under freedom of information or similar acts, subject to certain conditions and exceptions. Some information in government files may be closed, for example disclosures by politically exposed persons as regards their assets and income. Although some courts may have direct access to that type of information, a court order may be required for the insolvency representative or another person to obtain it.

### **(c) Registers**

77. Registers useful for ATR 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 (see the annexed table). They serve various purposes, such

<sup>63</sup> That information may need to 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) emails or correspondence involving the account and other relevant information.

as: (i) establishing proof of title; (ii) providing information on security and other third-party interests in property; (iii) establishing effectiveness of rights, including against third parties, and priority of rights in the same property; and (iv) identifying businesses, their beneficial owners as well as directors, officers and other persons authorized to bind the business.

78. Register entries may thus inform about the debtor's assets, transactions concluded with the debtor's assets, ongoing proceedings affecting the insolvency estate, names of directors and bank account information. Some registers may be connected with other registers or other sources of information (such as government files) enabling a more comprehensive search.

79. Some registers are also means of enforcing provisional measures and the stay of proceedings, suspensions of rights of disposal of property and other effects of insolvency proceedings. Entries like the tag "in insolvency" or "under administration by the insolvency representative" added in registers for the business name of the debtor or its assets warn third parties against entering into unauthorized transactions with the debtor and the assets affected by those measures. They also prevent recording outcomes of any unauthorized transactions (e.g. transfers of the debtor's assets, creating encumbrances) and making them effective against third parties. At the same time, they record the outcomes of the transactions authorized during the insolvency proceedings and confirm the title and priority of the insolvency estate against third parties.

80. The records of the registers may be used in civil litigation or other proceedings. 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.

81. Most registers are public. 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 the name of the debtor. Some registers do not keep historical records, periodically removing old entries, which necessitates regular checks and extra steps to obtain comprehensive information.

82. Registers containing (commercially) sensitive or confidential records may be closed to public. 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. Sanctions may be imposed for unauthorized access to and use of information from registers.

83. Standards for access to some registers are not uniform. For example, rules for access to central registers of bank accounts differ across States. In some States, these registers may be consulted only by prosecutors and courts in criminal cases or only in certain criminal cases, such as money-laundering. A special court order is required for access to them in other cases. In other States, all courts have direct access to this type of register, and access to them is also granted to foreign courts and foreign representatives under MLATs. Standards for access to some other registers have evolved. For example, information about the financial situation of a beneficial owner included in UBO registers and made previously public have been found in several States to be protected on the ground that unhindered access to that information and the possibility to retain and further disseminate it interfere with privacy and other fundamental human rights of subjects of that information.

84. 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 by virtue of its official status under law, without the need for the insolvency representative to demonstrate an enforceable title or obtain a court authorization. Some States enable and facilitate real-time telematic searches by the insolvency representative directly from the relevant sources,

for use in any proceeding. In other States, access by insolvency representatives to some registers may need to be justified or is conditioned upon obtaining a court authorization, and it is restricted to information strictly necessary for ATR. The court may authorize access by the insolvency representative to a specific register or all relevant registers. Special arrangements may be put in place for processing requests of the insolvency court or the insolvency representative in a specific case (e.g. *ex parte* and with other restrictions on disclosure).

## 8. Duties and powers of the insolvency representative

85. The general obligation of the insolvency representative is to protect and preserve insolvency estate assets.<sup>64</sup> A number of ATR-related duties and powers of the insolvency representative, including investigative, flow from that obligation, some of which arise under the insolvency law while others need to be specified or authorized by the court.<sup>65</sup> Some States require insolvency representatives claiming payment for their services from the public fund to demonstrate to the satisfaction of the court or another competent authority that they have taken all the necessary steps to trace and recover the insolvency estate assets.<sup>66</sup>

86. ATR-related duties and powers of the insolvency representative are closely linked to the rights and obligations of the debtor, other parties in interest and third parties under insolvency law, discussed in other parts of this text. For example, the scope of insolvency representative's ATR-related powers in each concrete case depends on the type of insolvency proceeding to which the insolvency representative is appointed (liquidation or reorganization) and the terms of reference, in particular 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 of the debtor is in place, the division of responsibilities between the debtor and the insolvency representative is to be specified.<sup>67</sup>

87. The ATR-related duties and powers of the insolvency representative 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 and affairs, including liabilities and past transactions (in particular those that took place during the suspect period) from various sources (e.g. the debtor itself, its directors, registers, government files, court and investigation records) and by different means (e.g. examination of the debtor, directors 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 (e.g. special court orders may be required for (public) examination generally or of only some persons). Limits may also be imposed on the matters that could be covered in the examination of the debtor, directors and third parties (i.e. "examinable affairs"). 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 (e.g. employees). In addition, it may be required that the production of documents should not entail an unnecessary and unreasonable burden on the person required to produce them. Violation of those requirements may trigger charges against the insolvency representative for abuse of power or abuse of process;

<sup>64</sup> Recommendation 120.

<sup>65</sup> E.g. examination of records of the wire transfer department of a financial institution related to transactions involving the debtor's account may most certainly require a special court order.

<sup>66</sup> E.g. the insolvency representative may be required to present records of the seizure and of the inventory made, information on all relevant registry searches, communications with tax and other government agencies and minutes of creditor meetings approving ATR strategies, including decisions not to trace and recover certain assets.

<sup>67</sup> Recommendation 112.

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

(e) Taking other steps to protect, preserve and maximize the value of the insolvency estate, including (i) verifying and admitting or 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 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 duties (e.g. for valuation of assets or forensic investigations);<sup>68</sup>

(g) Periodically providing information to the court and 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.

88. In States 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 against the debtor's debtors or creditors and in the context of any proceedings commenced against the debtor and any communications as regards the debtor's affairs with government agencies. 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. Such capacity thus often obviates the need for any court orders, for example, in order to obtain disclosure of otherwise privileged or protected information.<sup>69</sup> In that capacity, the insolvency representative will be able to avail itself directly of the help of law enforcement bodies to compel non-cooperative persons to implement their insolvency law obligations. Where the insolvency representative acts in a more restricted capacity, it may need to obtain court orders to compel third parties to

<sup>68</sup> In some States, authorization of the court or creditors or the creditor committee may be required for involving third parties.

<sup>69</sup> E.g. information protected under laws, rules and regulations related to attorney-client privilege, personal data, business secrets and banking secrecy. Exceptions may apply to individual entrepreneurs.

cooperate with it. Sanctions (e.g. fine or imprisonment) may be imposed on non-compliant persons.

89. Some insolvency representative's powers are time-bound (e.g. limitations period may apply, and the insolvency representative may be held liable for not verifying and adhering to them). Some other insolvency representative's powers may cease to exist in other proceedings since those other proceedings trigger their own formal processes and protections for the parties involved in the proceedings, for instance, against self-incrimination.

90. Apart from limitation periods, other considerations may influence the insolvency representative's ATR priorities, strategies and steps, including availability of funding, chances of success and expected benefits. For example, the insolvency representative may give priority to ATR actions with respect to assets that are perishable, susceptible to devaluation or otherwise in jeopardy. It may also give priority to seeking interim measures of protection with respect to disputed assets (e.g. on which there are competing claims of the insolvency estate and third parties), to preserve the status quo until disputes are resolved. The insolvency representative may decide that holding multijurisdictional forensic investigations with respect to some assets, although desirable, may be unfeasible due to restrictions imposed on tracing and recovery of those assets in the States concerned as well as costs and other considerations. Conversely, it may decide that ATR actions may be feasible but undesirable due to high volatility and vulnerability of assets concerned or their expected low value for the insolvency estate because of the lack of a predictable market for realization of those assets or other reasons.

91. The usual requirements to act with due care and diligence of a prudent businessperson apply to the insolvency representative also when it handles ATR. Safeguards to ensure that the insolvency representative complies with those requirements and performs and exercises its ATR-related duties and powers with the required integrity and quality include the usual oversight over qualification, appointment, remuneration and performance, and procedures for removal and replacement, of the insolvency representative.<sup>70</sup> ATR-specific transparency and accountability safeguards, in particular against possible conflict of interest and collusion with, or undue pressure from, creditors or third parties, include the timely disclosure to the court and the creditors sufficient details of planned, ongoing and completed ATR actions.

92. The insolvency representative may face fines, displacement, disqualification and the obligation to compensate for damages for not performing ATR actions or not performing them properly, whether as a result of misfeasance or malfeasance.<sup>71</sup> Where a competent State authority fulfils the functions of the insolvency representative, State liability for actions of the relevant competent authority arises in such cases.

