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

**Note by the Secretariat**

Addendum

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## Annex

### Submissions by States

#### A. Domestic insolvency context

##### 1. Preventive measures

###### (a) China

In order to prevent the improper operation of companies and to safeguard the legitimate rights and interests of shareholders and creditors, listed companies are obliged to disclose company information pursuant to the information disclosure requirements for investors and other public groups concerning matters relating to the insolvency of listed companies. Article 22 of the Measures for the Administration of Information Disclosure of Listed Companies stipulates that “In the case of a material event that may considerably affect the trading price of a listed company’s shares or their derivatives and of which investors are not yet aware, the listed company shall immediately disclose such event to the investors, stating the cause, current status and possible impact of the event. A ‘material event’ as referred to in the preceding paragraph includes: ... (e) The company’s main debtor becomes insolvent or enters insolvency proceedings, and the company has not made adequate provision for bad debts in respect of the corresponding claim; ... If the controlling shareholder or the actual controller of a listed company exercises considerable influence in the occurrence or progress of a material event, they shall promptly inform the listed company in writing of the relevant circumstances of which they are aware and cooperate with the listed company in fulfilling its information disclosure obligations.” Companies or enterprises that fail to honour their information disclosure obligations are liable to such penalties as warnings or fines commensurate with the severity of the circumstances, in accordance with article 54 of the Measures for the Administration of Information Disclosure by Listed Companies, article 197 of the Securities Law and article 161 of the Criminal Law; and if their actions constitute a crime, they shall be held criminally liable in accordance with the law.

###### (b) Japan

Several lower court decisions have upheld the notion 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 insolvency proceedings.

##### 2. Provisional measures

###### (a) Belgium

If there are clear and specific indications that the applicant or a third party is in possession of a document containing proof of cessation of payments, or of circumstances justifying postponement of the date of cessation of payments, for the purpose of opening judicial reorganization proceedings, or a document relevant to any other decisions that may be taken in the course of insolvency proceedings, the delegated judge or the insolvency judge may order that such document or a copy thereof be attached to the insolvency file.<sup>1</sup>

The commercial court may request any information relating to the debtor from the Central Contact Point maintained by the National Bank of Belgium in accordance with the Act of 8 July 2018.<sup>2</sup> The Central Contact Point is a register containing the

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<sup>1</sup> Article XX.6 of the Code of Economic Law; article 877 of the Judicial Code. The Secretariat notes that this provision should be read as also applicable to the measures upon commencement of insolvency proceedings, addressed below.

<sup>2</sup> Article XX.14/1 of the Code of Economic Law and Royal Decree of 7 April 2019 on the operation of the central contact point for accounts and financial contracts.

numbers of bank accounts – and information on the types of contracts – held by (resident and non-resident) natural and legal persons with financial institutions in Belgium in order to facilitate assessment of a company’s financial situation in the event of insolvency proceedings.

Following application for judicial reorganization, movable or immovable property of the debtor cannot be realized.<sup>3</sup> The presiding judge, at the request of the debtor, the Public Prosecutor or any other interested party, may appoint one or more receivers (an external party) who is tasked with a limited role as defined by the judge with respect to the debtor and its assets and affairs. It is the court that determines the precise scope and duration of the receiver’s role. The court thus retains control and must justify its decisions. This is a limited interim measure (outside insolvency proceedings) put in place where there are events that result in ungovernability of the enterprise or serious shortcomings on the part of the debtor or one of its bodies, threatening the continuity or economic activities of the business, where the requested measure is likely to preserve that continuity. The measure may remain in place when a debtor formally initiates reorganization proceedings (e.g., to support the company in its judicial reorganization).<sup>4</sup>

**(b) Japan**

Provisional measures may be ordered after the filing of a petition for commencement of the insolvency proceeding and prior to the rendering of an order as to the commencement of the insolvency proceeding. For instance, the court may issue a provisional order to prohibit the disposition of the debtor’s property or any other temporary restraining order as to the property.<sup>5</sup> If the debtor is a judicial person, the insolvency court, upon petition of an interested person or by its own authority, may appoint a provisional insolvency representative who administers and disposes of the debtor’s property if necessary.<sup>6</sup> The insolvency court, upon petition of an interested person, a provisional insolvency representative (if any) or by its own authority, may issue an order of provisional seizure or provisional disposition or any other necessary temporary restraining order to secure the right of avoidance.<sup>7</sup> (See further below under Avoidance and similar actions).

**(c) Jordan<sup>8</sup>**

The court, on its own motion or at the request of creditors, can take precautionary measures to conserve the value of the debtor’s assets and protect the rights of all parties, or to limit the powers of the debtor to exercise economic activities.<sup>9</sup>

**(d) Lithuania**

The fixed assets of the debtor must be seized for the period until the ruling to open an insolvency proceeding comes into effect. Issues concerning the assets of a debtor which were seized prior to the opening of an insolvency proceeding are decided by a court which opened the insolvency proceeding.

**(e) Morocco**

The law envisages the appointment of an interim insolvency representative and other provisional measures.<sup>10</sup>

<sup>3</sup> Articles XX.44 and XX.45 of the Code of Economic Law.

<sup>4</sup> Article XX.30 of the Code of Economic Law.

