United Nations A/CN.9/WG.V/WP.182

General Assembly

Distr.: Limited
5 October 2022

Original: English

United Nations Commission on International Trade Law
Working Group V (Insolvency Law)
Sixty-first session
Vienna, 12–16 December 2022

Inventory of civil asset tracing and recovery tools used in insolvency proceedings

Note by the Secretariat

Contents

V.22-22715 (E)

I. Introduction

1. The provisional agenda of the sixty-first session of the Working Group (A/CN.9/WG.V/WP.181) provides background information about the project on civil asset tracing and recovery in insolvency proceedings referred to the Working Group by the Commission at its fifty-fourth session.[1] This note contains an inventory of asset tracing and recovery (ATR) tools used in insolvency proceedings, compiled by the secretariat as requested by the Working Group. The inventory supplements information on ATR tools found in the proposals by the United States to UNCITRAL for the work on the topic (A/CN.9/WG.V/WP.154 and A/CN.9/996), the report of the Colloquium (A/CN.9/1008) and the earlier working papers on the subject (A/CN.9/WG.V/WP.175 and A/CN.9/WG.V/WP.178) by adding information submitted by States (see below and an annex to this note in document A/CN.9/WG.V/WP.182/Add.1) and from a comparative law study prepared by Mr. Samuel Baumgartner, Professor of Law, University of Zurich, whom the Secretariat engaged as a consultant for the project. The inventory also reflects materials received by the secretariat informally at different stages of the project from the United States (about ATR tools in common law jurisdictions), the European Commission (about ATR across the European Union (henceforth the "EU")) and the Kozolchyk National Law Center (about ATR tools in selected jurisdictions).

2. The ATR tools surveyed in the inventory are those found in the law or access to which is regulated by law. Other tools, such as searches of media, were not included. The inventory consists of three chapters and an annex. The first part, in chapter II, refers to the ATR tools found in laws relating to insolvency of the surveyed jurisdictions and in UNCITRAL insolvency texts.[2] The second part, in chapter III of this note, refers to civil ATR tools of general application, such as those used in civil litigation or international commercial arbitration that may also be relevant to insolvency proceedings, especially in the context of provisional measures or if the insolvency representative commences, participates or intervenes in civil or arbitral proceedings for recovery of the debtor assets. The third part, in chapter IV, refers to criminal proceeding tools that may be used to aid ATR in insolvency proceedings. The annex, found in an addendum to this note (A/CN.9/WG.V/WP.182/Add.1), highlights main points from State submissions received by the Secretariat in response to its request of 29 December 2021, grouping them per category for ease of reference by the Working Group.

3. In that latter context, the Working Group may wish to recall that, at its fifty-ninth session (Vienna, 13-17 December 2021), delegations expressed the wish that the secretariat would expand the references to civil ATR tools found in the report of the Colloquium and document A/CN.9/WG.V/WP.175 that were before the Working Group at that session.[3] In a note verbale circulated thereafter the Secretariat requested States to provide information about ATR tools used by insolvency practitioners in insolvency proceedings in their jurisdictions in addition to those mentioned in that report and document. The following States responded to that request: Austria [22 March 2022; original: English]; Belgium [18 March 2022; original: French]; Chile [30 March 2022, original: Spanish]; China [29 March 2022; original: Chinese]; Dominican Republic [1 April 2022; original: Spanish]; Hungary [9 February 2022; original: English]; Japan [10 March 2022; original: English]; Jordan [14 February 2022; original: Arabic]; Lithuania [31 March 2022; original: English]; Malta [29 March 2022; original: English];[4] Morocco [6 April 2022; original: French];

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

[2] The UNCITRAL Legislative Guide on Insolvency law (the Guide); the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI); the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-related Judgments (MLIJ); and the UNCITRAL Model Law on Enterprise Group Insolvency (MLEGI).

[3] A/CN.9/1088, para. 55.

[4] This submission did not refer to specific ATR tools and was therefore not reflected in the annex.

Panama [21 March 2022; original: Spanish]; Spain [14 February 2022; original: Spanish]; Switzerland [14 January 2022; original: English]; Uruguay [8 April 2022; original: Spanish]; and Uzbekistan [4 February 2022; original: Russian]. The reported tools included: (a) ATR tools designed for insolvency proceedings reflecting the collective nature of those proceedings; (b) ATR tools used in individual proceedings by creditors, including in enforcement of judgments, arbitral awards, settlement agreements and contracts; and (c) ATR tools that, although supplementing ATR in insolvency proceedings, are used primarily by State authorities, such as tax and social security authorities, for their purposes (tax collection, etc.). Some submissions referred also to domestic criminal law provisions on insolvency-related crimes and related matters. Some highlighted practical considerations arising in the domestic context from the use of the reported ATR tools. Because of the length of some submissions, the Secretariat was unable to present them in their entirety in the annex. Some excluded parts may inform the content of a future text on the topic, for example, if the Working Group decides to include practitioners' perspectives to ATR in insolvency proceedings.

4. The Working Group may wish to take note of State submissions and acknowledge with appreciation all contributions to the preparation of the inventory. It may wish to consider the inventory, viewing it as a supplement to the report of the Colloquium and the earlier working papers on the subject. The Working Group may wish to decide on the form that a paper to be prepared by the secretariat for consideration by the Working Group at its next session should take.

5. In the light of the work accomplished so far, and divergent views expressed as regards the nature, scope and form of a text to be prepared on the subject,[5] the Working Group may wish to consider whether the consolidation of separate parts found in different working papers on the subject might be helpful for further consideration of the topic by the Working Group. Recalling comments made in the Working Group, including on tables 1 to 3 found in document A/CN.9/WG.V/WP.178,[6] such a consolidated text might contain the inventory as revised to reflect comments of the Working Group and as expanded, in consultation with experts and as appropriate (in particular, avoiding confusion, inconsistencies and overlap with existing UNCITRAL insolvency texts), to address also: (a) digital aspects of ATR, reflecting the results of related work on effective enforcement and digital assets in UNIDROIT; (b) practical and technical aspects of ATR, including experiences with ATR across borders; (c) description of specific ATR tools with a sufficient level of detail, including as regards the purpose of each tool and conditions and safeguards for its use; (d) jurisdictional, applicable law and other issues (e.g. the constitution and the scope of the insolvency estate); (e) general ATR enabling provisions; and (f) a revised glossary of relevant ATR terms.

II. ATR tools specifically designed for insolvency proceedings

A. Domestic context

1. Preventive measures[7]

6. Some surveyed jurisdictions referred to obligations of the debtor and persons exercising factual control over the debtor's business in the period approaching insolvency to have due regard to the interests of creditors and other stakeholders and to take reasonable steps to avoid insolvency, and, where it is unavoidable, to minimize the extent of insolvency.[8] Courts in one jurisdiction upheld that an attorney at law acting as a debtor's representative is under an obligation to preserve the existing status of the debtor's property until the voluntary petition for commencement of bankruptcy

[5] A/CN.9/1094, paras. 18–20 and 59–61.
[6] A/CN.9/1094, paras. 21–58.
[7] Addressed in part four and recommendation 372 of the Guide.
[8] See e.g. submissions by Hungary and Morocco.

proceedings.[9] Breach of those obligations may lead to liability, including personal and criminal, of the debtor and persons in control of the debtor who would be obliged to compensate for losses and damages (see below under "Actions against directors, shareholders and other persons").

7. Some surveyed jurisdictions referred to actions that creditors may take under the law of obligations to protect themselves from fraudulent legal transactions intended to reduce a debtor's estate by transfers to third parties in bad faith (actio pauliana).[10] In some jurisdictions, those actions may be stayed or discontinued upon commencement of insolvency proceedings and the insolvency representative may take them over by initiating avoidance proceedings. In other jurisdictions, commencement of insolvency proceedings does not have such effect.

2. Provisional measures[11]

(a) Types of provisional measures

8. Surveyed jurisdictions referred to provisional measures that may be granted by courts between the time of application for commencement of insolvency proceedings and commencement of the proceedings, at the request of the debtor, creditors, or third parties, where those measures are needed to protect and preserve the value of the assets of the debtor or the interests of creditors. They may include: (i) staying execution against the assets of the debtor; (ii) entrusting the administration or supervision of the debtor's business or realization of all or part of the debtor's assets to a provisional insolvency representative or other person designated by the court; and (iii) any other measure, including of general application mentioned in chapter III below, not specifically designed for insolvency proceedings.[12]

9. In some jurisdictions, upon application for commencement of insolvency proceedings, an automatic stay is imposed on realization of movable or immovable property of the debtor. In other jurisdiction, courts, upon petition of an interested person, a provisional insolvency representative (if any) or by its own authority, are required or authorized to conserve the value of the debtor's assets and, for such purpose: (i) to order the immediate drawing-up of a detailed inventory of the debtor's assets by a government agency or a provisional insolvency representative[13] and for such purpose, authorize site visits and other similar measures; (ii) issue a temporary restraining order against the debtor, its assets or third parties (e.g. provisional freeze,[14] seizure,[15] preventive attachments,[16] embargoes[17]), including for the purpose of securing the right of avoidance;[18] and (iii) limit the powers of the debtor as regards

[9] See submission by Japan.

[10] See e.g. submissions by Belgium and Japan. Also articles 1562–1564 of the Civil Code of Romania and the Obligations Code and Financial Operations, Insolvency and Compulsory Dissolution Act of Slovenia.

[11] Addressed in recommendations 39–45, 49 and 51 of the Guide and their accompanying commentary. See also MLCBI, article 19 and its accompanying commentary in the Guide to Enactment and Interpretation of MLCBI.

[12] See e.g. recital 36 of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (binding and directly applicable in EU member States) (the EU Insolvency Regulation). See also, submissions by Belgium, Japan, Morocco and Panama.

[13] See e.g. the Debt Enforcement and Bankruptcy Act of Switzerland (DEBA) (available at www.fedlex.admin.ch/eli/cc/11/529_488_529/fr), articles 162–165.

[14] See e.g. article 692a (2) of the Commerce Act of 18 June 1991 of Bulgaria.

[15] See e.g. submission by Uruguay (the seizure places the assets at the disposal of the court).

[16] Ibid. (in the case of immovable property, automobiles, rights and shares, the attachment operates through the registration of the measure in public records, which has the effect of publicity before third parties).

[17] See e.g. submissions by Belgium; Japan; and Uruguay (the debtor may use the embargoed assets but must refrain from alienating them and must ensure their diligent preservation. In the event that there are no known assets, a generic attachment of assets may be requested).

[18] See e.g. submissions by Japan; Lithuania; Panama; and Uruguay.

its assets[19] (e.g. require the permission of a provisional insolvency representative for transfers or encumbrances as regards all or certain assets[20]).

10. Some jurisdictions allow their courts, upon receipt of application for commencement of insolvency proceedings, to request information relating to the debtor from the debtor, different registers and other third parties, including on the debtor's bank accounts, contracts entered and moveable and immovable property, which is aimed to assist the court to decide whether to commence an insolvency proceeding or deny the application and, if to commence, which type of proceeding to commence.[21] In some jurisdictions, the right to request that information from public sources (e.g. registers; see chapter III below) is given also to a provisional insolvency representative and creditors.[22]

11. An institute of a judicial overseer is found in one jurisdiction, whose role is to analyse and report on the economic and financial situation of the debtor. That limited intervention may eventually merit a more rigorous intervention, such as displacing the debtor from operation of its business.[23]

(b) Safeguards

12. Usual safeguards include: (i) to require the applicant to demonstrate that relief is urgent and outweighs any potential harm resulting from the measures and to inform the court of all material changes that may require modification or termination of the provisional measure; (ii) to require the applicant to provide indemnification for provisional measures, and, if appropriate to pay costs or fees; and (iii) to impose sanctions in connection with an application for provisional measures, including on the applicant where the provisional measure was improperly obtained.