## 9. Avoidance<sup>72</sup>

93. Avoidance is designed to overturn transactions that are detrimental to the general body of creditors. The use of the word "transactions" in this context is intended to refer to the wide range of legal acts by which assets may be disposed or obligations incurred including by way of a transfer, a payment, granting of a security interest, a guarantee, a loan or a release or an action to make a security interest effective against third parties or by a composite series of transactions.

94. Avoidable transactions include:

(i) **Fraudulent or prejudicial transactions** that intend 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. They may cover the lawful exercise of the right to

<sup>70</sup> Recommendations 115–125.

<sup>71</sup> Recommendation 121 and accompanying commentary.

<sup>72</sup> Recommendations 87–99, 217–218, 228 and 316 and accompanying commentary.

divide property during the suspect period that damaged the interests of all or some of the creditors. They may also cover the filing for registration or registration of a security interest after the commencement of insolvency proceeding beyond the deadline established by law;

(ii) **Undervalued 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;<sup>73</sup> and

(iii) **Preferential transactions** concluded 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. Examples include paying or offsetting debts not yet due, granting a security interest to secure existing unsecured debts or a new security for pre-existing secured debt, repaying a mature debt or carrying out a transaction for valuable consideration after the cessation of payments but before the declaration of insolvency if the counterparty was aware of the cessation of payments.

95. Prejudice to creditors or preference is usually presumed in transactions with related persons. However, 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.<sup>74</sup>

96. Certain transactions are exempted from avoidance, for example transactions that were reasonably required to save the business from insolvency (e.g. debt restructuring transactions, transactions for provision of additional finance or engagement of professional advice at a reasonable cost). Defences to avoidance may be allowed, such as innocent acquisition or 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.

97. In some States, the burden is on the beneficiary of the transaction to prove that the transaction did not fall into any category of avoidable transactions and raise other defences. In other States, the insolvency representative is required to prove that the transaction satisfies the requirements for avoidance. Some States allow the burden of proof to be shifted to the counterparty with regard to those elements that may be difficult for the insolvency representative as an outsider to the transaction to prove.

98. Avoidance proceedings may be handled by the court in charge of insolvency proceedings or another court. In some States, the insolvency representative usually has the principal or sole responsibility to commence avoidance proceedings while creditors are allowed to pursue avoidance with agreement of the insolvency representative or, if it does not agree, with leave of the court.<sup>75</sup> In other States, no authorization of the insolvency representative or the court is required for creditors to pursue avoidance, especially where the insolvency representative decides not to commence it.

99. The time limit for commencement of avoidance proceedings usually begins to run on the commencement of insolvency proceedings. For concealed transactions that the insolvency representative could not be expected to discover, it should run from

<sup>73</sup> In some jurisdictions, there is no concept of undervalued transactions. Instead, directors are pursued for disposal of assets below market value or, more commonly, for breach of fiduciary duties in executing such a transaction (see the next section).

<sup>74</sup> Recommendation 217.

<sup>75</sup> Recommendation 93.

the time of discovery. Bringing avoidance actions against fraudulent transactions should not be subject to a time limit.

100. Assets recovered through avoidance (or upon the court's order, a cash payment for the value of the transaction,<sup>76</sup> subject to any rules for upward valuation) are included in the insolvency estate.<sup>77</sup> The counterparty to the avoided transaction obtains an ordinary unsecured claim against the insolvency estate unless it acts in bad faith (in such case, its claim may be subordinated) or does not comply with the court order (in such case, its claim may be disallowed). Some States require the claim of the counterparty to be settled once the asset is returned, or the cash payment is made, to the insolvency estate.

101. Issues related to avoidance may be raised as a defence or as an incidental question in other proceedings and against enforcement actions.

## **10. Actions against directors, equity holders and other persons**

### **(a) Cases of embezzlement, misappropriation and other similar acts**

102. Where misappropriation or other similar act concerning the assets that belong to 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 into the extent of involvement of directors, equity holders and other persons in those actions and potential breaches of their fiduciary duties. If their fraudulent or dishonest conduct is established (e.g. the assets were diverted for personal gain or the directors were engaged in self-dealing), these persons may face civil and criminal liability and be held personally liable.

103. The pursuit of civil claims against such persons (as opposed to criminal cases discussed in chapter IV of this text) primarily aims at the recovery of the assets in question or, if not possible, reimbursement to the estate of the value of those assets (that is to restore the integrity of the insolvency estate to the position it would have been if the misappropriation or similar act had not occurred). Compensation for damages caused by the act, such as lost profit, may also be obtained, in the amount ordered by the court. In addition, where personal benefits or profits were derived from those assets, the persons concerned should be required to account for them and surrender those benefits and profits to the insolvency estate. Personal assets (e.g. bank accounts, real estate or investments) of the persons found liable for misappropriation or similar acts could be used to obtain the ordered compensations to the insolvency estate.

104. Most considerations discussed above with respect to avoidance are applicable to the pursuit of claims for misappropriation or similar acts, including that the cause of action belongs to the insolvency estate, that the insolvency representative has the principal responsibility to bring such an action and that creditors or other parties in interest may do so only with the agreement of the insolvency representative or, where the insolvency representative does not agree, with leave of the court. The latter requirement is not found in all States.

105. The pursuit of claims for misappropriation or similar acts is in addition to avoidance of fraudulent, prejudicial, undervalued or preferential transactions that might have been concluded between the debtor and directors, equity holders and other persons (e.g. unreasonable remuneration packages to directors before commencement of insolvency proceedings). The pursuit of those claims is also in addition to other remedies that may be available under insolvency and other laws against such persons, such as deferral of payments owed to them from the insolvency estate, subordination or denial of their claims against the insolvency estate and imposition of subsidiary or joint and several liability on them for repayment of the debts of the insolvency estate (see below).

<sup>76</sup> Recommendation 98.

<sup>77</sup> Recommendation 35.

**(b) Verification of claims**

106. Effective mechanisms for verification of claims prevent submission of fraudulent or non-existent claims and help to identify and address such claims before they are admitted in insolvency proceedings. This in turn eliminates the need for subsequent ATR. In addition, during verification, certain claims (e.g. of related persons) are made 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 claim's amount may be reduced or the claim may be subordinated.<sup>78</sup>

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

107. Some States envisage, under exceptional circumstances, the possibility of piercing the corporate veil and extending liability for repayment of the debts of the insolvency estate to equity holders, directors and other persons, for example to a parent company in an enterprise group. The circumstances that may justify those exceptional measures should be very limited, for example 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.

**(d) Contribution orders**

108. 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 insolvent 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). Outside the enterprise group insolvency context, contribution orders may be ordered, for example, where a person conceals its commercial activity through the debtor. Contribution orders are used sparingly because they touch upon many different interests that may be difficult to reconcile.

**(e) Substantive consolidation**

109. 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 the substantive consolidation is essential to rectify that scheme or activity. An order for substantive consolidation has the following effects: (i) the assets and liabilities of the substantively consolidated entities are treated as if they were part of a single insolvency estate; (ii) claims and debts between entities included in the order are extinguished (this may include the secured indebtedness owed between those entities); and (iii) claims against individual entities included in the order are treated as if they were claims against the single insolvency estate.<sup>79</sup> Some case law indicates that substantive consolidation may concern only some assets and liabilities of the substantively consolidated entities.

110. Substantive consolidation is treated cautiously since it raises sensitive issues and may create tensions with the principle of separate legal entity. The commonly found safeguards include: (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

---

<sup>78</sup> Recommendations 169–184, 319–325 and part three.

<sup>79</sup> Recommendations 224 and 225.



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, creditor perceptions should not be overlooked. For example, where an insolvent member of an enterprise group transfers assets to the solvent group member, 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.<sup>80</sup>

**(f) Procedural consolidation or coordination**

111. Procedural consolidation or coordination of related insolvency proceedings is used to address comprehensively intertwined debts. The need for these measures usually arises in enterprise group insolvency<sup>81</sup> and simplified insolvency proceedings.<sup>82</sup> In procedural consolidation, 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 discussed above, the assets and liabilities of each debtor involved remain separate and distinct.

112. In procedural coordination, two or more judges handling related proceedings ensure their coordination but each proceeding remains separate. For example, one of the coordinated insolvency proceedings may address personal debts of an individual debtor,<sup>83</sup> or although coordinated, separate insolvency proceedings may proceed for a parent company and its subsidiaries.

113. Procedural consolidation and coordination increase information flow across related proceedings. They may reveal transactions between the related parties as well as assets whose true ownership may be obfuscated through arrangements of the related debtors and other parties. As such, they make ATR more efficient and less fragmented.

**11. Post-closure measures**

114. The insolvency proceedings already closed may be reopened if, after the closure of the insolvency proceedings, the assets that should have become part of the insolvency estate (e.g. concealed or undisclosed by the debtor) are discovered, or if the fact of concealment, non-disclosure or illegal transfer of such assets is revealed.