<sup>5</sup> Article 28(1) of the Insolvency Act.

<sup>6</sup> Article 91(1) of the Insolvency Act.

<sup>7</sup> Article 171 (1) of the Insolvency Act.

<sup>8</sup> With reference to Insolvency Act No. 21 of 2018, noting also the absence of jurisprudence under the Act.

<sup>9</sup> Articles 12 (4) and 13 (e) of the Insolvency Act.

<sup>10</sup> Article 671 et seq of law n°73-17 on corporate distress procedures reforming Book V of the Commercial Code, adopted and published in the Official Bulletin on 23 April 2018.

**(f) Panama<sup>11</sup>**

Provisional measures include:<sup>12</sup>

- Discovery procedures, initiated upon application through a petition to the competent judge. This is a measure to gather evidence whereby the judge has the authority to order the counterparty to produce or submit for inspection the property which is the subject of litigation or the books, documents and other objects in the possession of the respondent or a third party. 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;<sup>13</sup>
- Judicial inspections, initiated by the judge upon application through a petition to the competent judge, accompanied by the necessary supporting documents. The application for an inspection is made ex parte by the interested party. The procedure allows the judge to verify the facts presented by the applicant. Experts may take part, and the procedure may involve the production of material objects for inspection. The interested party or someone that that party trusts may be present during the inspection;<sup>14</sup>
- Securing evidence, including preliminary testimonies, expert opinions, reconstruction of events, acknowledgement of signature and summoning of the counterparty to that end, and statements by parties. In the application, it must be proved prima facie that there is a justified concern that a piece of evidence may go missing or will be difficult or impractical to obtain at the appropriate time. The applicant is required to place in safekeeping the evidence gathered and to ensure that it is not damaged as a result of poor handling, lost or altered;<sup>15</sup>
- Sequestration, carried out through a petition to the judge hearing the case. The applicant may request, before or after filing the claim or at any stage of the proceeding, that a receiver appointed by the court be given custody of the assets. This procedure is used to prevent a proceeding from being rendered void and the respondent from transferring, disposing of, concealing, impairing, encumbering or dissipating the movable and immovable assets that it owns. Once the application for sequestration has been received, the judge sets the amount of the security at his or her discretion, taking into account the value and nature of the assets to be sequestered. The respondent may file objections and request enforcement of the guarantee and, if necessary, the imposition of criminal sanctions;<sup>16</sup> and
- Seizure, a judicial procedure whereby specific assets are confiscated to cover the debtor's property-related liabilities. The judge hearing the case is requested to convert a previously ordered sequestration into a seizure so that the assets held in custody can be auctioned off.<sup>17</sup>

**(g) Uruguay**

Provisional measures include preventive attachments of the debtor's assets and other types of embargos that seek to protect assets from dissipation. If the assets covered by embargos are nevertheless disposed, embargos have priority. In the case of personal property, the attachment is effected through seizure and sequestration. The seizure places the assets at the disposal of the court. In the case of real estate, automobiles, rights and shares, the attachment operates through the registration of the

<sup>11</sup> With reference to the Judicial Code of the Republic of Panama, Book Two (Civil procedure), Part I (General rules of procedure), section II (Provisional measures) and section VII (Evidence); available at: [www.oas.org/juridico/pdfs/mesicio4\\_pan\\_cod2.pdf](http://www.oas.org/juridico/pdfs/mesicio4_pan_cod2.pdf).

<sup>12</sup> The Secretariat notes the relevance of the listed measures also for enforcement.

<sup>13</sup> Article 817 of the Judicial Code and article 87 of the Insolvency Act.

<sup>14</sup> Article 828 of the Judicial Code and article 87 of the Insolvency Act.

<sup>15</sup> Article 815 of the Judicial Code and article 87 of the Insolvency Act.

<sup>16</sup> Article 533 of the Judicial Code and article 87 of the Insolvency Act.

<sup>17</sup> Article 533 of the Judicial Code and article 87 of the Insolvency Act.

measure in public records, which has the effect of publicity before third parties. The debtor may make use of the embargoed assets as long as they are not seized or sold judicially but must refrain from alienating them and must ensure their diligent preservation. If there are no known or insufficient assets, a generic attachment of assets may be requested, which includes real estate, automobiles, and present and future registrable assets that may exist or be known. This attachment may be perfected when specific assets or credits are known; when these are seized, their date automatically takes the date of the generic attachment. The attachment of the debtor's claims entitles the executor to take all judicial or extrajudicial steps to obtain collection.<sup>18</sup>

In addition, a judicial overseer could be appointed to audit the debtor's assets, rights and income. Its role is less rigorous than the intervention with powers of access and disposition of assets, in that it is only limited to analysing and reporting on the economic and financial situation of the debtor. Such an intervention may eventually merit a more rigorous intervention that goes as far as displacing the debtor from the cash income or interfering with the debtor's assets.