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

14. Provisional measures may be made subject to periodic review by law, or they may be reviewed and modified or terminated upon the court's own motion or at the request of the applicant or an affected person. The circumstances that justify their termination usually include: (i) when an application for commencement is denied; (ii) an order for provisional measures is successfully challenged; and (iii) the measures applicable on commencement take effect, unless the court continues the effect of the provisional measures. Some jurisdictions limit the duration of provisional measures to a specified time period or to steps to be fulfilled by the applicant or other persons.[24]

3. Measures upon commencement

(a) Stay[25] and treatment of ipso facto clauses and continued contracts[26]

15. It is common to impose a stay of: (i) individual actions or proceedings; (ii) actions to make security interests effective against third parties and to enforce security interests; and (iii) execution or other enforcement against the assets of the estate. In some jurisdictions, the stay is imposed by operation of law (i.e., automatic)

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[19] See e.g. submission by Jordan.
[20] See e.g. German InsO, §21(2)(2); DEBA, articles 164 and 170.
[21] See e.g. submission by Belgium.
[22] See e.g. article 4 (6) of the Enforcement and Security Act of Slovenia.
[23] See submission of Uruguay.
[24] See e.g. DEBA, article 165.
[25] Addressed in recommendations 46-51 and 317-318 of the Guide and accompanying commentary.
[26] Addressed in recommendations 69-86 of the Guide and accompanying commentary.

on all or certain actions while in other jurisdictions the stay is ordered by the court upon application of interested persons, the insolvency representative or ex officio.[27]

16. The duration of the stay may be limited. In addition, there may be exceptions from the stay and 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. For example, exceptions to the stay usually include the right to commence or continue the individual action or proceeding necessary to preserve a claim against the debtor and actions that intend to increase the value of the estate and actions against the insolvency representative.[28]

17. By operation of insolvency law, the rights of a counterparty to terminate any contract with the debtor may be made unenforceable. Exceptions to that rule exist. Special rules usually apply also to the treatment of continued contracts, in particular their rejection, continuation or assignment.

(b) Different arrangements for control over assets and affairs of the debtor[29]

18. Another common measure upon commencement of insolvency proceedings is to limit the debtor's role in operation of business, including access to assets.[30] Those limitations are usually notified to the relevant authorities so that they could make necessary entries in their records or registers or take other necessary steps to prevent unauthorized transactions with the debtor's assets.[31]

19. The insolvency representative or another official may be appointed to displace the debtor partly or fully from operation of business[32] or to perform other functions assigned by the court.[33] In the debtor-in-possession regime, the ability of the debtor-in-possession to dispose of certain assets and to enter into certain transactions may also be restricted. An officer may be appointed to supervise those and other aspects of the day-to-day operation of business by the debtor-in-possession, including with respect to post-commencement finance and treatment of contracts. An independent professional may also be appointed for certain functions that cannot be expected to be performed by the debtor-in-possession, such as avoidance. In one jurisdiction, an institute of a business mediator is found, whose functions may include the transfer, under court supervision, of all or some of the debtor's assets to one or more third parties to prevent their concealment by the debtor and to ensure their preservation.[34]

(c) Treatment of unauthorized transactions[35]

20. Some insolvency laws treat transactions by the debtor involving assets over which the debtor has lost control as invalid and unenforceable against the insolvency estate if they are not authorized by the insolvency representative or the court.[36] They enable assets transferred to be reclaimed, except, in some jurisdictions, where the counterparty entered into the transaction in good faith and gave value or can prove that the transaction did not impair creditor rights. In other jurisdictions, depending on the facts of the case, some unauthorized transactions may be automatically void while others may be subject to avoidance by the insolvency representative. Examples of unauthorised transactions may include transfer of ownership or encumbrance of

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[27] See e.g. submissions by Belgium; China; the Dominican Republic; Jordan; Lithuania; and Morocco.

[28] See e.g. submission by Belgium with reference to actio pauliana and other actions that intend to increase the debtor's assets.

[29] Addressed in recommendations 112–114 and 284–287 of the Guide.

[30] See e.g. submissions by Belgium; the Dominican Republic; Jordan; and Uruguay.

[31] See e.g. submissions by Hungary; and Panama. Also, German InsO, §32; DEBA, article 176 (1 and 2).

[32] See submissions by Lithuania and Panama.

[33] See e.g. submission by Belgium with reference to a temporary administrator and a business mediator.

[34] Ibid.

[35] Addressed inter alia in part two of the Guide, chapter II, para. 16, and chapter III, paras. 2, 12, 33.

[36] See e.g. submissions by Belgium; the Dominican Republic; Jordan; Morocco; and Panama.

insolvency estate assets by the debtor and acceptance by the debtor of payment that can only be accepted validly by the insolvency representative.[37] In some jurisdictions, the insolvency representative may authorize any transaction that has led to an effective increase in the value of the debtor's assets or a positive effect on creditors.[38]

(d) Other measures

21. Other measures may be authorized by court, within certain limits,[39] or set out in a statute. For example, in some jurisdictions, the court may order, including ex parte, interception of the debtor's mail under some conditions[40] and subject to certain safeguards, such as the right to be heard.[41] In other jurisdictions, that measure is automatic (i.e., no court order is needed).[42] Some measures may be directed against assets of the current and former administrators, liquidators or members of the internal control body of the debtor.[43]

4. Obligations of the debtor[44] and third parties, including government agencies

(a) Obligations of the debtor

22. The debtor is usually required, among others: (i) to cooperate with the court and the insolvency representative, if any, and assist them to perform their functions;[45] (ii) to provide accurate, reliable and complete information relating to its financial position and business affairs,[46] including the means to make the contents legible within a reasonable period of time.[47] That obligation may encompass a duty to deliver documents necessary to effectively claim or access an asset[48] and may refer not only to the current knowledge but also to the need to perform all preparatory work necessary to provide the relevant information. It may apply to the corporate governance body members, shareholders and debtor's employees;[49] (iii) to give a necessary explanation concerning insolvency to the court, the insolvency representative or creditors acting through the creditor committee or otherwise, upon their demand;[50] (iv) to hand over all assets and documents of the company to the court or the insolvency representative, as the case may be, within a time limit set by the court;[51] (v) to facilitate or cooperate in the recovery of the assets, or control of the insolvency estate and business records, wherever located; and (vi) immediately upon commencement of the insolvency proceedings, to permit access to its premises and to

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[37] See e.g. Croatian Bankruptcy Law, article 162; German InsO, §82; DEBA, article 205. Payment to the debtor instead of the insolvency representative may result in the third-party debtor having to pay again if the debtor fails to forward the payment to the insolvency representative, unless the third-party debtor had no reason to know of the insolvency proceedings and the displacement of the debtor from the control over the business and assets. Such a general insolvency measure as the public announcement of the decision to commence insolvency proceedings (see e.g. German InsO, §30; DEBA, article 232(2)(4)), among other things, advises creditors or third parties against entering into transactions with the debtor and making payment to the debtor instead of to the insolvency representative, where the latter displaced the debtor from the control and operation of the business.

[38] See submission by Jordan.

[39] See e.g. submissions by China; and Jordan.

[40] See submission by Uruguay.

[41] See e.g. Austrian Insolvenzordnung (InsO), §78(2)&(3); German InsO, §§99 and 151.

[42] See e.g. the Commercial Code of Luxembourg, article 478; and articles 93a and 14 (1) of the Bankruptcy Act of the Netherlands.

[43] Uruguay Law No. 18.387, in particular sections 24 and 25.

[44] Addressed in recommendations 110, 111, 284–286 and 290 of the Guide and accompanying commentary.

[45] See submission by Hungary; Morocco; and Uruguay. See also the Bankruptcy Act of Estonia.

[46] See submission by Chile. See also article 95 of Law No. 4738/2020 on Debt Settlement and Facilitation of a Second Chance of Greece.

[47] The Bankruptcy Act of the Netherlands.

[48] See submission by Switzerland.

[49] See articles 292–293 of the Bankruptcy Act of Slovenia.

[50] See submission by Japan.

[51] See submission by Lithuania.

open containers, warehouses and other relevant places for review and inventorizing their content (business records, assets, etc.).[52]

23. The debtor may be made subject to judicial compulsion, restraints and economic or personal injunctions (including criminal sanctions such as fines and arrests) as well as sanctions in case it does not comply with its insolvency law obligations.[53] In some jurisdictions, lack of collaboration by the debtor, including by concealment, disinformation or misrepresentation, is taken as presumption of guilt[54] and may lead to denial of discharge. Adverse inferences may also be drawn in related civil or criminal proceedings. Cooperation with the insolvency court and the insolvency representative, on the other hand, may lead to a reduced sentence for the persons concerned in case of their conviction for insolvency-related crimes. The displacement of the debtor-in-possession by the insolvency representative and conversion of reorganization to liquidation proceedings may be additional sanctions in the debtor-in-possession regime.

24. The person in control of the debtor (e.g. the director) and their accomplices may be held liable and subjected to a fine, disqualification and the order to compensate for the damages caused by non-performance or improper performance of the obligations imposed on the debtor upon commencement of insolvency proceedings.[55] In serious cases, criminal sanctions may be applied, including imprisonment, for instance, in common law countries, for contempt of court.

25. Many jurisdictions require the debtor or some of its officers or directors to remain at the disposal of the court and the insolvency representative, if any, for the duration of the insolvency proceedings. Consequently, the debtor natural person may be required to give notice to the court before changing his or her habitual residence while the debtor legal person is usually required to obtain consent of the court before moving its headquarters. In some jurisdictions, this obligation may only be imposed on the debtor by a court order.[56] In other jurisdictions, it is a statutory duty that can automatically be enforced against a recalcitrant debtor.[57]

26. The information to be provided by the debtor or about the debtor may belong to the debtor or be under its control or it may belong to or be under control of a third party. The information can be commercially sensitive, confidential, protected by personal data standards or subject to obligations owed to other persons (e.g. trade secrets, lists of customers and suppliers, research and development information, professional secrets or privileged information). Special rules may apply to handling different types of information to prevent its inappropriate disclosure or use.

(b) Obligations of third parties and government agencies

27. In some jurisdictions, third parties (e.g. those that have had dealings with the debtor or who have knowledge about the debtor or its assets), including government agencies, such as tax authorities and social insurance agencies, may have obligations under insolvency law: (i) to provide information and documents about the debtor's assets and accounts (within a short period of time and free of charge);[58] (ii) to open

[52] See e.g. articles 640 and 658 of the Commercial Act of Bulgaria; DEBA, article 222(3).
[53] See e.g. sections 100 and 105 of the Bankruptcy Act of Denmark.
[54] See submission by Uruguay.
[55] See submission by Chile; China; Lithuania; and Uruguay.
[56] See e.g. German InsO, §97(3).
[57] See e.g. DEBA, article 229 (noting that the debtor or the relevant officers or directors can be picked up and presented to the insolvency representative by the police, if necessary).
[58] See e.g. Australian Bankruptcy Act, §81; Estonian Bankruptcy Act, articles 22(3)(4) and 55(4); chapter 6, 596 (2) of the Companies Act 2014 of Ireland; Slovenian Insolvency Proceedings Act, article 294(4); submissions by the Dominican Republic; Hungary; and Panama. In comparison, in some jurisdictions, the insolvency representative is required to obtain a court order or an order of other competent State agency for access to databases of public administrations and to pay a fee (see e.g. article 492 of the Code of Civil Procedure of Italy and article 155.1 of the implementing decree).

rooms and containers for inspection; and (iii) to turn over assets of the debtor and, in the case of crypto currencies, to turn over the relevant information and access keys.[59]

28. In some jurisdictions, those obligations are statutory and arise upon the public notice of the commencement of the insolvency proceedings[60] that inter alia may alert that anyone who has custody of any of the debtor's assets is obligated, under penalty of law, to make those assets available to the insolvency court or the insolvency representative, as the case may be.[61]This permits the insolvency representative to demand the performance of those obligations without first obtaining a court disclosure or search order.[62] In other jurisdictions, court orders are required.[63]

29. Limitations include: (i) certain privileges and rules, such as the attorney-client privilege and banking secrecy rules, that may prevent full disclosure of certain information although they do not usually apply where the insolvency representative replaces the debtor (see below);[64] (ii) depending on the type of information obtained, the restrictions on its subsequent disclosure and use; and (iii) restriction of the surrender of the debtor's assets used for public purposes, for instance for the purpose of impoundment in a criminal proceeding.