115. Some States allow some ATR actions, such as avoidance or pursuit of civil actions against directors, equity holders or other persons, to continue after the closure of insolvency proceedings by assigning them to special purpose companies that may also be entrusted with handling the outcomes of those ATR actions, for example distribution of any additional proceeds to creditors. Such arrangements alleviate the need to keep the insolvency representative engaged and the insolvency proceedings opened for the duration of those ATR actions or to reopen the insolvency proceedings if the outcomes of those ATR actions so require. They also address situations where insolvency representatives, facing the perspective of a long engagement with no or insufficient remuneration, are reluctant to commence ATR actions.

<sup>80</sup> Recommendations 219–231 and accompanying commentary.

<sup>81</sup> Recommendations 202–210 and accompanying commentary.

<sup>82</sup> Recommendations 364–366 and accompanying commentary.

<sup>83</sup> Recommendation 273 and accompanying commentary.

## B. Cross-border context

### 1. Initiation of a cross-border ATR action

116. The assets that belong to the insolvency estate or the evidence necessary to trace and recover those assets may be located in different States, which would necessitate the commencement of a cross-border ATR action in those States. In addition, the debtor, directors, witnesses or other persons in possession of those assets, evidence or relevant information 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 proceeding, taking cross-border ATR actions to compel them to cooperate may be necessary.

117. 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 is required for the insolvency representative to pursue cross-border ATR actions. The insolvency representative remains accountable for those actions to the court and the creditors.

118. The insolvency representative may be required to involve a competent State authority (e.g. an insolvency ombudsman) in some 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 Matters (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 Matters (the Hague Evidence Convention), procedures of that Convention will be followed for obtaining evidence.

119. 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 licences and take diplomatic or consular actions (e.g. legalization or letters rogatory) in order to seek ATR-related assistance in foreign States.<sup>84</sup> 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 is required for such purpose. This in turn enables timely initiation of ATR actions by creditors if they wish to pursue those actions in the State that commenced insolvency proceedings or elsewhere.<sup>85</sup>

### 2. ATR actions in the receiving State

120. Cross-border requests for ATR measures may originate from the main, non-main or other insolvency proceeding. They may be handled in the receiving State by civil, commercial or specialized insolvency courts or other competent authorities as part of or in parallel with domestic insolvency or other proceedings related to the same debtor or in the absence of such. Requests may be handled *ex parte* and with other necessary measures to ensure efficiency and effectiveness of ATR given that cross-border ATR requests are often initiated in circumstances of imminent danger of dissipation or concealment of the assets that belong to the insolvency estate.

121. Measures that may expedite consideration of such requests include those listed in court-to-court cross-border insolvency cooperation guidelines and principles effective in some States, for example: (i) sharing evidentiary and written materials, utilizing modern means of communication as far as possible; (ii) permitting the authentication of documents, where required, on any basis that is rapid and secure,

<sup>84</sup> E.g. articles 7, 9, 11 and 15 of MLCBI.

<sup>85</sup> E.g. article 14 (2) of MLCBI.

including via electronic transmission; (iii) recognizing and accepting as authentic the provisions of statutes, statutory or administrative regulations and court rules of general application applicable to the proceedings in foreign jurisdictions without further proof or exemplification (such recognition and acceptance not constituting recognition or acceptance of the legal effect or implications of those provisions); and (v) accepting without further proof or exemplification that orders made in the foreign proceedings were duly and properly made or entered on or about their respective dates, subject to court reservations concerning possible appeal and review, proper objection on valid grounds and other safeguards.

122. Different conditions may be imposed for granting ATR requests. Some conditions may be specific to a particular ATR measure requested. For example, the identification of an asset in question, its location in the territory of the receiving State and that the asset belongs to the insolvency estate may need to be demonstrated by evidence when requesting an asset freezing measure. Other conditions may apply generally to any cross-border ATR request. For example, some States commence a local proceeding, insolvency or other, before granting an ATR request. In other States, recognition of a foreign proceeding or a foreign judgment may be a pre-condition for obtaining a domestic ATR relief, but an urgent provisional relief may be granted before the decision on application for recognition has been made. Public policy exceptions and safeguards related to the protection of creditors and local interests usually apply.

123. Inter-State arrangements, such as those in the EU, may require the States concerned to enable direct access to their courts by the foreign representatives of the foreign (main) proceeding taking place in those States. Such direct access may include the rights to request directly, without any further formalities, any measures available under the law of the State where the assets are situated to secure and preserve those assets.

124. The UNCITRAL cross-border insolvency framework envisages that ATR-related assistance may be provided by the receiving State irrespective of recognition of foreign proceedings.<sup>86</sup> It also envisages a broad range of provisional relief, including staying execution against the debtor's assets, entrusting the administration or realization of certain assets (e.g. perishable) to the foreign representative, suspending the right to dispose of the assets of the debtor or another person against whom the judgment has been issued and providing for examination of witnesses or the taking of evidence.<sup>87</sup> It provides that, in enterprise group insolvencies, relief may concern any enterprise group member subject to or participating in a planning proceeding, subject to some safeguards.

#### **(a) Provisional measures**

125. As discussed in the domestic context above, ATR measures may take the form of provisional measures. To be effective across borders, those provisional measures must be recognized and enforced in foreign States. In some States, provisional measures put in place in the State that commenced insolvency proceedings may be recognized and enforced via exequatur, on the basis of a treaty, reciprocity or comity. Inter-State arrangements, such as those in the EU, may require automatic recognition and enforcement of provisional measures originated in those States. Other States 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.

126. The decision recognizing provisional measures usually conditions continuation of those measures on the filing of a request for recognition of the foreign (main) proceeding within a short period of time (e.g. 20 days). Public policy exceptions and adequate creditor protection safeguards also apply. In particular, justifications for

<sup>86</sup> E.g. articles 7 and 9 of MLCBI and article 8 of MLEGI.

<sup>87</sup> E.g. article 19 of MLCBI, article 12 of MLIJ and article 22 of MLEGI.

imposing a provisional measure and accompanying safeguards in the requesting State may affect cross-border recognition of the measure.

**(b) Recognition and enforcement of insolvency-related judgments**

127. ATR-related aspects are very often addressed in insolvency-related judgments, for example on avoidance or pursuit of actions against directors. Most States recognize insolvency-related judgments via exequatur, on the basis of a treaty, reciprocity or comity. Inter-State arrangements, such as those in the EU, may require automatic recognition of insolvency-related judgments originating in the States concerned. Other States recognize only those insolvency-related judgments that relate to the foreign proceeding that is eligible for recognition. Some States require that the defendant should not have had its local domicile at the time when the claim leading to the judgment was filed.

128. The UNCITRAL cross-border insolvency framework expedites recognition of insolvency-related and other judgments, including, under certain conditions, judgments that originate from neither main nor non-main proceeding, provided a judgment has effect in the originating States.<sup>88</sup> It provides for the possibility to recognize and enforce a severable part of an insolvency-related judgment where recognition and enforcement of that part is sought or where only that part of the judgment is capable of being recognized and enforced.<sup>89</sup>

129. In some States, a recognized foreign judgment has the same effect as in the originating State. In other States, it has effects which it would have had if it had been issued by the domestic court. These two approaches have been reflected in the UNCITRAL cross-border insolvency framework.<sup>90</sup>

**(c) Recognition of foreign proceedings**

130. Another way to give effect to a domestic ATR measure or obtain an equivalent or similar ATR relief in a foreign State is through recognition of foreign proceedings. 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, particularly as regards the treatment of creditors, for recognition of a foreign proceeding to be granted.

131. The UNCITRAL cross-border insolvency framework expedites recognition of foreign proceedings, including a foreign planning proceeding in enterprise group insolvencies. It envisages that courts should decide on the application for recognition “at the earliest possible time”,<sup>91</sup> 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 and allows a modification or termination of recognition.<sup>92</sup> Some enacting States fix a time period, usually very short (3–10 days), for consideration of a recognition application.

132. Once a foreign proceeding has been recognized, any decision issued in that proceeding, including those related to ATR, may become effective in the recognizing States without the need for further action. In some States, recognition of a foreign proceeding leads to the opening of local ancillary proceedings unless a petition not to open it is granted, which would not be always the case, for example where local

<sup>88</sup> Articles 9, 10 and 14 (h) of MLIJ and accompanying commentary. See also article X adopted by UNCITRAL together with MLIJ.

<sup>89</sup> Article 16 of MLIJ.

<sup>90</sup> Article 15 (1) of MLIJ.

<sup>91</sup> Article 17 (3) of MLCBI.

<sup>92</sup> E.g. article 17 (4) of MLCBI and article 23 of MLEGI.

creditors (e.g. employees) have filed claims in the call for submission of claims following recognition. In some cases, local insolvency proceedings, although not required to be commenced by law, are commenced for convenience and other reasons.