### **3. Measures upon commencement**

#### **(a) Belgium**

Upon commencement of judicial reorganization proceedings, a stay of proceedings against the debtor and its assets is imposed.<sup>19</sup> The stay does not apply to claims arising in the course of proceedings, Paulian actions and other actions that intend to increase the debtor's assets. Seizures already made previously continue to serve as a protective measure. The court may appoint a temporary insolvency representative for the duration of the stay but only if the debtor or one of its bodies has committed a serious wrong. The measure is flexible: it can be withdrawn or modified at any time. The court thus retains control and must justify its decisions.<sup>20</sup> The presiding judge may divest the debtor of the management of all or some of its assets or activities if there is evidence that the conditions for insolvency have been met.<sup>21</sup> Also in judicial reorganization proceedings, at the request of the debtor, the court may appoint a business mediator whose main task is to facilitate the reorganization of all or some of the debtor's assets or activities.<sup>22</sup> More specifically, that task may involve facilitating an amicable settlement,<sup>23</sup> securing the agreement of the creditors with regard to a reorganization plan,<sup>24</sup> or facilitating the transfer to one or more third parties, under court supervision, of all or some of the debtor's assets or activities.<sup>25</sup>

Upon commencement of insolvency proceedings, a stay of proceedings is imposed (except for actions against the insolvency representative),<sup>26</sup> all seizures made prior to the declaration of insolvency are suspended<sup>27</sup> and, the debtor, as of the day on which insolvency is declared, is divested by operation of law of the administration of all its property, including any property that may be due to it while it is insolvent on a legal basis existing prior to the initiation of the insolvency proceeding. Any payments made or transactions or acts carried out by the debtor and any payments made to the debtor from the day on which the declaration of insolvency is made, are unenforceable against the estate.<sup>28</sup> From the time insolvency is declared, claims and enforcement actions in respect of movable or immovable property may be pursued or brought only

<sup>18</sup> See e.g., articles 18, 24, 25, 244 et seq of Law No. 18.387 on Judicial Declaration of Insolvency and Business Reorganization.

<sup>19</sup> Articles XX.50 and XX.51 of the Code of Economic Law.

<sup>20</sup> Article XX.31 of the Code of Economic Law.

<sup>21</sup> Article XX.32 of the Code of Economic Law.

<sup>22</sup> Article XX.36 of the Code of Economic Law.

<sup>23</sup> In accordance with articles XX.37 or XX.65 of the Code of Economic Law.

<sup>24</sup> Pursuant to articles XX.67 to XX.75 of the Code of Economic Law.

<sup>25</sup> In accordance with articles XX.84 and XX.85 of the Code of Economic Law.

<sup>26</sup> Article XX.119 of the Code of Economic Law.

<sup>27</sup> Article XX.120 of the Code of Economic Law.

<sup>28</sup> Articles XX.105 and XX.110 of the Code of Economic Law.

against the insolvency representatives.<sup>29</sup> All enforcement measures intended to achieve the payment of debts secured by a security interest or a special lien on movable property that is subject to the insolvency proceedings are also suspended until the first report on the verification of claims is filed, without prejudice to any protective measures or to the right of the owner of any leased premises to repossession.<sup>30</sup>

**(b) China**

According to article 6 of the Provisions of the Supreme People’s Court on Several Issues Concerning the Application of the Enterprise Insolvency Law of the People’s Republic of China (II), “After the acceptance of a insolvency petition, and where the insolvency proceedings may be affected by the acts of the interested parties concerned or for other reasons in accordance with the law, the people’s court accepting the insolvency petition may, upon the application of the insolvency representative or ex officio, take measures to preserve all or part of the debtor’s property.”

Article 19 of the Enterprise Insolvency Law and article 7 of the Provisions of the Supreme People’s Court on Several Issues Concerning the Application of the Enterprise Insolvency Law of the People’s Republic of China (II) stipulate that after the insolvency application is accepted by a people’s court, relevant units that have already taken measures to preserve the debtor’s property shall promptly lift such measures and the procedures for executing them shall be suspended. Article 42 of the Minutes of the National Court Work Conference on Insolvency Trials provides that the enforcement court may, at the request of the court that accepted the insolvency, issue a letter transferring the right to dispose of the sealed, impounded or frozen property to the court that accepted the insolvency. The court accepting the insolvency may await the enforcement court’s letter transferring the right of disposal to renew or suspend such seizure, impoundment or freezing, or it may proceed with the disposal.

**(c) Dominican Republic<sup>31</sup>**

Once insolvency has been declared, the judge of the Commercial Court assumes the role of the insolvency judge in order to take any necessary measures, such as ordering the fixing of seals and imposing protective measures. To the extent the assets are distributed among the creditors and, if there is an agreement (“concordato”) among unsecured creditors and secured creditors who have waived their security rights, an insolvency representative is appointed to administer the assets and draw up their inventory. In the absence of the agreement, the union of creditors will seek the sale of the debtor’s assets.<sup>32</sup> The Tax Code and the General Banking Act of the Dominican Republic allow creditors to retain the company’s monetary assets during the insolvency proceedings and the judge of the commercial court orders the retention of those assets until the company has been liquidated.

**(d) Jordan**

The court can limit the power of the debtor to administer and dispose of its assets. If the court decides to impose restrictions on the administration or disposal of the insolvent’s assets, its ruling must include an order to the debtor’s debtors to pay any obligations owing to that debtor directly to the insolvency representative.<sup>33</sup> Neither the debtor nor the insolvency representative may sell or dispose of the debtor’s assets

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<sup>29</sup> Article XX.118 of the Code of Economic Law.