5. Powers of the insolvency representative[65]

30. The insolvency representative's ATR-related duties and powers may be grouped into the following categories: (a) displacing the debtor from operation of the business (fully or partly) and representing the insolvency estate; (b) obtaining information concerning the debtor, its assets, liabilities and past transactions; and (c) taking all steps to protect, preserve and restore the integrity of the insolvency estate and business records of the debtor. Their ambit and duration may be specified by law (including by such general requirements of law for performance of insolvency representative duties as to act with due care and diligence of a prudent businessperson[66] or time limits for bringing actions[67]), court orders and other factors.[68]

31. Information concerning the debtor, its assets, liabilities, past transactions and other affairs may be obtained by various means provided in legislation, including: (a) inspection of accounting and business records of the debtor and affiliated persons (in some countries, this includes the entire electronic system of the debtor and also of the accounting and business records of subsidiaries of the debtor), including tax accounts, contributions to pension systems and bank transactions; (b) inspection of public registers, such as the land registry, the commercial register, or the motor vehicle register as well as records of the courts and other State authorities (e.g. tax and social security agencies, the prosecutor and attorney general offices) (see chapter III below), including in connection with criminal proceedings that might have been opened in relation to insolvency proceedings, provided access to any such records was granted (see chapter IV below); (c) inspection of the debtor's premises, containers, bank safe deposit boxes and other safes and places; (d) examination of the debtor or its directors, officers, and employees (in some jurisdictions, also the

[59] See e.g. DEBA, article 222.

[60] See e.g. Austrian InsO §97(2) (debtor's assets in third party's possession) (obligation to inform insolvency representative triggered when learning of insolvency proceedings).

[61] See e.g. DEBA, article 232(2)(4).

[62] See e.g. DEBA, article 222; and submission by Chile.

[63] See e.g. Australian Bankruptcy Act, §81; section 212, para. 2 of the Act on Bankruptcy and Methods of its resolution (Insolvency Act) of 9 May 2006 as amended of the Czech Republic; submission by Uruguay (measures of judicial collection of information about debtor assets are available also with respect to creditors, witnesses and other third parties. For example, the court may order banks to disclose to the court information about bank accounts and deposits).

[64] See e.g. the Bankruptcy Act of Finland, Ch.8, Sec. 9(1).

[65] Addressed inter alia in recommendation 120 of the Guide and accompanying commentary.

[66] See e.g. article 89.1 of the Insolvency Law of Croatia; and submission by Panama.

[67] E.g. a one-year deadline for initiating asset recovery actions from the commencement of insolvency proceedings is found in the Bankruptcy Act of Sweden.

[68] See A/CN.9/WG.V/WP.175, para. 13.

directors of subsidiaries of the debtor; special safeguards may be imposed on examination of certain persons, such as employees); (e) examination of any other person and institution with respect to the debtor assets and affairs, including the debtor's auditors and advisors, and requiring them to submit the relevant documents; and (f) inquiries to crypto exchanges and other digital platform operators as a means of accessing the debtor's digital assets.[69]

32. Steps necessary to protect, preserve and restore the integrity of the insolvency estate and business records of the debtor usually include: (a) demanding payments due to the debtor and the return of the insolvency estate assets; (b) taking or requesting measures to protect, preserve and restore the integrity of the insolvency estate and business records of the debtor (e.g. closing warehouses or the entire business, sequestrating certain fungible assets, such as cash, placing tracing, tracking, searching, seizing, freezing, securing orders (see chapter III below)); (c) submitting enforcement orders to a bailiff (e.g. on the basis of promissory notes, the final judgments and settlement agreements); (d) initiating proceedings for asset recovery, including avoidance and actions against directors and partners and other persons personally liable for the debtor's obligations (in such case, measures described in chapter III below may become relevant); (e) handling debt settlement; (f) assigning claims, liabilities or debt; (g) participating and intervening in all acts or proceedings related to the debtor, its assets as well as claims against the insolvency estate, including for recovery of the insolvency estate assets or for prevention of their unauthorized disposal; and (h) claiming tax refunds.[70]

33. In jurisdictions where the insolvency representative not only displaces the debtor in operation of the business but also becomes the debtor's representative, many insolvency representative's ATR-related duties and powers are exercised without court orders. In that capacity, the insolvency representative can exercise the rights that the debtor would have exercised but for insolvency, including placing demands for information to the debtor's debtors or creditors, participating or intervening in commercial litigation, arbitral, administrative and other proceedings, communicating with government agencies and so on. Where the insolvency representative acts in that capacity, third parties (e.g. trustees, insurance companies, banks, cryptocurrency wallet providers with which the debtor has an account or who may owe the debtor money) are required to provide it upon request with the same information they would have to provide to the debtor itself. This often obviates the need for any court orders, for example in order to obtain disclosure of otherwise privileged or protected information or avail itself of the help of the law enforcement bodies to compel a non-cooperative debtor to implement its insolvency law obligations.[71] Where the insolvency representative acts in more restricted capacity, court orders may need to be obtained first to compel third parties, if necessary by approaching the law enforcement bodies for such purpose, to cooperate with the insolvency representative.[72] Sanctions in the form of a fine or imprisonment may be imposed on non-compliant persons.

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[69] See submissions by Austria; Chile; Hungary; and Japan. See also article 658 (1) (5) of the Commerce Act of the Czech Republic; and articles 22 and 55 of the Bankruptcy Act of Estonia as regards access to State records.

[70] See submissions by Chile; China; Hungary; Lithuania; Panama; and Uruguay. In Australia, the insolvency representative may obtain warrant from court, authorizing constable to enter any premises, open containers, and use such force as necessary to find and seize assets of the insolvency estate if insolvency representative has reasonable grounds for suspecting that such assets are located there. Also, article 642 of the Commerce Act of Bulgaria; sections 43–44 of the Insolvency Act and article 87, para. 1 of Law No. 4738 of Greece; article 115 (1) of Law No. 85/2014 of Romania; DEBA, articles 98, 221, 223, 242(3) and 243(1); 11 U.S.C. 542 (United States). In comparison, in some jurisdictions (e.g. Italy), an advance court authorization is required for the insolvency representative to be able to take claim recovery actions with the justifications to be provided for envisaged actions.

[71] See, e.g. Chile, Act No. 20.720 of 2014, article 196; articles 292-293 of the Bankruptcy Act of Slovenia; DEBA, articles 222(3) 229 (1); Swedish Bankruptcy Act, Ch. 7 Sect. 14.

[72] See, e.g. Czech Insolvency Act, article 212(2); article 65.2 of the Insolvency Law of Latvia.

34. The insolvency representative may be assisted in performance of its functions by accountants, attorneys and other professionals.[73] It may face liability and disqualification for not performing its functions or not performing them properly.[74] In one jurisdiction, if the insolvency estate has no funds, insolvency representatives claiming payment for their services from public funds have to demonstrate that they have taken all the necessary steps to trace, seize and dispose of the debtor's assets. They are expected to submit relevant supporting documents, such as the record of seizure (and of the inventory made) signed by those specified by law; minutes of meetings of creditors attesting to any decisions taken not to pursue certain assets; information on vehicle searches; tax information; copies of title deeds; or any other information that would allow the relevant authority to satisfy itself that steps were taken to trace the debtor's assets.[75]

6. Identification and preservation of the insolvency estate assets

(a) Composition of the insolvency estate[76]

35. The insolvency estate may include: (i) all assets of the debtor, including the debtor's interest in encumbered assets and in third-party-owned assets; (ii) assets acquired after commencement of the insolvency proceedings; and (iii) assets recovered through avoidance and other actions. In the case of a debtor natural person, certain assets may be excluded from the estate, such as assets that are necessary for the debtor to earn a living, post-application earnings from the provision of personal services by the debtor or monies received for public works by the debtor, or personal and household items. The date from which the estate is to be constituted may either be the date of application for commencement or the effective date of commencement of insolvency proceedings. The significance of the difference between the dates relates to the treatment and the protection of the debtor's assets in the interim period between application and commencement (see above under "Provisional measures").

36. The assets of the debtor may form part of the estate whether or not the debtor discloses them and whether or not the insolvency representative learns about them on time to be able to include them in the inventory of insolvency estate assets. Some insolvency laws provide for the reopening of the insolvency proceedings if the assets are discovered after the closure of the insolvency proceedings.[77]

37. Some jurisdictions include all assets of the debtor regardless of their location in the insolvency estate.[78] Other jurisdictions include in the insolvency estate only those assets that are located within the boundaries of that jurisdiction unless there are treaties or other inter-State or inter-court cooperation agreements that facilitate including the debtor assets located abroad in the insolvency estate. Yet other jurisdictions follow an intermediate approach, for example that the insolvency estate in the main proceeding should include all assets of the debtor wherever located. Some laws envisage, like the MLCBI, that certain assets can be reserved for administration in a particular proceeding (main, non-main, or proceeding at the place of the location of the assets). They may also restrict removal of debtor assets located in their jurisdiction abroad before interests of local creditors are satisfied.

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[73] Specifically on audit, see e.g. section 100 of the Bankruptcy Act of Denmark; chapter 9, section 5 of the Bankruptcy Act of Finland; and articles 67.13 of the Insolvency Law of Latvia.

[74] See e.g. submission by China.

[75] See submission by Chile.

[76] Addressed in recommendations 35–38 and 313–315 of the Guide and accompanying commentary; and MLCBI articles 21(2) and (3), 23(2), 28 and 29(c).

[77] See, e.g. Austrian InsO, §138(2); German InsO, §203; DEBA, article 269; *Arnot v. ServiceLing Title Co. of Oregon*, 744 Fed. Appx. 415 (9th Cir. 2018) (United States); *Kane v. National Union Fire Ins. Co.* 535 F.3d 380, 384 (5th Cir. 2008) (United States); submission by Jordan.

[78] See e.g. submission by the Dominic Republic.

(b) Drawing up an inventory of assets

38. Many insolvency laws require the insolvency representative immediately upon appointment to establish which assets belong to the insolvency estate, to draw up a detailed inventory,[79] and to estimate the value of each asset.[80] Insolvency laws differ as to whether they require the insolvency representative to seize, seal, or simply mark the assets over which the debtor no longer has control, a matter which may depend on the type of asset and on the probability of dissipation in the absence of such a measure.[81]

39. The supervision of the judge or a public certifying officer and presence of the debtor may be required for drawing up an inventory. Site visits may take place under similar safeguards.[82]

40. Upon completion and certification of the inventory, the insolvency representative assumes control and responsibility over all assets, records and documents in the inventory, including their preservation and realization of the assets that by their nature or because of other circumstances are perishable, susceptible to devaluation or otherwise in jeopardy. The insolvency representative may be assisted by the law enforcement agencies for obtaining control over the assets and by experts in estimating the value of the assets.[83] Safeguards, such as court authorization and review of objections, apply if rights of third parties are affected by those measures.

7. Avoidance[84]

(a) Suspect period and time limits for initiating avoidance actions

41. The duration of the suspect period varies across jurisdictions. Within a single jurisdiction, it may vary depending on the type of transaction and with whom it was concluded. For example, where transactions subject to avoidance involve related persons, insolvency laws usually provide a longer duration of the suspect period and dispense with requirements that the debtor was insolvent at the time of the transaction or was rendered insolvent as a result of the transaction. Any fraudulent transactions entered into with creditors, or fraudulent payments made to creditors, are usually unenforceable, regardless of the date on which they took place.[85]

(b) Avoidable transactions

42. The criteria determining which transactions are avoidable vary considerably across jurisdictions and may include objective and subjective aspects and different

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[79] See e.g. submission by Chile (the inventory of assets was meant to be a detailed list, broken down into groups and line items, and different rules applied to the inventory of different assets, for example, for movable assets "their kind, quantity, quality, condition and any other background information or specification required for their proper itemization" should be indicated in the inventory; for cash, the liquidator must indicate the quantity, amount and currency; for money held in bank accounts, the liquidator must indicate the name of the bank, the account number, the balance and any chequebooks with unused cheques; for motor vehicles, the liquidator must request from the relevant register the certificates of registration of all the vehicles registered in the debtor's name; for immovable assets, the liquidator must specify their location, property registration number and details of the relevant title deeds filed with the relevant immovable property registry; for business records, the liquidator must close the books of accounts and ensure that they cannot be used for further entries. All the supporting documents must be itemized).