133. The UNCITRAL cross-border insolvency framework considerably facilitates recognition of a foreign proceeding and ensuing ATR actions in the recognizing State. Recognition of the foreign main proceeding leads to certain additional benefits. In addition to those discussed in the sections below, recognition of the foreign main proceeding imposes some limitations on the commencement of local insolvency proceedings and the scope of those proceedings. In particular, an insolvency proceeding in the recognizing State may be commenced only if the debtor has assets in that State, and the effects of that proceeding would be limited to those assets and, to the extent necessary to implement cooperation and coordination with foreign courts and foreign representatives, to other assets of the debtor that, under the law of the recognizing State, should be administered in the local insolvency proceeding.<sup>93</sup>

#### **(d) Powers of the foreign representative**

134. In some States, upon recognition, the foreign representative obtains the same rights and obligations as a locally appointed one, including as regards ATR actions, such as filing claims for the recovery of insolvency estate assets against third parties, but it may not exercise any public powers or take any coercive actions in the recognizing State. In addition, removal of assets abroad requires special court authorization. Other States defer to the law of the foreign proceeding as regards powers of the foreign representative unless giving those powers domestically contradicts public policy or domestic laws of the recognizing State or is incompatible with the effects of a domestic insolvency proceeding opened in the recognizing State or with measures put in place in that State.

135. In States 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 is 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.

136. Under the UNCITRAL cross-border insolvency framework, the foreign representative, upon recognition of a foreign proceeding, whether main or non-main, may: (i) make petitions, requests or submissions in an insolvency proceeding concerning the debtor in the recognizing State;<sup>94</sup> (ii) intervene in any proceeding commenced by the debtor or against the debtor in the recognizing State;<sup>95</sup> (iii) 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;<sup>96</sup> and (iv) request any relief available under the law of the recognizing State.<sup>97</sup> In exercising those powers, the insolvency representative must comply with the law of the recognizing State.<sup>98</sup>

#### **(e) Domestic relief**

137. 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,

<sup>93</sup> Article 28 of MLCBI.

<sup>94</sup> Article 12 of MLCBI.

<sup>95</sup> Article 24 of MLCBI.

<sup>96</sup> Article 23 of MLCBI.

<sup>97</sup> Article 21 of MLCBI.

<sup>98</sup> See e.g. article 5 of MLCBI.

this relief is automatically effective upon recognition of a foreign main proceeding<sup>99</sup>); (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 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. Relief may include recognition and enforcement of a judgment.<sup>100</sup>

138. Other relief may be granted, which may or may not be limited in its type, scope and other aspects to the ones available under the domestic law of the recognizing State although the relief granted to the foreign representative and the foreign proceeding rarely exceeds the relief available domestically to locally appointed insolvency representatives and locally commenced insolvency proceedings. The UNCITRAL cross-border insolvency framework envisages that if the recognized insolvency-related judgment provides for relief that is not available under the law of the recognizing State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.<sup>101</sup> Some States give effect to the foreign relief if this does not contradict public policy or domestic laws of the recognizing State and is not incompatible with the effects of a domestic insolvency proceeding opened in the recognizing State or with the measures put in place in that State.

139. Additional relief may include approval by the court of undertakings to creditors as regards the treatment of their claims in local insolvency proceedings and the court's decision to stay or decline to commence an insolvency proceeding. In enterprise group insolvencies, relief may be granted with respect to any enterprise group member subject to or participating in a planning proceeding<sup>102</sup> and include any relief that is necessary for implementation of the group insolvency solution, subject to additional safeguards and restrictions.

#### **(f) Coordination of relief in concurrent proceedings**

140. Where concurrent insolvency or other proceedings with respect to the same debtor or enterprise group take place, coordination of ATR-related relief granted to different proceedings may be necessary to achieve coherence, effectiveness and efficiency of ATR while also ensuring non-interference with the administration of proceedings in different States (see the next section for description of some means of coordination). Another goal is to ensure that a creditor that has received part payment in respect of its claim in one insolvency proceeding would not receive a payment for the same claim in the other insolvency proceeding(s) 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.<sup>103</sup>

141. The UNCITRAL cross-border insolvency framework envisages that: (i) any relief granted to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding by the receiving State must be consistent with the foreign main proceeding; (ii) the court may refuse to grant relief between application and recognition if such relief would interfere with the administration of a foreign

<sup>99</sup> Article 20 of MLCBI.

<sup>100</sup> Article X adopted by UNCITRAL together with MLIJ 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.

<sup>101</sup> Article 15 (2) of MLIJ.

<sup>102</sup> E.g. article 24 of MLEGI.

<sup>103</sup> Article 32 of MLCBI.

main proceeding;<sup>104</sup> (iii) 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 to that non-main proceeding would be expected to be reviewed by the court and modified or terminated if inconsistent with the foreign main proceeding; (iv) 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;<sup>105</sup> and (v) 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 its State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.<sup>106</sup>

142. In addition, under the UNCITRAL cross-border insolvency framework, recognition and enforcement of an insolvency-related judgment may be refused where, among others: (i) the judgment is inconsistent with a judgment issued in the receiving State in a dispute involving the same parties; (ii) the judgment is inconsistent with an earlier judgment issued in another State in a dispute involving the same parties on the same subject matter, provided the earlier judgment fulfils the conditions necessary for its recognition and enforcement in the receiving State; (iii) recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings, including by conflicting with a stay or other order that could be recognized or enforced in the receiving State; or (iv) the judgment materially affects the rights of creditors generally.<sup>107</sup>

### 3. Cross-border communication, cooperation and coordination

143. Cross-border ATR is enabled and facilitated by cooperation of courts, insolvency representatives and a group representative to the maximum extent possible. Cooperation may be implemented by any appropriate means, including: (i) direct communication between them, including for the purpose of requesting ATR-related information and assistance; (ii) coordination of the administration and supervision of the assets and affairs of the debtor, of the affairs of enterprise group members and of concurrent insolvency proceedings; (iii) approval and implementation of agreements concerning the coordination of proceedings; (iv) conducting hearings in coordination with another court; and (v) appointing a single or the same insolvency representative to administer and coordinate concurrent insolvency proceedings.<sup>108</sup> Safeguards that usually accompany those measures include protection of domestic public policies, of confidential information, of jurisdiction and independence of the courts and of the substantive and procedural rights of the parties. In addition to those measures, some insolvency laws require publication in the domestic official gazette of information relating to cross-border insolvency proceedings.

144. Specific means of cooperation depend on the case and the urgency of ATR relief and other considerations, for example: (i) the location of assets being traced or recovered; (ii) the location of the debtor, witnesses or other relevant persons; (iii) the law governing the assets and other ATR matters; (iv) the courts that have jurisdiction over those assets and matters; (v) a party best placed to undertake ATR actions in different States; (vi) whether an enterprise group is involved; and (vii) whether concurrent proceedings take place, or seeking recognition of a foreign proceeding or the commencement of a local proceeding is required.<sup>109</sup>

145. Cross-border insolvency agreements may need to be put in place for especially complex ATR cases, with the aim of designing an optimal and coordinated approach

<sup>104</sup> Article 19 (4) of MLCBI.

<sup>105</sup> Article 30 of MLCBI.

<sup>106</sup> Articles 21 (3), 23 (2) and 29 (c) of MLCBI.

<sup>107</sup> Article 14 of MLII.

<sup>108</sup> See articles 25–27 of MLCBI and articles 9–18 of MLEGI.

<sup>109</sup> As noted in this text, the commencement of a local proceeding may be required by law, or it may be initiated by the foreign representative for other reasons (e.g. practical convenience).

to ATR actions by several insolvency representatives (and a group representative in enterprise group insolvencies). An agreement may: (i) 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 States; (ii) coordinate the steps and manner in which the assets would be traced and recovered in all States involved;<sup>110</sup> (iii) also include provisions on sharing information and progress reports, holding consultations regarding ATR actions and protecting confidentiality; and (iv) specify the source of funding for ATR actions.<sup>111</sup> Courts approving, and involved in, the implementation of such agreements may agree on modalities of coordination of provisional and other relief, in particular relief from the stay of proceedings or, conversely, imposition of such a stay where it was not (automatically) imposed.

---

<sup>110</sup> E.g. depending on the regime for a stay of proceedings upon commencement of insolvency proceedings, requesting an urgent relief from the stay may be necessary in States where it was imposed, to make an ATR action possible there, or conversely, requesting the imposition of a stay of proceeding may be necessary in States that did not impose it, in order to preserve a status quo before rights to an (disputed) asset are established.

<sup>111</sup> 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 debtor's assets 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.