<sup>30</sup> Article XX.121 of the Code of Economic Law.

<sup>31</sup> With reference to Act No. 479-08 governing companies and enterprises; articles 437 et seq. of the Commercial Code; Act No. 4582-56; Act No. 155-17 on money-laundering; the Tax Code; and the General Banking Act.

<sup>32</sup> Art. 504 et seq. of DR Leyes - Código de Comercio and Arts. 504 al 506 | Concordato y de la union.

<sup>33</sup> Article 13 (c) of the Insolvency Act.

during the preparatory phase except under the circumstances envisaged in article 19 of the Insolvency Act.<sup>34</sup>

No case may be brought against the debtor following the declaration of insolvency and any party who claims to have a debt against the debtor may register a claim following the procedures set forth in the Act;<sup>35</sup> the debtor's assets may not be executed or seized after insolvency has been declared and any execution proceedings that began before the declaration of insolvency are suspended;<sup>36</sup> there may be no execution or seizure of assets until six months have elapsed from the date of declaration of insolvency or until a restructuring plan has been approved, whichever comes earlier; a request may be made to rescind any contracts of sale entered into before the declaration of insolvency, if the sale has not already been concluded or if the price has not already been paid;<sup>37</sup> a third party to whom an asset has already been transferred or who has come to have possession of an asset must be made a party to the proceedings.<sup>38</sup> A case may be brought to block any transaction effected by the debtor.<sup>39</sup>

**(e) Lithuania**

An insolvency representative takes control over the assets and documents of the debtor upon the court's ruling to open an insolvency proceeding. It is prohibited to discharge the financial obligations of the debtor, including the payment of taxes, interest and penalties and to recover debts from the debtor from that point. The court that opened the insolvency proceeding decides on the assets of the debtor that were seized prior to the opening of an insolvency proceeding.

**(f) Morocco**

Depending on the procedure, a stay of proceedings may be automatic or imposed upon request. At the request of any interested party, payment of pre-commencement claims made despite a stay may be declared void and their restitution may be ordered irrespective of the good faith of the payee. Penal sanctions are imposed on the head of the debtor and the creditor involved for making and accepting such payments.<sup>40</sup>

**(g) Panama<sup>41</sup>**

Upon commencement of liquidation proceedings, both voluntary and compulsory, the judge appoints an insolvency representative to seize all the assets of the debtor (whether a natural or legal person) and its books and records; an inventory thereof must be made. The declaration of liquidation is notified to the Director General of the Public Registry of Panama so that the latter does not register any title deeds submitted by the debtor, and to the General Directorate of Domestic Trade or the provincial or regional directorate of the Ministry of Commerce and Industry, as appropriate, so that

<sup>34</sup> The Secretariat notes that the cited provision refers inter alia to the conduct in the ordinary course of business; and upon approval of the court, sale of assets, which is necessary to continue business or obtain liquidity, or assets that are not necessary for the continuation of the business.

<sup>35</sup> Article 21 of the Insolvency Act.

<sup>36</sup> Article 22 of the Insolvency Act.

<sup>37</sup> Article 29 of the Insolvency Act.

<sup>38</sup> Article 34 (c) of the Insolvency Act.

<sup>39</sup> Articles 18 and 34 of the Insolvency Act.

<sup>40</sup> Articles 690-691 of the Commercial Code.

<sup>41</sup> With reference to National Assembly Act No. 12 of 19 May 2016 establishing the framework for insolvency proceedings (Official Gazette No. 28036-B (23 May 2016); available at: [http://gacetas.procuraduria-admon.gob.pa/28036-B\\_2016.pdf](http://gacetas.procuraduria-admon.gob.pa/28036-B_2016.pdf)), complemented by National Assembly Act No. 212 of 29 April 2021 establishing a special framework for conciliation-based reorganization proceedings conducted in connection with the national emergency due to the COVID-19 pandemic (Official Gazette No. 29274 (29 April 2021); available at: [www.gacetaoficial.gob.pa/pdfTemp/29274\\_B/84733.pdf](http://www.gacetaoficial.gob.pa/pdfTemp/29274_B/84733.pdf)) and implementing regulations (Executive Decree No. 90 of 9 July 2021, Official Gazette No. 29327-B; available at: <https://cecap.com.pa/wp-content/uploads/2021/11/DECRETO-EJECUTIVO-NO-90-DEL-9-DE-JULIO.pdf>).

a relevant annotation can be added to the notice of operation (aviso de operación) covering commercial or industrial activities. The declaration is also notified to the Director General of the Social Security Fund, the General Directorate of Revenues and the municipal authorities of the place of the proceeding.<sup>42</sup> The insolvency representative replaces the debtor in respect of the rights arising from the debtor's assets. Payments and any other legal transactions involving ownership or administration carried out by the debtor after the declaration of liquidation has been made are voided.<sup>43</sup> Any seizures and provisional measures ordered in other proceedings instituted against the debtor which affect the assets that are to be drawn into the liquidation proceeding cease to be effective from the date of cessation of payments.