[80] See, e.g. Austrian InsO, §81a; German InsO, §§22 and 151; Sweden; DEBA, articles 221 and 299; submissions by Belgium; Chile; the Dominican Republic; and Panama.

[81] See, e.g. Chile, Act No. 20.720, article 36(1); German InsO, §§148-150; DEBA, article 223.

[82] See e.g. submission by Belgium.

[83] See e.g. submissions by Belgium; and Chile.

[84] Addressed in recommendations 87–99, 217–218, 228 and 316 of the Guide and accompanying commentary.

[85] See e.g. submissions by Belgium; and Hungary.

presumptions, including as regards detriment to creditors.[86] They usually include: (i) transactions intended to defeat, delay or hinder the ability of creditors to collect claims where the effect of the transaction was to put assets beyond the reach of creditors or potential creditors or to otherwise prejudice the interests of creditors; (ii) transactions where a transfer of an interest in property or the undertaking of an obligation by the debtor was a gift or was made in exchange for a nominal or less than equivalent value or for inadequate value that occurred at a time when the debtor was insolvent or as a result of which the debtor became insolvent (undervalued transactions); (iii) transactions involving creditors where a creditor obtained, or received the benefit of, more than its pro rata share of the debtor's assets that occurred at a time when the debtor was insolvent (preferential transactions). Examples include payment or set-off of debts not yet due or granting a security interest to secure existing unsecured debts. Filing or registration of security rights beyond the deadline established by law may also be avoided; (iv) if, during the suspect period, the debtor has damaged the interests of all or some of the creditors through the lawful exercise of the right to divide property; and (v) any other payments made by the debtor for debts owed, and any other transactions carried out by the debtor for valuable consideration after the cessation of payments and before the declaration of bankruptcy is made if those who received payment from or dealt with the debtor were aware of the cessation of payments.[87]

(c) The right to bring avoidance actions

43. Depending on jurisdictions, the insolvency representative may have the principal or sole responsibility to commence avoidance proceedings. Where avoidance is the sole responsibility of the insolvency representative, any creditor action commenced before the time of the commencement of the proceedings may have to be discontinued and the insolvency representative may take over that action.[88] The costs of avoidance actions are paid as administrative expenses but alternative approaches to address the pursuit and funding of such actions may also exist. Creditors are able to pursue avoidance in some jurisdictions only with the agreement of the insolvency representative or, if it does not agree, with leave of the court. Some laws permit one or more creditors who wish to do so to pursue avoidance proceedings in cases in which the insolvency representative, based on the balance of considerations, decides not to commence such proceedings.[89] Some laws require that the creditors who want to pursue avoidance must do so on their own risk, that is, without incurring potentially unnecessary litigation and other costs for the estate.[90]

44. Where creditors are permitted to commence avoidance proceedings, either on an equal basis with the insolvency representative or because the insolvency representative decides not to commence such proceedings, insolvency laws adopt different approaches to the assets or value recovered. The most common approach is to treat the assets or value recovered as part of the estate on the basis that the purpose of avoidance is to return assets or value to the estate for the benefit of all creditors. Other laws provide that whatever is recovered can be used to cover the costs and satisfy the claim of the suing creditors, with only the remainder going to the insolvency estate, subject to a duty of the creditors to detailed accounting.[91]

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[86] See e.g. submission by Spain (irrebuttable presumption of detriment to creditors where transactions are with related persons or involve new security for pre-existing debt or payment of unmatured secured claims; and relative presumption of detriment to creditors where gratuitous acts of disposition, except for gifts of use, and payment of unmatured unsecured claims are involved).

[87] See e.g. submissions by Belgium; Chile; China; Jordan; and Panama.

[88] See references to the actio pauliana under "Preventive measures" above. See also submission by Japan.

[89] See e.g. *Unisys Corp. v. Dataware Prods. Inc.,* 848 F.2d 311 (1st Cir. 1988) (United States). See also submission by Spain.

[90] See, e.g. DEBA, article 260.

[91] For an example of the duty of the creditors to provide a detailed accounting of the result and, when successful, assets and value gained in their avoidance action, see Swiss Bankruptcy Form 7K, paras. 2–4.

(d) Consequences of avoidance

45. The counterparty to a transaction that has been avoided is usually required to return to the estate the assets obtained or, if the court so orders, make a cash payment to the estate for the value of the transaction. The counterparty may have an ordinary unsecured claim against the estate. In case of bad faith of the counterparty, its claim may be subordinated. If the counterparty does not comply with the court order, its claim may be disallowed. Some jurisdictions require that the claims must be settled at the same time as the assets and rights that are the subject of the avoidance are restored.[92]

8. Actions against directors, shareholders and other persons[93]

46. As noted above under "Preventive measures" and "Obligations of the debtor and third parties, including government agencies", under certain conditions, personal liability of persons exercising factual control over the debtor's business (collectively referred to as "directors", the term encompassing de jure, de facto, shadow directors as well as shareholders and lenders controlling the debtor's business) may arise for their conduct during the period when the debtor was insolvent or in the period approaching insolvency.[94] What is being sought in pursuit of actions against those persons is not the recovery of assets of the debtor like in avoidance but recovery of the damage suffered by the creditors due to the actions of those persons. Those actions are in addition to actions that could be pursued to avoid transactions that could have taken place between the debtor and those persons and in addition to additional remedies or sanctions that may be available under law against those persons, such as deferral of payments owed to them by the debtor or subordination or denial of their claims. Some laws contemplate different sanctions against directors depending on how their behaviour impacted the insolvency,[95] not precluding criminal liability.[96]

47. Actions against directors share many features of avoidance. A number of insolvency laws provide that all claims against directors for breach of their fiduciary duty – not limiting those duties to any listed ones – form part of the insolvency estate. The cause of action thus belongs to the insolvency estate and the insolvency representative has the principal responsibility to pursue an action for breach of those obligations. The costs of an action are paid as administrative expenses, but alternative approaches to the pursuit and funding of such actions may also exist. In particular, creditors or any other party in interest may pursue actions against directors with the agreement of the insolvency representative or, where the insolvency representative does not agree, with leave of court.

9. Substantive consolidation[97]

48. Substantive consolidation may be ordered as an equitable remedy[98] or otherwise when the court is satisfied that: (a) 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; and (b) separate legal entities are engaged in a fraudulent scheme or activity with no legitimate business purpose and that substantive consolidation is essential to rectify that scheme or activity. In such case, the assets and liabilities of the substantively consolidated entities are treated as though they were part of a single estate and claims and debts between the substantively consolidated entities, including the secured

[92] See e.g. submissions by Panama; and Spain.
[93] Addressed in part four of the Guide.
[94] See e.g. submissions by Hungary; Morocco; and Panama.
[95] See e.g. submission by Morocco.
[96] See e.g. articles 56 and 169 of Law No. 85/2014 of Romania.
[97] Addressed in recommendations 219–231 of the Guide in the context of the enterprise group insolvency.
[98] See, e.g. *In re Bonham*, 229 F.3d 750, 767 (9th Cir. 2000) (United States).

indebtedness, are extinguished and claims against individual entities are treated as if they were claims against the single insolvency estate.

49. Safeguards include: (a) a court order and the ability of the court to modify the order, where appropriate; (b) notice of the hearing for a possible court order to interested parties; (c) exclusion of some assets and claims from an order for substantive consolidation under certain conditions; (d) respect, as a general rule, of the rights and priorities of a creditor holding a security interest over an asset; and (e) recognition of priorities established under insolvency law and applicable with respect to an individual entity prior to an order for substantive consolidation.

10. Procedural coordination and consolidation[99]

50. In some jurisdictions, the law provides for the possibility of procedural coordination or consolidation (or joint administration) of related insolvency proceedings (e.g. insolvency proceedings against the debtors and related persons (family members, partners, shareholders, affiliates).[100] Such possibility allows the court to address comprehensibly intertwined debts, e.g. business, consumer, and personal of individual entrepreneurs and owners of limited liability micro- and small enterprises and their family members. The consolidated case usually receives the same case file, is assigned to the same insolvency judge, and a single insolvency representative is appointed. However, unlike in substantive consolidation, the assets and liabilities of each debtor involved remain separate and distinct. For ATR purposes, procedural consolidation may reveal transactions between the related debtors or assets of one in the possession of the other that the debtor would otherwise have been able to keep hidden.

B. Cross-border context[101]

1. General

51. Jurisdictions that enacted relevant provisions of MLCBI facilitate ATR in cross-border insolvency cases. There are other instruments that pursue similar objectives,[102] including the EU Insolvency Regulation.

2. Provisional measures

52. Unless otherwise provided in domestic law, the foreign representative needs to apply for provisional measures in the relevant jurisdiction.[103] Jurisdictions that enacted article 19 of MLCBI[104] provide for possibility of granting provisional measures to the foreign representative, including to the one appointed on an interim basis, from the time of application for recognition of a foreign proceeding until a decision on the application is made. Across the EU, in addition to the automatic recognition of judgments originating in the EU member States relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it,[105] a temporary administrator appointed in the EU main insolvency proceedings is empowered to request any measures available under the law of the EU member State where the debtor's assets are situated to secure and preserve those

[99] Addressed in recommendations 202–210 and 364–366 of the Guide and accompanying commentary.

[100] See, e.g. Federal Rule of Bankruptcy Procedure 1015(b) (United States).

[101] Addressed in UNCITRAL insolvency model laws.

[102] See e.g. submission by China referring to the 2021 Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region.

[103] See e.g. submission by China.

[104] See also articles 12 of MLIJ and articles 20 and 22 of MLEGI.

[105] Article 32.

assets.[106] Some jurisdictions allow the foreign representative to apply for provisional measures ex parte.[107]

53. Usual measures sought and granted include: (a) the suspension of enforcement with respect to any part of the debtor's local property; (b) 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; (c) urgent realization of the debtor's assets due to the nature of such assets or for any other reason; and (d) the examination of witnesses under jurisdiction of the receiving State, the taking of evidence located in the receiving State or the delivery to the foreign representative of information concerning the assets, affairs, rights, obligations or liabilities of the debtor. In granting or denying any of these measures, the court is usually required to ensure adequate protection of the interests of the creditors and other interested persons, including the debtor. [108] Where requests are made for an order to seal, freeze or seize local debtor assets, the existence and the location of those assets and the fact that the debtor is their legal or beneficial owner may be required to be demonstrated by prima facie evidence when requesting the order.[109]

3. Relief upon recognition

54. In some jurisdictions, the recognized proceedings have the effects similar to those of a local insolvency proceeding without however a retroactive effect (e.g. liquidation already undertaken is irrevocable).[110]In other jurisdictions, recognition of a foreign proceeding may lead to the opening of local ancillary proceedings,[111] which are administered according to the domestic insolvency law.

55. Jurisdictions that enacted relevant provisions of the MLCBI provide for: (a) an automatic stay of proceedings, including the suspension of the debtor's right to transfer, encumber, or otherwise dispose of its assets, upon recognition of the foreign main proceeding; and (b) a discretionary stay if requested by the foreign representative upon recognition of the foreign non-main proceeding. The scope, modification, termination, and effect of the stay is subject to the law of the recognizing jurisdiction. Other types of relief may encompass those mentioned under "Provisional measures" above and any additional relief that courts may be authorized to grant. Some jurisdictions do not limit it to that available under domestic law.

4. Obligations of the debtor

56. Debtor obligations set out in the domestic insolvency context may arise vis-à-vis the locally appointed insolvency representative or the foreign representative, as the case may be, upon recognition of the foreign insolvency proceeding.

57. Challenges may arise where the debtor or the director is located abroad and where untimely disclosure or the lack of disclosure of relevant information leads to the expiration of the time limit for bringing actions.

5. Powers of the insolvency representative

58. Some surveyed texts authorize the insolvency representative to exercise ATR powers across borders; others limit them to the domestic context, thus necessitating cooperation with the relevant foreign authorities or request of foreign assistance

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[106] Article 52.