## Chapter III

### Civil proceedings

#### A. Introduction

146. Many ATR actions are pursued through civil proceedings. Those proceedings may take place domestically or abroad in parallel with insolvency proceedings, each with its rules, including for disclosure orders and asset protection measures. Some civil proceedings (e.g. *actio pauliana* or constructive trust) might be initiated before commencement of insolvency proceedings and subsequently taken over by the insolvency representative or, if it is allowed by law or the court and the insolvency representative, they may continue as creditor actions, with the result integrated in insolvency proceedings when and as appropriate.

147. The decision to commence, intervene, take over or join proceedings is informed by the availability of funding, cost-benefit analysis and other considerations, many of which have been discussed in the preceding two chapters of this text.

#### B. Disclosure measures

##### 1. Types of measures

148. Disclosure measures may be ordered by the court at pre-litigation, litigation and post-litigation stages of civil proceedings to gather evidence from parties and non-parties that cannot be obtained by other means (e.g. non publicly available). They vary across jurisdictions depending on whether information, documents and evidence-sharing involves the direct exchanges between the parties or submissions to the court. Not all measures available during litigation may be available at pre- and post-litigation stages.

149. Disclosure measures at the pre-litigation stage are usually imposed to collect and 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 altered before litigation is commenced. In some States, pre-litigation disclosure measures are 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 disclosure measure.<sup>112</sup>

150. Disclosure measures during the litigation stage are subject to the court rules and procedures. The court may order parties and witnesses to appear for questioning, order persons in possession of documents to produce those documents, question parties and witnesses or view things or review documents. 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.

151. Some States permit the judgment creditor to obtain disclosure measures after litigation in aid of the enforcement of the judgment. They allow the judgment creditor to obtain information about the debtor's assets, including concealed assets, from the judgment debtor or third parties. The scope of the measure against the debtor may be broad while against third persons it is ordinarily limited to the debtor's assets and

<sup>112</sup> 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.

cannot be expanded to other matters. However, when a third party has close ties to the debtor, more extensive disclosures may be permissible, including as regards the third person's assets.

## 2. Conditions for use

152. In most States, disclosure measures are 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 States, 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.

153. In States 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. Where the court obtains evidence itself (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.

154. 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). In some States, sensitive information is generally protected and may be revealed only if parties agree. In other States, the court decides whether such information should be revealed. In yet another group of States, such information is less protected, or must be made available under applicable law.

155. 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.

## C. Asset protection measures

### 1. Types of measures

156. Asset protection measures include: attachment or garnishment orders;<sup>113</sup> sequestration;<sup>114</sup> embargoes;<sup>115</sup> freezing orders;<sup>116</sup> judicially ordered security interests

<sup>113</sup> 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 States, the creditor does not need to specify the debtor's assets that might be subject to attachment or garnishment. 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 States, 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 States, a general description, such as "all machines in warehouse X" or "all business accounts with bank Y", may suffice. In other States, if there are no known assets, a generic attachment of assets may be requested. With respect to property subject to registration, the attachment operates through the registration of the measure in public records, which has the effect of publicity and effectiveness against third parties. Some assets (e.g. personal items or basic income) may not be subject to attachment or garnishment.

<sup>114</sup> Whereby the assets are taken away by a public authority.

<sup>115</sup> Whereby the debtor may use the embargoed assets but must refrain from alienating them and must ensure their diligent preservation.

<sup>116</sup> Known as Mareva injunctions in some jurisdictions (*Mareva Compania Naviera S.A. v. International Bulk Carriers S.A.* [1975] 2 Lloyd's Rep. 509). Injunctions ordered with regard to all assets of the defendant anywhere in the world are known as "worldwide freezing orders" (WFOs). They are 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.

or liens;<sup>117</sup> and seizures.<sup>118</sup> 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 orders not to remove an asset from a certain place; not to transfer an asset or to encumber it with a security interest; to return an asset to a particular place; or to place an asset into the custody of a trusted third person or the court.

157. Some States 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.

158. Depending on their effect, measures 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 (a) an obligation of the defendant not to dispose of the attached asset at the risk of facing criminal sanctions and (b) upon execution of the order, the effective freeze of the asset by rendering any transaction or encumbrance with respect to that asset ineffective.

## 2. Conditions for use

159. Asset protection measures 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 or against a third party, such as a trustee, a bank or an intermediary with whom an asset is held. They are often accompanied by restrictions on disclosure.

160. 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 States, provide some evidence of the claim. However, since the purpose of requesting an asset protection measure 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 the measure is not as high as that required to prevail on the merits. A lower standard of proof, such as a good arguable case or the appearance of a legitimate right (*fumus boni iuris*), is usually sufficient.

161. Most States also require the plaintiff to establish the need for an asset protection measure, for example that without the measure: (a) enforcement of the judgment would be impossible or significantly impaired; (b) the plaintiff is likely to suffer an injury not reparable by a claim for damages or other remedy against the defendant; (c) probability of the plaintiff's suffering an irreparable injury is high while the probability of the defendant's suffering an irreparable injury with the measure in place is low; or (d) the defendant might flee or remove assets from the jurisdiction of the court or otherwise dissipate them.

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

<sup>117</sup> 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.

<sup>118</sup> Whereby the seized assets are placed at the disposal of the court.

## D. Generally applicable safeguards

163. The requirements of a (good or strong) 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 applicant's interests 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 the "respondent", who may be the (potential) defendant or another person). 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.

164. Additional safeguards may apply to especially intrusive measures (e.g. site visits, search of premises, forensic examinations of electronic systems and devices, 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 any items removed. 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 it has identified its assets or made them available for attachment or garnishment, that order must be chosen over an arrest of the debtor. Furthermore, those measures are usually for a short duration, extended only in extraordinary circumstances to achieve the purpose for which they were ordered.

165. 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 non-compliance with the court's conditions for granting a measure.

166. 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 for imposition of the measure are proven to be missing. In some States, 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 States, some measures are granted *ex parte* and with restrictions on disclosure as a matter of course on the assumption that once there is a danger of dissipation, speed and surprise are of the essence.

167. 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 States, the applicant is also liable to the respondent for any damages caused by the wrongful or unjustified imposition of a measure. In some States, such liability arises regardless of whether the applicant acted with the wrongful intent or negligence in obtaining the measure ("no-fault liability"). The posting of security may be mandatory or at the discretion of the court. In the latter case, the court assesses a level of risk that the respondent will not get compensated by the applicant for damages arising from the wrongful imposition of the measure.

168. 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 States, the defendant can have the measure terminated if

circumstances have changed (e.g. because the defendant has paid the debt or the debt has otherwise been extinguished).

169. Other safeguards vary across States and within the same jurisdiction may depend on the specific measure sought, the applicant, the respondent, the context and other circumstances. For example, questioning or examination may take place orally or in writing, publicly or privately, on oath, before the court and in presence of trusted persons or otherwise. Some States do not guarantee a right to refuse testimony and do not offer protection against self-incrimination but bar the use of information obtained in subsequent criminal proceedings. Other States do not require the respondent to testify if this will expose the respondent to criminal liability. The respondent may also refuse permitting search and seizure of materials protected by privilege.

170. In most States, courts retain discretion to decide whether to apply the measure given all the circumstances of the case. In some States, courts may combine and tailor measures to the needs at hand, including safeguards for implementing them.<sup>119</sup>

## E. Cross-border aspects

### 1. Jurisdiction

171. Courts may be reluctant to grant disclosure and other *in personam* measures against persons located abroad unless those persons have some presence in the jurisdiction. Rules in some States may require that, for the court to be able to order *in personam* measures, it should have jurisdiction over the person against whom such measures are ordered or would have jurisdiction in the proceedings on the merits. Other States take a more flexible approach and allow their courts to grant disclosure and other *in personam* measures in other situations, including against unknown persons whose location is also unknown. In comparison, jurisdiction to order or enforce *in rem* measures (e.g. attachment and garnishment orders) depends on the location of the asset in question. In some States, attachment or similar *in rem* measures may be imposed also by the court that has or would have jurisdiction in the proceedings on the merits.

### 2. Service abroad

172. Many States require the diplomatic process to be used for service abroad but the effectiveness of other means is increasingly recognized. Where there is occasion to transmit a judicial or extrajudicial document for service abroad by States parties to the Hague Service Convention, the following procedures may be used under that Convention: the letter-of-request procedure (articles 2–7); service through the

<sup>119</sup> E.g. 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: 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 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.

diplomatic or consular channels (articles 8–9); service by direct mail or direct communication among courts (article 10); and other permissible methods of transmission (article 19). The Convention does not exclude the possibility of using electronic means of transmission.<sup>120</sup> It does not apply where the address of the person to be served with the document is not known.<sup>121</sup>

173. Courts have used various means and combinations of means for service abroad.<sup>122</sup> Criteria and conditions for service abroad by alternative means included whether: (a) efforts have been made to serve the respondent by traditional means; (b) using such methods turned out to be, or are deemed *ab initio*, ineffective or futile; (c) communicating by an alternative means has been identified as a fair and effective means of communication with the defendant; (d) the defendant has given its consent for service via an alternative means; (e) the respondent is trying to circumvent the traditional means of service and to what extent it is doing so; and (f) the chosen alternative means is prohibited by the law of the addressee's State. Some courts have elaborated on specific conditions and technical requirements for the use of alternative means, such as reliability, integrity, preservation, security and confidentiality of data, identification of the recipient and of the time of the communication and receipt as well as confirmation of receipt. Some courts considered service to be automatically effected following a certain period of time after transmission.