**(h) Uruguay**

The commencement of insolvency proceedings displaces the debtor with the effect that the debtor cannot afterwards dispose of and bind the insolvency estate. The judge may, at the request of a party or ex officio, take measures to secure the debtor's assets and credits and impose preventive measures against assets of the current and former administrators, liquidators or members of the internal control body.<sup>44</sup>

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

**(a) Chile**

The debtor is obliged to disclose all its assets, together with background information, and make them available to the insolvency representative. If the debtor refuses to do so, the insolvency representative may request the assistance of the law enforcement agencies.<sup>45</sup>

**(b) China**

If the debtor refuses to hand over property, seals and such materials as account books and documents to the insolvency representative or forges or destroys evidential materials relating to the property and makes the condition of the assets unclear, the people's court may impose a fine on the person directly responsible.<sup>46</sup>

**(c) Hungary**

The debtor has obligations to provide information and to cooperate with the insolvency representative in both contexts, where the debtor remains in control of its assets and the day-to-day operation, and where the insolvency representative exercises the right of representation in respect of the debtor.<sup>47</sup>

**(d) Japan**

The debtor, the debtor's current and former representative and employees as well as the current and former director, executive officer, inspector, auditor or liquidator (and any other person equivalent thereto) of the debtor that is a legal person are required to give a necessary explanation concerning insolvency upon the request of an insolvency representative or the creditors committee or the request based on a resolution of a creditors meeting.<sup>48</sup> Employees may be examined only when permitted by the court.

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<sup>42</sup> Article 96 of the Insolvency Act.

<sup>43</sup> Article 116 of the Insolvency Act.

<sup>44</sup> Law No. 18.387, in particular sections 24 and 25.

<sup>45</sup> Article 169 of Act No. 20.720 of 2014.

<sup>46</sup> Article 127 of the Enterprise Insolvency Law.

<sup>47</sup> Act XLIX of 1991 on Insolvency Proceedings, Liquidation Proceedings.

<sup>48</sup> Articles 40 (1) and 40 (2) of the Insolvency Act.



**(e) Lithuania**

The national insolvency legislation obliges the director of a company to hand over all assets and documents of the debtor to the insolvency representative within a time limit set by the court. The law envisages the following legal consequences for the director of the debtor for non-compliance with that obligation:

- A fine in the amount of up to one minimum monthly wage for each day of breach of that obligation;
- Restriction of the right to hold the post of a director of a company or to be a member of a collegial management body for a period from one to five years;
- Compensation for the damage resulting from non-performance or improper performance of that obligation.

**(f) Morocco**

Depending on the procedure, the debtor may be displaced or subject to the control of the insolvency representative as regards disposition of assets. It is required to cooperate and to provide the insolvency representative with all relevant information.<sup>49</sup>

**(g) Switzerland**

The debtor as well as any third party (including banks or insurances) or public entity (such as tax or social security administration) is obliged – under menace of criminal prosecution – to provide any available information on the debtor’s assets.<sup>50</sup> Bank secrecy provisions do not apply in relation to that obligation.<sup>51</sup> The obligation to inform also encompasses a duty to deliver documents necessary to effectively claim or access an asset.<sup>52</sup>

**(h) Uruguay**

The debtor has the general duty to observe good faith and collaborate in insolvency proceedings. The lack of collaboration by the debtor, including by concealment, disinformation or misrepresentation, is taken as presumption of guilt in the situation of business crisis. The debtor, or in the case of companies, directors (including de facto), liquidators and members of the internal control body, and their accomplices may be held liable and be required to cover the deficit in the company with their personal assets, to return the assets and rights that belong to the insolvency estate, and to compensate for the damages caused.<sup>53</sup>

The debtor may be made subject to the judicial compulsion, restraints and economic or personal injunctions (including criminal sanctions such as fines and arrests) to oblige it to provide information and access, including to its banking and tax data. The judge may intercept the debtor's communications related to its professional activity or line of business.<sup>54</sup>

The court may also order banks to disclose information about the debtor’s bank accounts and deposits to the court. Measures of judicial collection of information about debtor assets are available also with respect to creditors, witnesses and other third parties.

<sup>49</sup> Articles 686 to 691 of the Commercial Code.

<sup>50</sup> Article 222 of the Swiss Debt Enforcement and Insolvency Act (DEBA), available at [www.fedlex.admin.ch/eli/cc/11/529\\_488\\_529/fr](http://www.fedlex.admin.ch/eli/cc/11/529_488_529/fr).

<sup>51</sup> The official collection of decisions of the Federal Supreme Court (BGE) (available at [http://relevancy.bger.ch/php/clir/http/index\\_atf.php?lang=fr](http://relevancy.bger.ch/php/clir/http/index_atf.php?lang=fr)) 51 III 37; 56 III 44, 86 III 114; 146 III 435.

<sup>52</sup> BGE 146 III 435, c. 4.1.2.

<sup>53</sup> Articles 53, 192 num. 5, 193 nums. 2 and 3, 195, 201 to 204 of Law No. 18.387 on Judicial Declaration of Insolvency and Business Reorganization.

<sup>54</sup> Art. 23 num. 1 of Law No. 18.387.