[107] Article 168 of the Private International Law Act of Switzerland (SPILA), available at https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en.

[108] See e.g. submissions by Belgium; Jordan; and Panama.

[109] See submission by Switzerland.

[110] See submission by China.

[111] See e.g. submission by Switzerland (a foreign representative may request that no ancillary proceedings should be opened upon recognition but such an option does not exist where local privileged creditors (mostly local employees) have filed claims in the call for claims following recognition. In such case, ancillary proceedings must be opened).

abroad if assets are located abroad.[112] The exercise of ATR powers across borders is facilitated by some international instruments and domestic law provisions, including those enacting UNCITRAL insolvency model laws that envisage a wide range of relief that the recognizing court can provide to the foreign representative as a provisional measure or upon recognition of the foreign proceeding. Some jurisdictions do not limit assistance to that available under domestic law. Some explicitly state that a foreign representative has the same rights and obligations as locally appointed one.[113]

59. The powers of the insolvency representative abroad are restricted by law and court orders of the relevant foreign jurisdiction as well as by practical limitations. A representative of a foreign non-main proceeding may have fewer powers than a representative of a foreign main proceeding, as envisaged in MLCBI. In addition, the insolvency representative may face obstacles in the recovery of public debts. Challenges on jurisdictional and standing grounds, including because of expiration of time limits for bringing actions – which are not harmonized across jurisdictions – may also impede the exercise of the insolvency representative's powers abroad. Similar issues will be faced by creditors or third parties to whom the insolvency representative may assign rights to pursue actions.

60. In the EU, the insolvency representative appointed in the main insolvency proceedings is empowered to exercise all the powers conferred on it, by the law of the State of the opening of proceedings, in another EU member State to which the EU Insolvency Regulation applies, as long as no other insolvency proceedings have been opened and no preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. Subject to the EU Insolvency Regulation's provisions on the protection of third parties' rights in rem and reservation of title, the insolvency representative appointed in the main insolvency proceedings may, in particular, remove the debtor's assets from the territory of the member State in which they are situated. The insolvency representative appointed in the secondary insolvency proceeding: (a) may in any other EU member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other EU member State after the opening of the insolvency proceedings; and (b) may also bring any action to set aside which is in the interests of the creditors. In exercising their powers, insolvency representatives are required to comply with the law of the member State within the territory of which they intend to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures, unless ordered by a court of that member State, or the right to rule on legal proceedings or disputes.[114]

61. Some jurisdictions make it clear that the recognition of foreign insolvency proceedings gives the foreign representative the right to participate and intervene in local proceedings in which the debtor is a party, as envisaged in articles 12 and 24 of MLCBI, including to make petitions, submissions or requests concerning ATR, provided the requirements of the law of the recognizing State are met. Such proceedings may concern individual actions by the debtor or against the debtor that have not been stayed in the recognizing State as a result of the recognition of the foreign proceeding. Some other jurisdictions also highlight the ability of the foreign representative upon recognition of the foreign proceeding to take any steps to block transactions that would be harmful to the creditors.[115]

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[112] In some jurisdictions (e.g. Italy), request for assistance in cross-border insolvency cases that involves extra costs for the domestic insolvency proceeding (both administrative costs and professional fees) must be authorized by the judge and be justified on the grounds of expediency. In other jurisdictions, the insolvency representative may involve a competent State authority in a request for assistance from competent foreign authorities (e.g. the Bankruptcy Ombudsman in Finland).

[113] See e.g. article 9 of the Insolvency Law of Latvia (1 November 2020).

[114] Article 21 of the EU Insolvency Regulation.

[115] See submissions by Jordan; and Panama.

62. Jurisdictions that enacted articles 9 and 11 of MLCBI enable a foreign representative (of either a main or a non-main insolvency proceeding) directly to apply to domestic courts, including for commencement of local insolvency proceedings or other ATR-related actions, without the need to meet formal requirements such as licenses or consular action proceedings and without prior recognition of the foreign proceeding by that State.

63. Where local ancillary proceedings have been opened, the locally appointed insolvency representative of the ancillary proceedings may have the primary duty and task to trace and recover assets. In addition to requesting any kind of information from any party, it may take cautionary measures to secure the assets. In one jurisdiction, the foreign representative of the main proceeding may commence local avoidance or other actions against a third party (e.g. liability, restitution and compensation claims) if the locally appointed insolvency representative renounces to do so. In that jurisdiction, where no local ancillary proceeding was opened, the foreign representative can request any protective measure available under local law and file claims for recovery of assets against third parties. The foreign representative can also request there information on the basis of the laws of the main proceeding, excluding the exercise of public powers.[116]

6. Avoidance and other insolvency-related actions

64. Jurisdictions that enacted article 23 of MLCBI give the foreign representative standing to initiate avoidance actions upon recognition of the foreign proceeding. This is without prejudice to other provisions of domestic law related to such actions and on the condition that, in case of a foreign non-main proceeding, the action relates to assets that, under the law of the recognizing jurisdiction, should be administered in the foreign non-main proceeding. Jurisdictions that enacted article 13 (1) of MLCBI would enable also foreign creditors to bring avoidance claims in domestic insolvency proceedings if local creditors have such ability.

65. Avoidance judgments and other insolvency-related judgments, such as on actions against third parties claiming to be the owner of a particular asset, often have no effect in a foreign jurisdiction without prior recognition of the foreign proceeding or the judgement itself. In many countries, the recognition and enforcement of foreign judgments is not automatic and may be available only on narrow grounds or not at all. Where recognition and enforcement of foreign judgments is generally available, insolvency-related judgments, such as judgments in avoidance actions, may be excluded from recognition and enforcement.

66. Jurisdictions by enacting MLIJ would address difficulties that arise from ATR if assets related to the avoided transaction or persons ordered to return assets are located abroad. MLIJ enables the recognition and enforcement of foreign insolvency-related judgments, including judgments that originate in jurisdictions that are neither the place of the main nor of the non-main proceeding (article 14 (h)) or in courts that are not administering the foreign insolvency proceeding (e.g. civil courts hearing avoidance proceedings).

67. At the regional level, the EU Insolvency Regulation requires recognition and enforceability of insolvency-related judgments of courts with jurisdiction over main and secondary insolvency proceedings across the EU without any further formalities, including the judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.[117]

68. Some jurisdictions envisage direct recognition of foreign avoidance and other insolvency-related judgments and provide appropriate relief, where requested, subject to certain conditions (e.g. the defendant should not have had its local domicile at the time when the claim was filed; the foreign proceeding to which the judgment relates must be eligible for recognition locally). They also allow for recognition and

[116] See submission by Switzerland.
[117] Article 32.

enforcement of orders outside insolvency proceedings, for example, asset freezing or seizure orders related to a claim that has been assigned to a third party (and is not related to the insolvency estate anymore) or where a claim is not based on insolvency law (e.g. directors' misconduct) and is not being pursued by the insolvency representative. The usual conditions apply, such as presentation of a title (e.g. a foreign judgment) and compliance with due process requirement (e.g. the defendant should have had a right to be heard).[118]

7. Cooperation and coordination

69. Jurisdictions that enacted relevant provisions of UNCITRAL insolvency texts empower their domestic courts and locally appointed insolvency representatives to communicate directly and cooperate to the maximum extent possible with foreign courts and insolvency representatives. This ability is not linked to the requirement of recognition or the type of insolvency proceeding (main, non-main, or proceedings based on the presence of assets in the State) and does not require communication via designated authorities. Cooperation may be implemented by any appropriate means, including: (a) appointment of a person or body to act at the direction of the court; (b) communication of information by any means considered appropriate by the court; (c) coordination of the administration and supervision of the debtor's assets and affairs; (d) approval or implementation by courts of agreements concerning the coordination of proceedings; and (e) coordination of concurrent proceedings regarding the same debtor.

70. The EU Insolvency Regulation requires cooperation and communication between insolvency representatives in insolvency proceedings concerning the same debtor and of members of a group of companies, specifying matters that are expected to be communicated between them, including any information which may be relevant to the other proceedings. It also addresses cooperation and communication between courts across the EU in insolvency proceedings. The suggested means of cooperation are similar to those listed in UNCITRAL insolvency texts and include also coordination in the appointment of the insolvency practitioners and coordination of the conduct of hearings.[119]

71. Some jurisdictions envisage or require publication in the domestic official gazette of certain information relating to cross-border insolvency proceedings. Such publication aims, among others, at implementing the requirement for exchange of information between and among courts and insolvency representatives across borders.[120]

III. Civil ATR tools of general application

A. Registers

72. Across jurisdictions, there are multiple registers that contain information that may be useful for ATR in insolvency proceedings, in particular tracing the debtor assets. These registers serve various purposes, such as establishing proof of title (for example the land registry maintained in certain civil law jurisdictions); and facilitating commercial transactions by providing information on title, security rights and third-party interests on things or on the type of liability of a business entity and the identity of its directors, officers and other persons authorized to bind the entity (for instance, chattel and mortgage registers; commercial registers) or information about holders of intellectual property rights (patent, trademark, and copyright registers). There are also motor vehicle, ship, and aircraft registers and, particularly

[118] See submission by Switzerland.

[119] Articles 41–43. See also e.g. articles 471–473 of the Insolvency Act of Sweden.

[120] See e.g. submission by Belgium.

in the EU,[121] central registers of bank accounts.[122] There may also be publicly available registers of insolvency proceedings that permit courts, insolvency representatives, and creditors to obtain information about such proceedings regarding specific debtors.[123]

73. Some registers are particularly useful for ATR. For example, title registers, such as the land registries that are kept in certain civil law countries, require transfers and encumbrances of immovable property to be entered in the register to make them effective against third parties. A warning to users of the register about a court-ordered limitation on the defendant's ability to transfer or encumber property listed in the register can effectively prevent further transactions with respect to the property. Some registers come with a presumption of correctness of the information they contain, which may be useful in case a creditor or insolvency representative needs to prove ownership in civil litigation.

74. Some registers are publicly accessible online. Others, although publicly available, may be not easily accessible or searchable (e.g. local paper-based registers, requiring in-person and manual searches in each place where the debtor's immovable property may be located; some may be searchable by an asset or other criteria rather than the name of the debtor). Access to other registers may be granted only to persons who can demonstrate a legitimate interest. Yet others may be consulted only by specific persons (e.g. about one's own information listed in the register) or government agencies, usually because the information contained in the register is (commercially) sensitive or confidential. For example, in some countries, certain registers, such as the bank account registers, can be consulted only by prosecutors and courts in criminal cases[124] or in certain criminal cases, such as those involving money laundering.[125] A special court order may be needed to obtain information from such registers.

B. Files of government agencies

75. Files of government agencies, such as tax and social insurance authorities, may contain important information on the assets of the debtor. In some jurisdictions, government agencies have an obligation under insolvency law to provide the insolvency representative with information from such files that pertain to the debtor's assets. In other jurisdictions, it has become possible for insolvency representatives to gain access to files of government agencies because of open government laws.[126] However, access to certain data may be restricted (for example, because privacy protection considerations prevail)[127] or conditioned (for example, the insolvency representative may be able to obtain only information that it is directly relevant and important for the identification of the debtor assets), or limits may be imposed on its subsequent use (for example, the insolvency representative may be obligated not to reveal the obtained information to other persons or to make sure that the information is not used for purposes outside the insolvency proceeding).

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[121] Following the adoption of Directive (EU) 2015/849, OJ L 141, 73 (the fifth money laundering Directive).

[122] E.g. FICOBA in France.

[123] See e.g. the insolvency register required under article 24 of the EU Insolvency Regulation.

[124] See, e.g. Austria, Kontenregister- und Konteneinschaugesetz.

[125] See, e.g. Spain, Ley 10/2010, de 28 de abril, de prevención del blanqueo de capitales y de la financiación del terrorismo.

[126] See, e.g. VG Berlin 30.8.2009 – VG 2 K 147/11 (Administrative Court of Berlin); VG Köln, 1.12.2016 – 13 K 2824/15 (Administrative Court of Cologne); VG Schleswig 15.10.2014 – 8 A 1/14 (Administrative Court of Schleswig), all with respect to the tax authority.