174. Service outside a specific jurisdiction by alternative means may be restricted in some States to their nationals or residents located in another State. In other States, it is used only for foreigners.

### 3. Evidence taking abroad

175. If evidence or the person in control of the evidence is located abroad, one of the procedures under the Hague Evidence Convention<sup>123</sup> may be used by the Contracting Parties to that Convention. In other cases, a letter of request may be issued to the competent foreign authority under another applicable framework (e.g. a MLAT). Inter-State arrangements, such as those in the EU, may allow the direct taking of evidence from the States concerned if the person from whom evidence is to be taken voluntarily cooperates.

176. In some States, the court may order domestic discovery for use in a foreign litigation, planned or pending, upon application of an interested person. The measure is discretionary and may be refused if, for example, the court finds that the applicant attempts to circumvent proof-gathering restrictions imposed by the foreign country.

### 4. Cross-border recognition and enforcement

177. The effect of most types of disclosure and asset protection measures as interim measures is limited to the territory of the issuing State but there is a growing trend of not refusing recognition and enforcement of interim measures on the sole ground that they are interim. Recognition and enforcement of interim measures, subject to limited exceptions, are enabled and facilitated by some international texts,<sup>124</sup> including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New

<sup>120</sup> For further information, see “Practical Handbook on the Operation of the Service Convention” (2016), HCCH.

<sup>121</sup> Article 1.

<sup>122</sup> E.g. email addresses, social media posts, digital platforms, websites, instant messaging applications, non-fungible-token airdrops, in particular, for service abroad to “persons unknown” wherever located. See e.g. *Osbourn v. Persons Unknown* [2023] EWHC 39.

<sup>123</sup> The letter-of-request procedure under articles 1–14 or alternative procedures through diplomatic officers, consular agents and commissioners under articles 15–22. 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.

<sup>124</sup> See e.g. the OAS Convention on Execution of Preventive Measures (1979); MAL, articles 17 H–17 I.

York, 1958),<sup>125</sup> if an interim measure is issued by the arbitral tribunal in the form of an arbitral award. Other relevant international texts exclude interim measures from their scope.<sup>126</sup>

178. Upon receipt of a request for recognition and enforcement of foreign interim measures, some States give effect to the foreign interim measures, subject to public policy and other exceptions. Other States issue an equivalent domestic measure or, if the measure in the issuing State is not known to, or not available for a given case under, the law of the receiving State, adapt the foreign measure to the local 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.

---

<sup>125</sup> United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3. Also available at: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”) | United Nations Commission on International Trade Law.

<sup>126</sup> See e.g. 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 MLII.

## Chapter IV

### Criminal proceedings

#### A. Introduction

179. Some ATR actions may be pursued through related criminal proceedings, which may commence before, in parallel with or after commencement of insolvency proceedings. For example, a tax inspector, an accountant, an auditor, a creditor or a whistle-blower 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 or later time, an application for commencement of insolvency proceedings might have been filed with respect to the debtor. In other cases, investors might have become victims of the Ponzi scheme and initiated in parallel insolvency and criminal proceedings. In yet other cases, the insolvency representative, creditors or other parties in interest might trigger criminal proceedings after commencement of insolvency proceedings by reporting suspected criminal activities of the debtor, or other persons impacting or implicating the debtor, before or during the insolvency proceedings, which may include the insolvency representative or the debtor-in-possession during insolvency proceedings.

180. The stay of proceedings does not stay criminal proceedings. The reverse may be true: the insolvency proceeding or certain stages thereof (e.g. realization of insolvency estate assets and distribution of proceeds to creditors in liquidation) may be stayed until criminal proceedings have been closed. Criminal proceedings may influence the insolvency proceedings in other respects. For example, the liquidation of the debtor may be ordered by the court in charge of the related criminal case, or the pool of assets for distribution to creditors may be affected by multiple victim compensation orders and priorities. The court overseeing the insolvency proceedings, the insolvency representative and other parties in interest would be required to cooperate and share information to support criminal investigations and proceedings. At the same time, criminal proceedings may aid ATR in several respects, as discussed in sections below.

#### B. Compensation for damages

181. Entities and persons who have suffered damage as a result of a criminal act, which may include the general body of creditors,<sup>127</sup> have the right to initiate or join legal proceedings against those responsible for that damage in order to obtain compensation. Claims for damages may be filed either with the criminal or civil court or both, and it may be allowed to switch between the available options. In some States, when both proceedings are pending regarding the same facts, to avoid any conflict, civil proceedings are suspended until a final judgment has been reached in the criminal proceedings. Pursuing claims for damages in a criminal court may have certain advantages, for example the possibility to use for the claim all the evidence compiled by the prosecutor and the police during the criminal investigations.

182. Rules for the calculation and award 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, differ across States. Damages may be compensated from the forfeited or confiscated assets.<sup>128</sup> The disposal of those assets by the court may

<sup>127</sup> E.g. in cases of embezzlement, misappropriation and other similar actions with respect to the debtor's assets (see the relevant section in chapter II above) or where the debtor was the victim of fraud by third parties that led to its insolvency.

<sup>128</sup> 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



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. Reaching a settlement with the perpetrator is possible in some States, 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 pursuant to the agreed plan. Settlements would constitute irrefutable presumption of liability, which could subsequently be used in other proceedings.

### C. Access to criminal case files

183. Because of far-reaching investigative powers of criminal investigation agencies and a wider range of tools that they employ (e.g. search warrants, arrest warrants, interception of mails, wiretapping), criminal case files may contain information and evidence that may be very difficult or impossible to obtain in related insolvency or civil proceedings. That information may significantly facilitate ATR, in particular in substantiating a request for an urgent ATR relief domestically or abroad.

184. In some States, it is possible for an interested person, such as the insolvency representative, to obtain access to criminal case files by joining criminal proceedings as a “civil party” (see the next section). In other States, the insolvency representative may be granted such access by virtue of its official status or by a special court order. In the latter case, the insolvency representative may have to demonstrate that the materials in question are expected to have an intrinsic value for ATR and that the need for disclosure outweighs the need for secrecy of criminal investigations. Other persons with access to criminal case files may be allowed by law to share the obtained information with the insolvency court, the insolvency representatives or other authorized persons, subject to the usual safeguards to protect interests of the criminal investigation and the rights of the accused.

### D. Joining criminal proceedings as a “civil party”

185. Some States 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 addition to seeking compensation for damages and obtaining access to criminal case files (see the preceding sections), a “civil party” may have the right to request additional measures during criminal investigations, for example house searches, attachments<sup>129</sup> and freezing orders, and the right to appeal the dismissal 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 the United Nations Convention against Corruption (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.

<sup>129</sup> 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.

their requests. During a trial, a “civil party” may be allowed to question the accused and witnesses.

186. Some States allow only the direct victim of an (alleged) crime to join criminal proceedings as a “civil party”. In other States, indirect victims may also join in that capacity. The general body of creditors may be recognized as the direct or indirect victim depending on the case. To join the proceedings as a “civil party”, some States require filing a written complaint explaining the grounds to be granted the status of the victim and a “civil party” in criminal proceedings. In other States, a written self-declaration, expressing intention to join the proceedings and requesting a “civil party” status, is sufficient. The request to join as a “civil party” is filed either with the investigating agency (e.g. the public prosecutor, police or investigating judge) or with the court if the trial has already commenced. Legal costs and expenses arising from participation of the insolvency representative or another authorized person as a “civil party” in criminal proceedings, including attorney fees, would normally be paid as administrative expenses from the insolvency estate unless alternative funding arrangements are in place. They may be reimbursed by the convicted person or the State.

## **E. Cross-border aspects**

187. Bilateral and multilateral mutual legal assistance frameworks<sup>130</sup> support international cooperation in the investigation of crimes, including fraud, financial crimes or transnational organized crimes that often intersect with insolvencies. Adherence of State parties to coordination and cooperation provisions of those frameworks ensure smooth transmission of information from a requested State to a requesting State.