## 5. Powers of the insolvency representative

### (a) Austria<sup>55</sup>

The powers of insolvency representatives include:

- Inspection of accounting and business records, if necessary, with the assistance of experts;
- Inspection of bank transactions from the period prior to the opening of insolvency proceedings;
- Inspection of public registers (land register, company register [name query], registration records for motor vehicles, seizure records of the courts and financial authorities);
- Inspection of already existing lists of assets and ordering the debtor to submit a current list of assets;
- Reviewing mail addressed to the debtor after a mail blocking order for the debtor;
- Opening of bank safe deposit boxes or safes;
- Questioning of previous advisors of the debtor;
- Inspection of email accounts and the entire electronic system of the debtor;
- Inquiries to crypto exchanges such as Bitpanda as a means of accessing cryptocurrencies or wallets;
- Inspection of contribution and tax accounts to identify potentially contestable payments;
- Questioning of governing bodies and employees of the debtor;
- Questioning of the debtor's auditors and tax advisors;
- Inspection of files of the criminal prosecution authorities, in particular in the course of investigations by the public prosecutor.

### (b) Chile<sup>56</sup>

Powers and obligations of insolvency representatives include:

- Obligation to seize and make an inventory of the debtor's assets.<sup>57</sup> As soon as insolvency representatives have accepted their appointment, they must apply to the court handling the insolvency proceeding for communications to be sent out to various public institutions and agencies requesting them to provide information on the debtor's assets<sup>58</sup> (see further below under "Identification and preservation of the insolvency estate");
- Giving cautions to the debtor or anyone holding assets in the name of the debtor admonishing them to make such assets available for liquidation under penalty of being arrested or ordered to pay a fine – both measures to be determined, on the basis of the available evidence, at the discretion of the court hearing the case;<sup>59</sup>

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<sup>55</sup> With reference to sections 81a and 84 of the Insolvency Code.

<sup>56</sup> With reference to Act No. 20.720 of 2014 and regulations and administrative rules issued by the Office of the Superintendent of Insolvency and Restructuring.

<sup>57</sup> Article 36(1) of Act No. 20.720 of 2014.

<sup>58</sup> General Instruction Circular No. 1076 of 16 March 2016.

<sup>59</sup> A forensic practice specific to insolvency proceedings established at the instigation of the Office of the Superintendent of Insolvency and Restructuring under article 238 of the Code of Civil Procedure.

- Bringing insolvency-related avoidance actions where the debtor is a company,<sup>60</sup> except where the debtor is a natural person, in which case creditors bring such actions (see further below under “Avoidance and similar actions”);
- Examine the tax situation of the debtor, claim tax refunds and fulfil the debtor’s tax obligations.<sup>61</sup>

An insolvency representative is subject to the oversight by the Office of the Superintendent of Insolvency and Restructuring. Insolvency representative are instructed to provide the Office with substantiated information in writing and with all supporting documentation related to their handling of proceedings, together with any other documents that the Office may need to be able to fulfil its oversight functions.<sup>62</sup> Insolvency representatives applying for remuneration of their fees from the budget of the Office in proceedings where there are no funds to cover their fees must demonstrate that they have taken all the necessary steps to trace, seize and dispose of the debtor’s assets.<sup>63</sup> They must 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; and copies of title deeds. If insolvency representatives are unable to obtain such information from official sources, they may submit other background information that allows the Office to satisfy itself that steps were taken to trace the debtor’s assets.

**(c) China**

The duties of the insolvency representative include investigating and producing a report on the debtor’s financial position and reporting on the investigation into the debtor’s property at the first meeting of creditors.<sup>64</sup> If the insolvency representative fails to perform its duties diligently and faithfully, the people’s court may impose a fine.<sup>65</sup> If losses are caused to a creditor, the debtor or a third party, the insolvency representative shall be held liable for compensation.

**(d) Hungary<sup>66</sup>**

Definition and the role of the insolvency representative is compatible with article 2 (5) of the EU Insolvency Regulation.<sup>67</sup> Most of the functions of the insolvency representative listed in the Guide are available without a specific court order.

**(e) Japan**

An insolvency representative appointed by the court has the power to administer and dispose of property that belongs to the insolvency estate, to request, among others, the debtor and the debtor’s agent, director, executive officer, inspector, auditor, liquidator and employee to give an explanation, and to inspect books, documents and any other objects relating to the insolvency estate.<sup>68</sup> When necessary in order to perform its duties, an insolvency representative may request a subsidiary company of the debtor to give an explanation on the status of its business and property, or may

<sup>60</sup> Articles 287 and 290 of Act No. 20.720 of 2014.

<sup>61</sup> General Instruction Circular No. 299 of 12 September 2017.

<sup>62</sup> General Instruction Circular No. 1076 of 16 March 2016.

<sup>63</sup> Instruction Notice No. 3 of 16 November 2018.

<sup>64</sup> Article 25 of the Enterprise Insolvency Law.

<sup>65</sup> Article 130 of the Enterprise Insolvency Law.

<sup>66</sup> With reference to Act XLIX of 1991 on Insolvency Proceedings and Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings.

<sup>67</sup> The Secretariat notes that the referred provision of the EIR specifies the following functions of the insolvency representative: (i) verify and admit claims submitted in insolvency proceedings; (ii) represent the collective interest of the creditors; (iii) administer, either in full or in part, assets of which the debtor has been divested; (iv) liquidate the assets referred to in point (iii); or (v) supervise the administration of the debtor’s affairs.