[127] See, e.g. VG Stuttgart 18.8.2009 – 8 K 1011/09 (Administrative Court of Stuttgart) under which the insolvency representative cannot access information from social insurance agency under the German federal freedom of information act.

C. Information disclosure obligations

76. Information disclosure obligations may apply to certain persons, e.g. politically exposed persons as regards their assets and income. While often protected under personal data law and not accessible in civil proceedings, the disclosed information may be accessible to the insolvency representative or in criminal proceedings from where it could subsequently be used in insolvency proceedings.[128] Other information emanating from disclosure obligations may be publicly available, e.g. information that must be disclosed by companies to investors or the public at large in compliance with their due diligence obligations (e.g. to prevent the improper operation of listed companies and to safeguard the legitimate rights and interests of potential investors, shareholders and creditors).[129]

D. Evidence gathering in the context of civil litigation

1. Pre-litigation

77. Almost all jurisdictions provide for the pre-litigation gathering of evidence in some form. This includes the party-centred discovery or disclosure of evidence in common law countries and the court-cantered evidence gathering in civil law countries, both of which provide for the gathering of evidence from parties and non-parties alike. In most jurisdictions, the pre-litigation gathering of evidence is available to secure evidence in anticipation of litigation, planned or pending, when time is of the essence and there is a danger that the evidence in question will disappear or be lost or significantly changed before litigation is commenced or before litigation has moved to the evidence-gathering stage.[130] In some jurisdictions, the pre-litigation gathering of evidence is also available, at least to some extent, if there is some other interest of the applicant, most prominently the interest in evaluating the evidence to determine the chances of successful litigation, which in turn is intended to promote just settlements.[131]

78. If these requirements are met, the court usually orders the pre-litigation gathering of evidence, which usually proceeds the same way as evidence-gathering during litigation (see below), although the number of tools available for pre-litigation evidence is sometimes limited (not all evidence-gathering tools available during litigation may be available for pre-litigation evidence gathering[132]) and more requirements are imposed for their use (e.g. to show the likelihood of success of the plaintiff's claim on the merits and the need to obtain or preserve evidence or another provisional measure). In civil law jurisdictions, the competent court may question parties and witnesses, view things or review documents, or appoint an expert for an expert report and may order parties and witnesses to appear for questioning and order persons in possession of certain documents to produce those documents.[133] In

[128] See submissions by Switzerland; and Uruguay (also noting that sworn statements of the President, Vice President, Legislators, Ministers of the Supreme Court of Justice and other officials specified by article 12 bis of Law No. 17.060 are public).

[129] See submission by China.

[130] See, e.g. Federal Civil and Commercial Code, articles 326 and 327 (Argentina); Austrian Code of Civil Procedure, §384; Brazilian Code of Civil Procedure, article 381(1); Colombian General Code of Procedure, articles 183–190; French Code of Civil Procedure, article 145; German Code of Civil Procedure, §§485–494a; Swiss Code of Civil Procedure, article 158; Federal Rule of Civil Procedure 27 (United States) (only to obtain testimony and only "[i]f … perpetuating the testimony may prevent a failure or delay of justice"); submission by Panama.

[131] See, e.g. Brazilian Code of Civil Procedure, article 381(2) & (3); Dalloz, article 145, para. 87 (with further references; France); German Code of Civil Procedure, §485(2); Swiss Code of Civil Procedure, article 158(1)(b).

[132] See, e.g. German Code of Civil Procedure, §485 (not available for inspection of documents); Federal Rule of Civil Procedure 27 (United States) (only deposition of witnesses).

[133] See e.g. submission by Panama (once ordered, this procedure must be carried out on the same day without hearing the counterparty or the holder of the property in question. The applicant must provide a security to cover possible damages that may arise during the procedure).

common law jurisdictions, on the other hand, the evidence gathering proceeds in the form of disclosure or discovery, including obligations to appear for a deposition and to produce documents and things, where applicable.[134]

79. The same rules and limitations usually apply for pre-litigation evidence gathering and for evidence gathering during litigation. In particular, in most jurisdictions, the pre-litigation evidence gathering – like evidence gathering during litigation – is only available with regard to evidence that is relevant to the claims of the parties in the litigation on the merits. In common law jurisdictions, this relevance requirement is sometimes interpreted broadly, so that it may, under certain circumstances, include evidence of the assets of one of the parties.[135] On the other hand, there are jurisdictions that understand relevance to mean that the facts to be proven with the evidence to be gathered must be facts necessary to prove an element of the cause of action claimed.[136] This will rarely include evidence of the other party's assets, unless the cause of action is one of civil fraud. In these jurisdictions, therefore, pre-litigation evidence gathering may be of use for purposes of ATR only in specific cases.

2. Litigation

80. The same tools to gather evidence as at the pre-litigation stage, including disclosure and discovery in common law countries and court-centred evidence gathering in civil law countries, are usually available during litigation. In addition to them, other tools may be made available during litigation. Since the purpose of litigation is to evaluate the claims, evidence gathering is part of the process and needs no additional justification. For the same reason, certain interests, such as the interest in privacy and data protection, may weigh less at the litigation stage in comparison with other considerations.

81. As with pre-litigation evidence gathering, there are limits on the evidence that can be gathered during litigation. For example, the relevancy requirement may make it difficult in many jurisdictions to use the evidence-gathering process during litigation for the purpose of tracing and recovering the defendant's assets because evidence of the defendant's assets will rarely be relevant to proving the plaintiff's cause of action – except in cases involving claims of civil fraud. In addition to relevance, there are usually limits regarding the gathering of evidence involving privileges and attorney-client work product.[137] Frequently, there is also some sort of a proportionality requirement, which may particularly apply in the context of sensitive information or trade secrets.[138] The evidence one party intends to collect must often be identified much more specifically in civil law jurisdictions than is frequently the case in common law jurisdictions, deriving from a tightly understood rule against fishing for evidence.

82. Sensitive information, including information covered by banking confidentiality or banking secrecy, may be treated differently across jurisdictions. In some jurisdictions, such information is generally protected by privilege,[139] unless the parties of the litigation are requested to reveal their own bank accounts, trade secrets and the like, in which case the information may be more easily available. In other jurisdictions, the decision whether a litigant or a third person with such information should be ordered to reveal it is made by the court upon balancing the interests

[134] See A/CN.9/WG.V/WP.175 for references to Norwich Pharmacal Orders, Bankers Trust Order and Anton Piller orders.

[135] See e.g. Federal Rule of Civil Procedure 26(c) (United States).

[136] See e.g. Stein/Jonas-Thole, §284, para. 14 (Germany); Swiss Code of Civil Procedure, article 150.

[137] See e.g. German Code of Civil Procedure §§383–390; Swiss Code of Civil Procedure articles 163–167; Federal Rule of Civil Procedure 26(b)(1), (3) and (4) (United States).

[138] See e.g. Swiss Code of Civil Procedure article 156; Federal Rule of Civil Procedure 26(b)(1) and (c)(1)(G) (United States).

[139] See e.g. German Code of Civil Procedure §§383(1)(6) and 384(3).

involved or a proportionality analysis.[140] In yet another group of jurisdictions, such information is less protected or must be made available on the basis of special legislation.[141]

3. Post-trial discovery

83. Some common law jurisdictions permit the judgment creditor to obtain discovery "in aid of the judgment or its execution" from the judgment debtor and from third parties.[142] This allows the judgment creditor to obtain information about the debtor's assets, including hidden and concealed assets. Discovery of this kind is "quite permissive"[143] if requested from the debtor. Discovery from third persons, however, is ordinarily limited to the assets of the debtor and cannot be expanded to the assets of the third person. However, when a third party has close ties to the debtor, more extensive discovery is permissible.[144]

4. Safeguards

84. Usually, the counterparty (or counterparty to be) in the litigation on the merits has a right to be heard before pre-litigation gathering of evidence is ordered. However, many jurisdictions provide for an ex parte decision in cases of particular urgency and in cases in which there is a danger that the evidence in question might otherwise be removed from the jurisdiction or be destroyed.[145] In such cases, the defendant and other affected persons have an opportunity to be heard on the measure at a later time. If the requirements of pre-litigation evidence gathering turn out not to have been met upon hearing the defendant, there may be situations in some jurisdictions where the discovered evidence may not be admissible in the proceedings on the merits. In addition, the applicant for an ex parte measure is usually made subject to the full and frank disclosure requirement. Ancillary orders may be requested but usually additional safeguards apply in such case.[146]

85. Requirements of relevancy, proportionality and necessity discussed above usually limit the scope of evidence gathering to what is strictly necessary. Additional safeguards may apply in case of especially intrusive measures such, as site visits, search of premises, inspections or seizure of evidence. They include the presence of the defendant, its attorney at law or third party witnesses, the implementation of measures during ordinary business hours and detailed recording of steps taken and items removed.

86. As regards the post-trial discovery, it is usually required that the measure must be relevant to the finding of the judgment creditor's assets and proportional. It may not delve into matters protected by privilege, such as the attorney-client privilege, or into materials an attorney prepared for purposes of trial.[147] Moreover, the court may

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[140] See e.g. Swiss Code of Civil Procedure article 156; Federal Rule of Civil Procedure 26(b)(1) and (c)(1)(G) (United States).

[141] See e.g. Law No. 21.526 (Financial Entities Law), article 39 (Argentina); Bankers' Books Evidence Act of 1879, section 7 (England and Wales) ("a copy of any entity in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.") The same Act has been adopted, among others, by several common and mixed law jurisdictions. See e.g. Australia (www.legislation.wa.gov.au/legislation/statutes.nsf/law_a2805_currencies.html), India (https://indiankanoon.org/doc/1976331/) and Ireland (www.irishstatutebook.ie/eli/1879/act/11/enacted/en/print.html). Courts in England and Wales do not generally permit the use of the Act to obtain information from non-parties.

[142] See e.g. Federal Rule of Civil Procedure 69(a)(2).

[143] See e.g. *Republic of Argentina v. NML Capital, Ltd*., 573 U.S. 134, 138 (2014).

[144] See e.g. *G-Fours, Inc. v. Miele*, 496 F.2d 809 (2d Cir. 1974) (debtor's wife); *Trustees of North Florida Operating Engineers Health and Welfare Fund v. Lane Crane Service, Inc*., 148 F.R.D. 662 (M.D. Fla 1993) (alleged alter ego of judgment debtor).

[145] See e.g. submission by Panama.

[146] See e.g. A/CN.9/WG.V/WP.175 for discussion of gag and seal orders.

[147] See e.g. Federal Rule of Civil Procedure 26(b)(1), (3) and (4) (United States).

grant an order protecting the person from whom discovery is sought from annoyance, embarrassment, oppression, or undue burden or expense.[148]

5. Cross-border aspects

87. Generally, evidence-gathering measures are available to foreign litigants as well as to domestic ones. However, rules of judicial jurisdiction may require that there should be jurisdiction over the defendant in the planned or already pending litigation for the court to be able to order the measure, irrespective of whether the evidence involved is located within the country. In other countries, the court also has judicial jurisdiction whenever the evidence to be gathered is located within the country. In yet others, jurisdiction depends on the reason for evidence gathering, with jurisdiction more easily established to save evidence from dissipation or destruction than simply to assess the chances of successful litigation.

88. In common law jurisdictions, disclosure orders as injunctions operate in personam, meaning the person ordered to disclose certain documents or information is personally obligated to obey the order. If not, that person may be subject to sanctions for contempt of court. This means that the order can be enforced within the jurisdiction against the person or its assets located within the jurisdiction. For that reason, most courts are reluctant to grant disclosure orders against persons located abroad, but do not rule that out entirely.[149] An order against a person located abroad may be easier to obtain if that person has some type of presence in the jurisdiction.[150]

89. In some jurisdictions, disclosure orders may be available for use in foreign proceedings and can be obtained where the person to be ordered to disclose is domiciled.[151] The information gained can then be used to bring or continue litigation in another jurisdiction.