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

(a) Each State participating in the framework designates a central authority that acts as the contact point responsible for coordinating and processing incoming and outgoing requests for assistance and facilitating other communication between the requesting and requested States;

(b) The insolvency representative may initiate a request for assistance in its State. Before a request for assistance is sent to the requested State, a competent authority in the requesting State reviews it and determines 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;

(c) A request for assistance 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 freezing 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. It may also 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;

(d) 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;

<sup>130</sup> 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.

(e) 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 secrecy<sup>131</sup> or on the sole ground that the offence is also considered to involve fiscal matters;<sup>132</sup>

(f) 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 request. 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; 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 (e.g. protection of innocent third parties) returning them to the requesting State;

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

189. The requesting State is usually expected to bear the costs of the mutual legal assistance request. Some States expect the requesting party (e.g. the insolvency estate) 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.

190. 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. Restrictions may be imposed on the use of information or evidence contained in that file (e.g. 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 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.

<sup>131</sup> See e.g. *ibid.*, article 46 (8).

<sup>132</sup> See e.g. *ibid.*, article 46 (22).

## Chapter V

### Other supporting frameworks

#### A. Restrictions on disclosure

191. Most States 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 the process (e.g. investigations) 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, 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 persons<sup>133</sup>) may be prohibited. Such restrictions often accompany *ex parte* and *in-camera* court hearings. The breach of those restrictions leads to liability, including imprisonment.

192. The availability and scope of those restrictions and the specific requirements and conditions for issuing them vary among States. 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.

193. Courts usually require a strong evidentiary basis for imposing such restrictions and subject them to strict requirements of necessity and proportionality. Upon imposition, courts limit their operation in time, and narrowly define their scope, tailoring the restrictions to the specific circumstances of the case. However, where a “surprise” effect is vital, the scope of restrictions is usually broad.

194. The 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.

#### B. Compliance requirements

195. Compliance requirements are found in the financial and other regulated and non-regulated sectors, such as transport. Many arise from international obligations to fight transnational organized crime, such as financing of terrorism and the laundering of the proceeds of crime. Some of them, such as those aimed at ending safe havens for corrupt funds, require States to cooperate and better coordinate their efforts towards timely and effective tracing and recovering stolen assets and the proceeds of crime.<sup>134</sup>

196. They support ATR in several respects. In particular, they lead to: (a) the enactment in many States of UBO legislation, including know-your-customer (KYC) and similar requirements;<sup>135</sup> (b) establishment of registers of relevance to ATR,

<sup>133</sup> E.g. because of increased risks of cyberattacks and other negative consequences, courts usually preserve the anonymity of traders on crypto exchanges.

<sup>134</sup> See e.g. UNCAC, articles 52–59, and guidance materials on asset tracing and recovery related to those provisions. The return of assets is a fundamental principle of the Convention.

<sup>135</sup> 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](http://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html). Similar requirements include know your transaction (KYT), know your business (KYB), customer due diligence (CDD) and in

such as UBO registers and registers of directors (see the annexed table);<sup>136</sup> (c) implementation of whistle-blowing management policies and systems;<sup>137</sup> (d) enhancement of accounting and auditing standards in the private sector; and (e) introduction of modern solutions to enhance traceability and recoverability of assets, in particular through unique identification of assets, real-time tracking the physical movement of an asset, tracing the chain of possession or control of an asset and reversing, where necessary, asset transfers.

197. Generally accepted accounting standards for the maintenance of books and records are based on the concepts and principles that help ATR. They require: (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) properly 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. The establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the use of false documents and the intentional destruction of bookkeeping documents earlier than foreseen by law are among acts prohibited by law.

198. Those requirements and prohibitions are supplemented by financial statement disclosure requirements and auditing standards to ensure that business books and records are accurate, complete and transparent, and are made available and accessible, as required and appropriate, to State authorities (e.g. tax, social security), equity holders, creditors, potential investors and the public. In many States, 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 States 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.

## C. Other laws

199. ATR closely intersects with provisions of other laws, which if properly designed and are coherent with the ATR objectives, significantly facilitate ATR. Examples include requirements for the limitation period to start running from the time of discovery of the concealed asset, information or evidence; penalties, negative inferences (*contra spoliatores*) and other remedies for the failure to comply with the requirements of insolvency law; and incentives for taking ATR actions and removal of disincentives, including exposure to excessive risks of personal liability. The following sections briefly refer to some law of direct relevance to ATR.

---

the transport sector, know-your-cargo requirements. They usually require, apart from the verification of beneficial owners: 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 requiring 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. Sanctions for non-compliance are imposed, by some States extraterritorially.

<sup>136</sup> 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](http://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html). See the annexed table below.

<sup>137</sup> 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](http://www.unodc.org/unodc/en/ft-uncac/focus-areas/whistleblower.html).

## 1. Secured transactions law

200. Legal frameworks, including those promoted by international standards, applicable to secured transactions contain rules, among others, on: (a) effectiveness of a security interest against third parties, including the insolvency representative; (b) detailed priority rules, including rules that govern conflicts between security interests and the rights of the insolvency representative in an encumbered asset; (c) enforcement of a security interest upon insolvency of the debtor; (d) the right of a secured creditor in the proceeds of an encumbered asset in insolvency; and (e) treatment of all-asset security rights (e.g. enterprise mortgages, fixed and floating charges) in insolvency.

201. In addressing those issues, the secured transactions framework recommended by UNCITRAL seeks to establish a balance among the interests of the debtor, creditors (whether secured, privileged or unsecured), affected third persons (such as buyers and other transferees of encumbered assets), the insolvency estate and the State. Essential for this balance and for ATR is a close coordination between the secured transactions and insolvency law regimes, which is reflected in the UNCITRAL secured transactions and insolvency law frameworks.

## 2. Asset-specific laws

202. ATR needs to take into account legal frameworks, including those promoted by international standards, applicable to certain assets, for example: (a) assets subject to registration, including in an international register (e.g. aircraft objects), which may specify remedies and steps to be taken with respect to the recovery of such assets in insolvency;<sup>138</sup> (b) assets held with an intermediary (such as securities or digital assets), which may contain rules on segregation of clients' assets from those of an intermediary and treatment of assets in insolvency either of a client or an intermediary;<sup>139</sup> (c) assets comingled in the pool of other assets (i.e. mixed assets), in particular whether an asset is identifiable as a separate object or share in the mixed assets;<sup>140</sup> (d) assets whose transferability (or transferability of rights in those assets) is restricted (e.g. assets classified as cultural objects); (e) intangible assets such as intellectual property, including copyrights, patents and trademarks; (f) financial assets; (g) assets subject to international regimes for judicial sale (e.g. ships);<sup>141</sup> and (h) digital assets (to the extent they raise distinct issues to those already covered by the preceding items on this list).<sup>142</sup>

<sup>138</sup> See e.g. the Cape Town Convention framework.

<sup>139</sup> See e.g. Principle 13 and accompanying commentary of the UNIDROIT Principles on Digital Assets and Private Law, providing that, where an intermediary is a custodian of digital assets, the digital assets maintained by the custodian for a client do not form part of the custodian's insolvency estate in case of the insolvency of the latter. In contrast, where an intermediary is not a custodian of digital assets, an agreement between the client and the intermediary may specify that in case of insolvency proceedings of the latter the assets would belong to the intermediary.

<sup>140</sup> Shortfall allocation rules, whether *pro rata* or otherwise, may apply.

<sup>141</sup> See e.g. articles 4 and 8 of the United Nations Convention on the International Effects of Judicial Sales of Ships. As relevant to ATR specifically, 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.

<sup>142</sup> See Principles 18 and 19 and the accompanying commentary of the UNIDROIT Principles on Digital Assets and Private Law and [reference to any relevant provisions of the UNIDROIT final text on best practices for effective enforcement may need to be included here].

### 3. Electronic commerce law

#### (a) Retention and preservation of data

203. Given the inherent vulnerability of data and its importance for ATR, standards for retention and preservation of data and protection from its loss or temporary unavailability enable and support ATR. The UNCITRAL electronic commerce framework contains such standards. It provides 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: (i) the information contained therein is accessible so as to be usable for subsequent reference; (ii) the time and date of archiving is indicated and that time and date is associated with the data message; (iii) 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 (iv) 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.<sup>143</sup> 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.

#### (b) Data as evidence

204. In the light of the ubiquitous use of electronic means of communication that generate data messages for various purposes, of direct relevance to ATR are provisions of the UNCITRAL electronic commerce framework that provide that, in any legal proceedings, no rules of evidence should be construed so as to deny the admissibility of data as evidence on the sole ground that it is a data message.<sup>144</sup> 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.<sup>145</sup> 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.<sup>146</sup> Under that framework, information in the form of a data message is expected to be given due evidential weight.<sup>147</sup> Where special procedures and requirements are imposed,<sup>148</sup> for example, for identification of a person or use of a trust service,<sup>149</sup> capturing data from third-party devices or assessing the evidential weight of a data message, those standards should be appropriate and non-discriminatory. Non-compliance with those

<sup>143</sup> 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). See also “Notes on the Main Issues of Cloud Computing Contracts (UNCITRAL, 2019)”, paras. 163–164 and 173.