<sup>68</sup> Articles 78 (1) and 83 (1) of the Insolvency Act.

inspect its books, documents and any other objects.<sup>69</sup> The insolvency court may issue an order that the debtor hand over the property which belongs to the insolvency estate to the insolvency representative.<sup>70</sup> This order may be made without oral argument.

**(f) Jordan**

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.<sup>71</sup>

**(g) Lithuania**

An insolvency representative may:

- Carry out pre-trial debt recovery actions (e.g. sending exhortations to debtors, arranging for debt settlement, entering a settlement agreement);
- Conduct negotiations involving a court (e.g. concluding a settlement agreement with the court's approval);
- Initiate legal proceedings for asset recovery;
- Submit enforcement orders to a bailiff (e.g. on the basis of promissory notes, the final judgments and settlement agreements).

**(h) Switzerland**

In addition to requesting any kind of information from any party, the insolvency office conducting the insolvency proceedings can also take protective measures to secure the assets.<sup>72</sup>

**(i) Uruguay**

Insolvency representatives, as the debtor's procedural substitute, have broad powers to locate and recover insolvency estate assets, including to: (i) intervene in all the acts of administration and recovery of the insolvency estate assets and in all proceedings related to the debtor and its assets; (ii) request the appropriate seizure measures and actions against administrators, liquidators, or other parties involved; (iii) take actions against the partners personally responsible for the company's obligations prior to the declaration of the insolvency proceedings; (iv) pursue actions against the persons responsible for the business crisis so that they would cover the deficit with their own assets, replace the assets, compensate for damages and losses and be deprived of rights in insolvency proceedings; and (v) assign claims, liabilities or debt.<sup>73</sup> Insolvency representatives do not have legal powers to access government financial intelligence information, although they may access information on the credit risk rating of debtors or the economic groups of which they are members, at the Central Bank of Uruguay. However, the latter does not allow for the identification of bank accounts or balances.<sup>74</sup>

**(j) Uzbekistan<sup>75</sup>**

Upon appointment of the insolvency representative, the latter assumes all powers in relation to the management of assets and affairs of the debtor, including recovery of

<sup>69</sup> Article 83 (2) of the Insolvency Act.

<sup>70</sup> Article 156 (1) of the Insolvency Act.

<sup>71</sup> Article 18 of the Insolvency Act.

<sup>72</sup> Article 223 of DEBA.

<sup>73</sup> Law No. 18.387, in particular sections 147-150, 192 to 204, 250 and 253. See also articles 1600 to 1604 of the Civil Code, and articles 318 to 322 of the General Code of Procedure.

<sup>74</sup> Law No. 17.948, including art. 3, para. 2; article 22 of Law No. 18.381; and Executive Decree No. 437/009.

<sup>75</sup> With reference to the Law on Insolvency, noting that a new draft law on insolvency that would be applicable to legal entities, natural persons and individual entrepreneurs is being considered for adoption.

debts owed to the debtor and identification, tracing and recovery of debtor assets held with third parties.

## **6. Identification and preservation of the insolvency estate**

### **(a) Belgium**

Upon taking up their duties, the insolvency representatives must proceed without delay, and under the supervision of the insolvency judge, to make an inventory of the property of the debtor, who is present or duly summoned for that purpose. The insolvency judge signs the inventory. The signed inventory is filed in the register. The inventory separately describes all items of property. The insolvency representatives may, with the authorization of the insolvency judge, be assisted by whomever they deem appropriate – under their supervision – in drawing up the inventory, estimating the value of the objects and preserving and realizing the assets.<sup>76</sup> Once the inventory is completed, the goods, money, papers, active securities, movable property and effects of the debtor are handed over to the insolvency representatives who, at the bottom of the inventory, sign a declaration to the effect that they have assumed responsibility for those items. The debtor or administrators or managers of the debtor are required, if requested by the insolvency representative, to preserve the accounts and records, which must be presented at the insolvency representative's request. The law specifies the period for retention of accounting records.<sup>77</sup>

The insolvency judge decides, in consultation with the insolvency representative, whether a visit to the premises should be made, if necessary, in the presence of the clerk. If a person providing professional services is to be visited, the relevant professional body or institute is notified in advance.<sup>78</sup> Procedural safeguards apply to all site visits.<sup>79</sup>

The insolvency representatives may immediately sell assets that are liable to rapid deterioration or at imminent risk of depreciation, or if the cost of maintaining the property is too high in relation to the assets in the insolvency. This is a measure of protection taken in urgent cases in order to immediately liquidate certain assets that cannot be preserved for the 30-day waiting period (it is only after the filing of the first report on the verification of claims that the insolvency representative may commence liquidation measures). Such sale must be authorized by the insolvency judge, who is in charge of supervising the insolvency proceedings, and third parties may object to the sale, in which case the court must verify whether the rights of the third parties in question might be negatively affected by the planned sale.<sup>80</sup> In the case of joint ownership with other non-debtors, the insolvency representative is given the exclusive right to sell the undivided property, subject to the authorization of the insolvency judge.<sup>81</sup>

### **(b) Chile**

The process of determining the insolvency estate consists of two principal phases: first, the procedure of seizing and making an inventory of the assets; and, second, asset recovery actions, such as Paulian, or revocatory, actions (see further below under Avoidance and similar actions). The seizure and inventorying procedure is a key procedure ordered by the judge in the liquidation decision (or decision to commence a liquidation proceeding), whereby the insolvency representative is tasked with seizing – ideally in a single act and in the presence of a public certifying officer – all the debtor's assets and its books and documents, making an inventory thereof, and the law enforcement agencies are tasked with assisting the insolvency representative to that end. This is an intrinsic legal effect of the liquidation decision which translates

<sup>76</sup> Article XX.134 of the Code of Economic Law.