90. Many jurisdictions require the diplomatic process to be used for service of process abroad. If the involved countries are parties to the Hague Service Convention, the procedures of the Hague Service Convention must be used "where there is occasion to transmit a judicial or extrajudicial document for service abroad."[152] The letter-of-request procedure is envisaged in articles 2–7 and the alternative procedures are envisaged in articles 8–9 (service by way of the serving State's consular or diplomatic representatives) and article 10, of that Convention (service by direct mail or direct communication among courts).[153]

91. If at least part of the evidence to be gathered is located abroad or if the person with control of the evidence to be gathered is located abroad, a letter of request to the competent foreign authority (under mutual legal assistance treaties or otherwise) or the use of the procedures of the Hague Evidence Convention,[154] where applicable, or within the EU, the EU Evidence Regulation,[155] may be needed. Those procedures

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[148] See e.g. Federal Rule of Civil Procedure 26(c) (United States).

[149] See e.g. *Sabados v. Facebook Ireland* [2018] EWHC 2369.

[150] See e.g. *Credit Suisse Trust v. Banca Monte Dei Pasche Di Siena* [2014] EWHC 1447.

[151] See e.g. *K&S v. Z&Z BVIHCM* (COM) 2020/0016 (British Virgin Islands). In comparison, the Evidence (Proceedings in other Jurisdictions) Act 1975 permits courts of other jurisdictions to request evidence for proceedings in that jurisdiction and which is considered to be the only way to obtain evidence within England and Wales for proceedings abroad; *Ramilos Trading Ltd. v. Buyanovsky* 2016 EWHC 3175.

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

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

[154] For the status of the Convention and declarations and reservations made thereto, see www.hcch.net/en/instruments/conventions/status-table/?cid=82. Article 23 of the Hague Evidence Convention permits States parties to the Convention to declare that they will not execute letters of request for the purpose of obtaining pre-trial discovery of documents. Many States parties to the Convention made such a declaration.

[155] Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast).

include the letter of request procedure (articles 1–14 of the Hague Evidence Convention and articles 5–18 of the EU Evidence Regulation) and alternative procedures envisaged in article 15–22 of the Hague Evidence Convention (through diplomatic officers, consular agents and commissioners) and article 19 of the EU Evidence Regulation that permits the direct taking of evidence by members of the court of one EU State in another but this is limited to cases in which the person from whom evidence is to be taken voluntarily cooperates.

92. In one jurisdiction, a statute is found that specifically provides for the domestic discovery by a foreign tribunal or any interested person for use in litigation in a foreign or international tribunal, planned or pending.[156] The discovery may be ordered by the court in the district in which the person from whom discovery is sought resides or is found. A discovery order under that statute is discretionary and may depend on a number of factors, including whether the foreign court itself could order the discovery of the evidence sought and whether the applicant attempts to circumvent proof-gathering restrictions imposed by the foreign country, though court of appeals authority is split on some of these questions.

E. Interim measures of protection of assets and preliminary orders

1. General

93. There are various measures and orders available in the surveyed procedural laws to protect assets or secure performance. They include: attachment or garnishment orders;[157] sequestration;[158] embargoes;[159] freezing orders;[160] preservation orders;[161]

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[156] 28 U.S.C. §1782.

[157] Whereby the assets identified in the court order are attached or garnished by a public authority. See e.g. Belgium, Code judiciaire, article 1413; German Code of Civil Procedure, §917; The Netherlands Code of Civil Procedure articles 430 et seq. and articles 700 et seq.; DEBA, articles 271–278; Federal Rule of Civil Procedure 64 (United States) (referring to remedies according to the law of the State in which the federal district court sits, including, where available, attachment and garnishment); submission by Panama. (Pre-judgment) attachment typically does not cause a change in legal ownership, but it does cause the debtor to lose the ability to transfer or encumber the assets. In some jurisdictions, the creditor does not need to specify assets of the debtor that might be subject to attachment or garnishment. In these jurisdictions, it is the task of the attaching or garnishing authority to find assets for this purpose. In other jurisdictions, the creditor is required to identify the assets to be seized and their location before an attachment or garnishment can be obtained, which presupposes the creditor's knowledge of assets that the debtor owns within the jurisdiction, although in some jurisdictions, a general description, such as "all machines in warehouse X" or "all business accounts with bank Y," may suffice.

[158] Whereby the assets are taken away from the debtor or third person. See e.g. submissions by Panama; and Uruguay.

[159] See e.g. submission by Uruguay.

[160] See e.g. Civil Procedure Rules Part 25 and Practice Direction 25A (England and Wales), also known as *Mareva* injunction after the name of the case in which it was adopted. *Mareva Compania Naviera S.A. v. International Bulk Carriers S.A.* [1975] 2 Lloyd's Rep. 509.

[161] See e.g. within the EU, Regulation (EU) No 655/2014, OJ L-189, 59 (2014) that provides for the attachment of bank accounts by way of the European Account Preservation Order (EAPO), mentioned in A/CN.9/1008. The EAPO operates ex parte, with the defendant receiving notice and having the right to be heard promptly upon implementation of the attachment. The Regulation requires the applicant to demonstrate that there is a real risk justifying the need to freeze the debtor's account and to provide information on the accounts to be attached. However, if the applicant is unable to provide that information, but has reason to believe that the defendant holds one or more bank accounts within a particular EU member State, the applicant may file a request for account information in conjunction with the application for an EAPO. This account information request is decided upon as an interlocutory matter prior to the issuance of the EAPO. The Regulation requires that: (a) the applicant's claim have been reduced to a judgment or other form of enforceable title; (b) the applicant substantiates why it believes that the judgment debtor owns one or more bank accounts within the specific EU member State; and (c) the requirements for issuing an EAPO be met. If these conditions prevail, the court forwards the request to the appropriate authority in the requested EU member State, which then uses one of the various means listed in the Regulation, at least one of which the EU member State must have set up for

judicially ordered security interest or liens;[162] and seizures.[163] They may be granted on different grounds depending on whether they are sought before, during, and after litigation and whether they are directed against the defendant (e.g. seizure of passports or orders limiting freedom of movement, including arrests),[164] its assets or a third party who holds or controls assets of the debtor or assets beneficially owned by the debtor, such as a trustee, a bank, or the operator of a cryptocurrency exchange (e.g. account freeze orders). Depending on their effect, they may be characterized as in personam or as in rem although the line between the two may be blurred.[165]

94. Some jurisdictions provide the court with wide discretion to order any measure necessary in the case at hand.[166] In the digital context, where the defendant may be unknown, it has become possible in some jurisdictions to order measures against "unknown persons" (for example, to order the freezing of known digital assets whose owner remains, as of yet, unknown).[167] The reverse may also be true: the digital platform operators may receive orders to freeze operations with respect to all digital assets of a known user; assets of that user themselves may be unknown.

95. Where they are sought before or during litigation, when it is not yet clear that the claim made by the plaintiff exists and because the request can be filed with a court other than the one adjudicating the plaintiff's claim, the plaintiff must, in most jurisdictions, provide some evidence of the claim. However, since the purpose of requesting those measures is to obtain the relief quickly and thus without having to wait for a judgment on the merits, the standard of proof on the cause of action for granting those measures cannot be as high as that required to prevail on the merits. Thus, a lower standard of proof, such as a good arguable case or a particularly defined minimum probability is usually sufficient.[168] It is sometimes said that what is required is fumus boni iuris or the appearance of a legitimate right (freely translated, "the smoke of good right").

96. Where the claim has already been recognized in a judgment, the judgment serves as the evidence of the claim.[169] Once the judgment is enforceable, interim measures and preliminary orders are generally no longer available in some jurisdictions on the theory that the creditor can immediately commence enforcement proceedings and thus does not need such a measure. Moreover, in some jurisdictions, enforcement may be effectuated directly by the bailiff, without the need for an additional attachment or

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this purpose, to obtain the information about the debtor's bank account. Among those means are the consultation of a central bank account register and an obligation of the local banks to respond to requests whether the debtor holds an account with them.

[162] See e.g. German Code of Civil Procedure, §932.

[163] See e.g. submissions by Panama; and Uruguay.

[164] A number of jurisdictions provide for an order to limit the ability of the defendant to move around. In some jurisdictions, this is mainly done by seizing passports and other government-issued documents. In other jurisdictions, the order may go as far as arresting the defendant. This may be ordered when an attachment or garnishment of known assets would not suffice to secure enforcement of a judgment, such as, when the whereabouts of the defendant's assets remain unknown and the defendant seems unwilling to share information about their location. See, e.g. German Code of Civil Procedure, §918; so called passport orders made under the U.K. Senior Courts Act 1981, section 37(1). See *Bayer v. Winter,* [1986] 1 WLR 497; Federal Rule of Civil Procedure 64 (United States) (referring to remedies according to the law of the State in which the federal district court sits, including, where available, arrest).

[165] E.g. an attachment order may entail both an obligation of the defendant not to dispose of the attached asset at the risk of facing criminal sanctions and, upon execution of the order, the effective freezing of the asset by rendering any transaction or encumbrance ineffective, including for the involved third party.

[166] See e.g. Brazil, Code of Civil Procedure, articles 294–299.

[167] See e.g. *CMOC Sales & Marketing Ltd. v. Persons Unknown and 30 Others*, [2018] EWHC 2230 (Com.) (England); *ChainSwap v. Persons Unknown, BVIHC* (COM) 2022/031 (British Virgin Islands).

[168] See e.g. French CEC article L. 511-1; German Code of Civil Procedure, §920(2); DEBA, article 272; EU Account Preservation Order Regulation, article 7(2); the UNCITRAL Model Law on International Commercial Arbitration (MAL), article 17A(1)(b).

[169] See e.g. the EU Account Preservation Order Regulation, article 8(2)(i).

garnishment order of the court.[170] Nevertheless, some form of protection may need to be made available in the early stages of the enforcement proceedings to secure the enforcement of the judgment.[171] In jurisdictions in which there is no other way to sufficiently secure the enforcement of the judgment between application for enforcement and the time enforcement action occurs, an interim measure available before and during litigation is usually also available once the creditor has an enforceable judgment in hand.[172]

97. Since the purpose of those measures is to secure satisfaction of the claim ahead of enforcement – often even before, or at the beginning of, litigation – most jurisdictions require the plaintiff to establish a particular need for the measure. What is usually required is that, without the measure, enforcement of the judgment would be impossible or significantly impaired.[173] In common law jurisdictions, this may, with regard to injunctions, be phrased in terms of the irreparable injury rule. That is, plaintiff must show that without the injunction, it is likely to suffer an injury not reparable by a claim for damages or other common law remedy against the defendant or that the probability of the plaintiff's suffering an irreparable injury is high without the injunction while the probability of the defendant's suffering an irreparable injury with the injunction in place is low.[174] Either way, the need for the measure can be established in various ways, including by showing that there is reason to fear dissipation of the debtor's assets. In some jurisdictions, the reasons for such measures may be more narrowly circumscribed, for instance in an exhaustive list of the specific possible grounds for obtaining a measure (including, for example, the danger that the debtor might flee or remove its assets from the jurisdiction; in such cases, the imposition of some ancillary measures may also be justified[175]).[176]

98. In addition, the court may order the defendant or a third person to do or not to do something specific, provided the order is necessary and proportionate to secure the enforcement of a future judgment.[177] They include, among others, orders not to remove a particular thing from a certain place; not to transfer property to a particular person or to any person or to encumber it with a security right; not to pay a debt or receive payment on a debt; to return a thing to a particular place; to place the thing into the custody of a trusted third person or the court. As was noted above, orders in this category may also be issued to operators of certain registers or to register authorities, such as the land, commercial, or company register. Some jurisdictions distinguish between attachment and garnishment on the one hand and these other orders on the other, depending on whether the plaintiff's claim is a claim to pay money, in which case it is secured by attachment or garnishment, or whether it is a claim to do or not to do something else in which case an order is issued. Where this distinction is made, there may be slight differences in the requirements for using these measures and with regard to the applicable safeguards.