<sup>144</sup> UNCITRAL Model Law on Electronic Commerce, article 9, para. 1. See also: CLOUT 1607, where the court admitted printouts of entries of electronic accounts ledger as evidence; CLOUT 1239, where the court affirmed the admissibility of tax declarations in electronic form as evidence.

<sup>145</sup> UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services (2022), article 5.

<sup>146</sup> *Ibid.*, article 13.

<sup>147</sup> UNCITRAL Model Law on Electronic Commerce, article 9, para. 2.

<sup>148</sup> *Ibid.* 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 as well as to compliance with any applicable operational rules, policies and practices, security of hardware and software and the regularity, extent of independent audit and certification of reliability and any other relevant factor. See e.g. CLOUT 1240, where the court had due regard to the reliability and attribution of the electronic message to the author in denying the admissibility of an electronic message.

<sup>149</sup> *Ibid.*, article 2 (3).

standards (in addition to the usual criteria of relevancy, authenticity, persuasiveness, etc.) may lead to inadmissibility of data as evidence or negatively impact its evidential weight.

**(c) Identity management (IdM) and trust services**

205. IdM involves the issuance of identity credentials for physical and legal persons, the presentation of those credentials, and the verification by electronic means that the person whose credentials are presented is the one to whom the credentials were issued. It is relevant to ATR in many respects, for example when the insolvency representative seeks to obtain information about the debtor and its assets from an online property registry, access to which is restricted. Assurances of certain qualities of data exchanged in IdM, for example the source and integrity of the data supplied by the insolvency representative for identification in this example, are critical for many reasons, including for prevention of unauthorized access to the registry. They may be provided by trust services.

206. Different models and technologies exist across States for IdM and trust services. Legally enabling their cross-border use is one of the main goals pursued by the UNCITRAL IdM and trust services framework. Not presupposing the use of any technology or model and not discriminating against IdM schemes and trust services because of their geographic origin, that framework allows the recognition of any IdM scheme and trust service that meet certain requirements. At the same time, it provides guidance as to which IdM schemes and trust services offer a higher degree of confidence in their reliability. Those measures can considerably expedite ATR especially across borders.

207. As also relevant to ATR, that UNCITRAL framework is built on the principle that a service provider should be held liable for the consequences of failing to provide its services as required by law. While not establishing the degree of fault required to engage liability or the type and amount of recoverable damages, the UNCITRAL IdM and trust services framework provides for a uniform liability regime for IdM and trust service providers towards subscribers and relying parties that may include the insolvency representative.

**D. Effective enforcement and institutional framework**

208. The effectiveness of ATR depends on the quality of enforcement mechanisms,<sup>150</sup> professionalism of courts and practitioners involved in ATR and an enabling institutional framework. If those fundamentals are not able to respond to the demands for a swift action that usually arise in ATR, the inclusion of ATR enabling provisions and measures in the law alone will not achieve the ATR objectives.

209. The relevant institutions and practitioners should have capacity and tools, including those enabled by modern technologies, to handle ATR timely and appropriately, including where necessary across borders in cooperation with foreign courts and foreign representatives. Courts should be able to identify and prevent abuses and to achieve appropriate balance between the speed of ATR, on the one hand, and the protection of interests of all persons affected by ATR and other public policy considerations, on the other hand. Awareness-raising and education about warning signals and building judicial capacity to handle intricacies of ATR, including through the full use by courts of their case management powers under law, are essential. Specialization of courts in insolvency matters and procedural rules designed specifically for handling urgent ATR requests have also proved to be useful.

210. The preceding considerations are closely linked to professionalism of practitioners, who usually must comply with professional standards, and

<sup>150</sup> [References to the relevant provisions of the UNIDROIT final text on best practices for effective enforcement may need to be included here, and those provisions may need to be summarized in this section].



non-compliance with those standards may lead to their disqualification. They may be required to undertake regular training to keep their licence to practice, or to be certified against applicable standards, including those relevant to ATR.

## Annexed table

### ATR-relevant registers

<i>Description</i>	<i>Objectives</i>	<i>Features</i>	<i>Access conditions</i>	<i>Safeguards (applicable to all registers)</i>
<b>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.))</b>	<p>To register ownership and other rights in immovable property and transactions therewith, including security interests.</p> <p>To serve legally significant notices (e.g. notices of seizure of encumbered assets) with respect to that property.</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.	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 States, 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>International best practices for registries promote electronic registries, flexible, prompt (including on a 24/7 basis) 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</p>
<b>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)</b>	To ensure publicity and effectiveness of rights, transactions and acts with respect to movable property before third parties (e.g. ownership, pledges, arrests, seizures).	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 interest), a description of the asset and the	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. Standard forms may be made available	

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 <i>in rem</i> 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.	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.	interests and causes of action by 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 registers.  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.
<b>Central registers of bank accounts/financial registers</b>	To maintain information in one central location (such central location is usually	Generally, information available in bank registers refers to: bank accounts and payment accounts	Upon request (usually via a standard application), persons may receive information from the central register.	

<i>Description</i>	<i>Objectives</i>	<i>Features</i>	<i>Access conditions</i>	<i>Safeguards (applicable to all registers)</i>
	<p>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>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>Payment of a fee may be required. A person may receive information about its own accounts.</p>	
<b>Financial instruments and securities registers</b>	<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>	
<b>Commercial, trade or company registers</b>	<p>To register enterprises and individual entrepreneurs, legalize the books that businesses are obliged to keep by law and register the financial statements of</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.</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</p>	

<i>Description</i>	<i>Objectives</i>	<i>Features</i>	<i>Access conditions</i>	<i>Safeguards (applicable to all registers)</i>
	<p>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>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>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>	
<b>Separate UBO registers</b>	<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 direct or indirect control may apply to all or some UBO registers maintained in a particular State. However, these registers do not always identify actual or all owners. In some States, directors or legal representatives can be</p>	<p>These types of registers may or may not be publicly accessible. In some countries, only limited information is made publicly available. 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>
		indicated as UBOs, there may be no requirement to list all UBOs but only those that hold certain percentage of equity in a legal entity or self-declarations are permitted without mechanisms for verification and updating and sanctions for non-compliance.		
<b>Patent and trademark registers</b>	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 of the registry.	
<b>Accounting registers and registers relating to tax and other similar authorities</b>	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).	
<b>Criminal records registers</b>	To capture criminal history records of individuals. Final court judgments	Data that can be comprised in criminal records are the defendant's name, his/her/its	In some States, criminal records, including those concerning other individuals, are publicly accessible	

<i>Description</i>	<i>Objectives</i>	<i>Features</i>	<i>Access conditions</i>	<i>Safeguards (applicable to all registers)</i>
	issued domestically or by foreign courts against nationals or foreigners living in that country may be recorded in a criminal register.	convictions, the type of sentence(s) as well as the relevant fines and fees.	either through a court clerk's office or through an official website. In other States, persons can apply to receive information only as regards their own criminal records. Payment of a fee may be required for the provision of information from criminal records registers.	
<b>Domain name registers</b>	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.	
<b>Insolvency registers (linked to registers of disqualified directors and company registers)</b>	To fulfil publicity, transparency, creditor protection and other objectives of insolvency law 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 debtor. Insolvency registers may also include information on the insolvency estate assets.	Access may be unrestricted and free or upon payment of a fee.	

<i>Description</i>	<i>Objectives</i>	<i>Features</i>	<i>Access conditions</i>	<i>Safeguards (applicable to all registers)</i>
<b>Probate registers and registers of births, marriages and deaths</b>	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 records 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.	
<b>Public procurement registers/systems (linked to registers of debarred contractors)</b>	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).	
<b>Registers of special rights/interests</b>	Registers of weapons are usually available in jurisdictions where registration of the relevant assets is mandatory. The establishment of registers on petroleum aims at recording acts such as, petroleum agreements, licences and authorizations. Other types of registers are intended to capture data on (ongoing and/or approved) mining activities and quarries	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) licences registers contain data on the holder, the type and number of the licence, its duration, the coordinates of the area covered by the licence,	Information on weapons may be requested directly by the relevant authority. Data on petroleum and mining licences 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>
	licences. Registers dedicated to initial exploration, retention, production, pipeline and associated activities licences and sub-licences may be also available.	technical specifications and commodities produced or extracted. Oil and gas well records, including drilling permits, may be included as well.		
<b>Enforcement registers</b>	To register the status of enforcement actions.	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.	