2. Safeguards

99. Laws usually require that the defendant should have a right to be heard before measures listed in this section is issued. However, in cases of particular urgency or where there is a danger of dissipation of assets if the defendant were aware of a

[170] See e.g. the Netherlands Code of Civil Procedure, articles 430 et seq. and articles 700 et seq.
[171] See e.g. German Code of Civil Procedure, §845 (Vorpfändung).
[172] See e.g. DEBA, article 271(1)(6).
[173] See e.g. German Code of Civil Procedure, §§917 and 918; EU Account Preservation Order Regulation, article 7(1).
[174] See also *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589 (7th Cir. 1986) (harm to plaintiff when injunction not granted multiplied by the probability of this decision being wrong on the merits must be larger than the harm to defendant if injunction is granted multiplied by the probability that granting the injunction is wrong on the merits). See also MAL, article 17A(1)(a).
[175] See e.g. A/CN.9/WG.V/WP.175 for discussion of gag and seal orders.
[176] See e.g. DEBA, article 271.
[177] See e.g. German Code of Civil Procedure, §935; Swiss Code of Civil Procedure, article 262(a)–(c); Federal Rule of Civil Procedure 65 (United States).

pending proceeding to obtain a measure, the measure may be awarded ex parte and some ancillary measures may apply to ensure its effectiveness.[178] In some jurisdictions, attachment and garnishment are granted ex parte as a matter of course on the assumption that once there is a danger of dissipation of assets, speed and surprise are always of the essence.[179] In other jurisdictions, this is not the case because of due process considerations.[180] If the measure is granted ex parte, the defendant has a right to be heard as soon as possible upon enforcement of the measure and to have the measure overturned by the court if the prerequisites are shown to be missing.[181] Usually, the plaintiff is also required to file a complaint or an enforcement proceeding in the matter within a particular, usually short, time period in order to sustain the measure if litigation or enforcement proceedings are not already pending.[182]

100. Certain assets of the defendant, such as personal items or wages to the extent necessary for a basic level of income may not be subject to attachment or garnishment.[183] There may be other restrictions on the assets that could be subject to those measures or the asset in question may dictate the nature of the measure issued. For example, in some jurisdictions, the creditor may be able to claim the misappropriated property and any subsequent assets into which the original property was converted while in other jurisdictions, only the original asset may be claimed via a proprietary claim while any subsequent assets into which the original property was converted may only be recovered through personal claims.

101. 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.[184] In some jurisdictions, the defendant can have the measure terminated at a later point in time if circumstances have changed, for instance because the defendant has paid the debt or the debt has otherwise been extinguished.[185] The ordered measures may be made subject to the mandatory periodic review by the court and the applicant for the measure may be required to inform the court about changes that would require termination or modification of the measure. Sanctions may be imposed for abuse of the measure and non-compliance.

102. In many jurisdictions, the plaintiff is liable to the defendant for any damages caused by a measure that turns out not to have been justified.[186] In some jurisdictions, this is a no-fault liability, that is, the plaintiff is liable to the defendant for the wrongful granting of a measure independent of whether the plaintiff acted with intent or negligence in obtaining the measure. The posting of security may be mandatory in all or most cases in order for a measure to be granted.[187] Alternatively, it may be at the discretion of the court to determine whether there is a particular danger that the opponent will not be able to obtain damages from the applicant if the measure turns out to have been wrongly granted.[188]

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[178] See e.g. A/CN.9/WG.V/WP.175 for discussion of gag and seal orders.

[179] See e.g. DEBA, articles 272–278.

[180] See e.g. *Sniadach v. Family Finance Corp*., 395 U.S. 337 (1969) (garnishment of wages before a suit has been adjudicated on the merits and without providing the defendant with notice and an opportunity to be heard violates Due Process Clause of 14th Amendment to U.S. Constitution).

[181] See, e.g. French CEC article r. 511-7; German Code of Civil Procedure, §924; DEBA, article 278.

[182] See e.g. French CEC article r. 511-7; German Code of Civil Procedure, §926; Mexican Commercial Code, article 1185; DEBA, articles 279.

[183] See e.g. DEBA, articles 92-95a; 15 U.S.C. §§1671-1677 (United States).

[184] See e.g. German Code of Civil Procedure, §934(1); Mexican Commercial Code, article 1180; Swiss DEBA, article 277; U.S. case law; MAL, article 17D (providing for the modification, suspension, and termination of the measure).

[185] See e.g. German Code of Civil Procedure, §927.

[186] See e.g. French case law; German Code of Civil Procedure, §945; DEBA, article 273; EU Account Preservation Order Regulation, article 13; MAL, article 17G.

[187] See e.g. Mexican Commercial Code, article 1176 (if main proceeding not yet pending); EU Account Preservation Order Regulation, article 12.

[188] See e.g. Practice Direction 25A (England and Wales); German Code of Civil Procedure, §921; Swiss Code of Civil Procedure article 264(1).

103. Measures affecting human dignity and human rights (e.g. freedom of movement, privacy) are usually subject to stricter safeguards. They include that the measure must be proportional. For example, if it is sufficient to secure enforcement of a judgment to order the defendant regularly to report to a local government agency or to turn over its documents of identification until the defendant has identified its assets or made them available for attachment or garnishment, then that order must be chosen over any more limiting measure, including in the worst case, an arrest of the debtor. In addition, those orders are usually of a specified short duration, which may be extended only in extraordinary circumstances to achieve the purpose for which they are ordered.[189]

3. Cross-border aspects

104. Jurisdiction to order interim measures and preliminary orders usually lies with the court that has jurisdiction over the defendant or that would have jurisdiction over the defendant in the proceedings on the merits. Depending on the measure in question, jurisdiction may also or only lie with the court where the assets in question are located.[190] Jurisdiction to enforce, on the other hand, that is, jurisdiction of local authorities to attach, garnish, or sequester property, or to arrest the defendant, among other things, is generally limited to the jurisdiction in which the assets or the defendant is located.[191]

105. Attachment and garnishment orders may be limited to the jurisdiction in which the assets to be attached or garnished are located because these measures usually operate in rem. Nevertheless, there are jurisdictions in which attachment and similar orders may also be issued by the court that has or would have judicial jurisdiction in the proceedings on the merits.[192] Where that is the case, an attachment or garnishment order could be issued by a court in one jurisdiction and then be recognized and enforced by the competent authority in another.

106. In comparison, preliminary orders directing the defendant or third parties to do or not to do something, such as preliminary injunctions, including freezing orders, in common law jurisdictions, usually operate in personam. They may be ordered irrespective of the location of assets and whether the activity is to take place within or outside of the jurisdiction.[193] Having such orders enforced in a foreign jurisdiction will require the cooperation of the foreign jurisdiction, usually by way of recognition and enforcement of the order.

107. In some jurisdictions, the power to issue interim relief in relation to arbitration proceedings is exclusive to the courts; in others, it is shared by courts and the arbitral tribunal with various combinations and subtleties;[194] and in yet others, it is exclusive to the arbitral tribunal. [195] Some interim measures may be restricted only to courts and not available to foreign arbitration.[196]The requirements for issuing interim measures

[189] See e.g. *Lakatamia Shipping Co. Ltd. v. Su* [2021] EWCA Civ 1187.

[190] See e.g. EU Brussels I Regulation article 35; Swiss PILA article 10.

[191] See e.g. Restatement (Fourth) of the Foreign Relations Law of the United States, §431.

[192] See e.g. German Code of Civil Procedure, §919; DEBA, article 272.

[193] See A/CN.9/WG.V/WP.175 for reference to "worldwide freezing orders" (WFO), issued when the court has personal jurisdiction over the defendant according to the law of the jurisdiction in question or according to potentially applicable international treaties. Requirements additional to those necessary for a domestic freezing order (Mareva injunction) may need to be met, for instance, that the domestic assets of the defendant within the jurisdiction will not suffice to cover a potential judgment. As with domestic freezing orders, enforcement of a WFO primarily takes place against the opposing party or its assets within the jurisdiction. If the opposing party fails to heed the freezing order, it may face contempt sanctions, such as fines and imprisonment, that will be enforced within the jurisdiction.

[194] See A/CN.9/WG.II/WP.119 paras. 19–33.

[195] See MAL, article 17.

[196] E.g. the United States Supreme Court held that §1782 discovery is not available in support of proceedings before private adjudicatory bodies, including international commercial arbitral tribunals. See *ZF Automotive US, Inc. et al. v. Luxshare Ltd*., 142 S.Ct. 2078 (2022).

of protection and preliminary orders by arbitral tribunals and the safeguards for their use are similar to those in place for national courts.

108. While many jurisdictions do not recognize and enforce foreign decisions regarding interim measures and some international instruments explicitly exclude them from the scope of their application,[197] in other jurisdictions cross-border enforcement of interim measures and preliminary orders may be facilitated by applicable international instruments, such as the OAS Convention on Execution of Preventative Measures or supranational legislation within the EU,[198] or domestic laws, including those enacting UNCITRAL texts.[199]

IV. Criminal proceedings in aid of ATR in insolvency proceedings

109. There are a few tools related to criminal proceedings that can be used to aid ATR in insolvency proceedings. First, there are some jurisdictions that permit a victim of a crime or, sometimes, more generally an interested person, such as the insolvency representative, to participate in criminal proceedings as a "civil party" (partie civile in French; Privatkläger in German).[200] The rights of these civil parties differ cross jurisdictions, but usually include: (a) the ability to seek initiation of criminal proceedings; (b) access to at least certain records of the criminal proceedings; (c) an ability to seek damages under the applicable tort laws in a parallel civil action to be decided by the same court; as well as (d) a right to appeal certain decisions of the court. In some jurisdictions, the civil party may also be able to seek orders to freeze assets.

110. Second, if insolvency-related criminal investigations are opened, such as investigations for fraud or for insolvency-related crimes, in some jurisdictions, the insolvency representative can obtain access to the files or to information from the files of criminal investigations without a court order.[201] In other jurisdictions, a special court order is necessary.[202] In cross-border criminal investigations, mutual legal assistance treaties may facilitate access to information obtained in such criminal investigations.[203] The insolvency representative may be required to demonstrate that the request is intended to seek records for their intrinsic value with the sole purpose to trace the assets and that the need for disclosure outweighs the need for continued secrecy. Other usual safeguards to protect the interest of the criminal investigation and the rights of the accused apply.[204]

111. Third, some jurisdictions provide for the forfeiture of assets obtained in the course of, or as remuneration for, criminal behaviour and for the subsequent delivery

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[197] See e.g. article 3(1)(b) of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2 July 2019.

[198] See e.g. the EU Account Preservation Order Regulation discussed above. See also articles 2(a), 4–29 and 36–67 of the Brussels I Regulation or other EU regulations where the term "judgment" is understood to include decisions on interim measures for purposes of recognition and enforcement subject to certain conditions.

[199] For the recognition and enforcement of interim measures issued by an arbitral tribunal, see MAL, articles 17H–17I.

[200] See e.g. Belgian Code of Criminal Procedure, article 21bis and submission by Belgium for more detail; French Code of Criminal Procedure, articles 85–91.1; German Code of Criminal Procedure, §§374–394; Swiss Code of Criminal Procedure, articles 118 et seq.

[201] See e.g. German Criminal Procedure Code, §474; DEBA article 222(5); submission by Austria.

[202] See e.g. Federal Rule of Criminal Procedure 6(e)(3)(E)(1) (United States) (regarding proceedings before Grand Jury).

[203] Requests for assistance under those treaties may need to be channelled through the Public Prosecutor (e.g. in the Netherlands) or another competent State authority.

[204] E.g. under rule 6(e)(3)(E)(1) of the United States Federal Rules of Criminal Procedure, if the request to obtain information gathered during a grand jury proceeding for use in another judicial proceeding is granted, the court administers production of information so as to protect criminal investigation.

of those forfeited assets to the victims of the crime under certain circumstances.[205] In the context of insolvency-related crimes,[206] this can be a useful tool for creditors to recover assets. However, where one or more creditors, rather than all of the creditors, are the victims of the crime, this tool effectively leads to the satisfaction of some creditors at the expense of the others and thus to a violation of the principle of equitable treatment of creditors. In addition, as was noted during the Colloquium, the opening of criminal proceedings in conjunction with the insolvency proceedings may in some cases prevent the closure of the latter before the former.[207]

[205] See, e.g. Belgian Code of Criminal Procedure, articles 42–43; Swiss Code of Criminal Procedure, articles 70–73.

[206] See submissions by the Dominican Republic; and Spain.

[207] A/CN.9/1008, para. 35.