<sup>77</sup> Article XX.138 of the Code of Economic Law.

<sup>78</sup> Article XX.133 of the Code of Economic Law.

<sup>79</sup> Articles 1010 (1), 1011, 1013 and 1015 (first sentence) of the Judicial Code apply to site visits.

<sup>80</sup> Article XX.142 of the Code of Economic Law.

<sup>81</sup> Article XX.193 of the Code of Economic Law.

into the expropriation of the debtor's unattachable assets, in respect of which the debtor loses its powers of administration. The record of seizure must be signed by the insolvency representative and the certifying officer who took part in the procedure. The inventory of assets is meant to be a detailed list, broken down into groups and line items, which is incorporated into the record of seizure drawn up by the insolvency representative and lists those assets of the debtor that were subject to expropriation.

Special rules apply for identification by the insolvency representative of the debtor's assets during the seizure and inventorying procedure. They are different for movable assets, immovable assets and records.<sup>82</sup> For example, for movable assets, the insolvency representative must indicate "their kind, quantity, quality, condition and any other background information or specification required for their proper itemization"; for immovable assets, the insolvency representative must specify their location, property registration number and details of the relevant title deeds filed with the relevant real estate registry; and for the debtor's records, the insolvency representative must itemize all documents, close the books of accounts and ensure that they cannot be used for further entries. Specifically for motor vehicles, the insolvency representative must request the certificates of registration of all the vehicles registered in the debtor's name from the relevant vehicle register and, if any vehicles are missing, apply for the court tracking and seizing order for the police.

The regulatory documents issued by the Office during the COVID-19 pandemic expanded the means available to insolvency representatives to examine the debtor's assets. For example, with regard to the tracing of the debtor's assets, communications addressed to public or private institutions housing databases with information on such assets may be processed electronically and they are to be handled using the most effective and suitable means of communication available at a given public institution. With regard to the recovery of the debtor's movable assets, the seizure and inventorying procedure with respect to such assets may be carried out using remote and electronic means, such as videoconferencing, on the condition that the means chosen allowed both the insolvency representative and the certifying officer (who signs a record of handover of the assets to the insolvency representative) to participate in the proceedings at the same time. The insolvency representative is required to inform the court that the surrender of assets would be carried out under that arrangement.<sup>83</sup>

**(c) Dominican Republic**

The tracing of assets extends to all the assets of the debtor both in the Dominican Republic and abroad, and public and private entities must provide information on such assets without delay upon the request of the interested party. As soon as the insolvency process is initiated, whether by the shareholders voluntarily or by a majority of the creditors, all the debtor's assets are frozen until such time as a final court ruling is issued or a settlement is achieved *ex aequo et bono*.

**(d) Hungary**

The insolvency representative is obliged to consult public registers electronically for the purpose of obtaining information relating to the debtor's assets. The requested public registers shall comply with such requests within 15 days by way of electronic means, free of charge.<sup>84</sup> Relying on information from the title deeds obtained by the insolvency representative, the court shall contact the real estate supervisory authorities to have the liquidation entered in the real estate register, and to have the change in the debtor's name recorded.<sup>85</sup> If the location of any debtor asset is unknown and the head of the debtor is unable to give any information as to the whereabouts of

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<sup>82</sup> Instruction Notice No. 1 of 6 October 2015 of the Office of the Superintendent of Insolvency and Restructuring, Section V, articles 28 to 36.

<sup>83</sup> General Instruction Circular No. 8142 of 20 May 2020.

<sup>84</sup> Article 30(1) of Act XLIX of 1991 on Insolvency Proceedings, Liquidation Proceedings.

<sup>85</sup> Article 29(2) of the Act.

the asset or does not cooperate with the insolvency representative, the court shall put out a search order for locating the asset in question.<sup>86</sup>

**(e) Lithuania**

It is prohibited to recover from the property assigned by trust right subject to actions brought by creditors of the trustor, except for the cases when insolvency proceedings are instituted against the trustor or the trustor becomes insolvent. After institution of insolvency proceedings against the trustor or it becoming insolvent, the property trust right shall expire and the property shall be returned to the trustor.<sup>87</sup>

**(f) Panama**

The insolvency representative is responsible for making an inventory of the debtor's assets, which includes determining the value of those assets. Moreover, the insolvency representative is responsible for collecting any receivables and income due to the debtor, and for paying any essential costs incurred in defending the debtor's rights and in preserving and enhancing its assets.<sup>88</sup> Similarly, the insolvency representative may request the provisional measures. The insolvency representative has the authority to ask any public or private entity, including banks, whether they hold any movable and immovable assets or bank accounts in the name of the debtor and, if so, information on those assets and accounts. The insolvency representative informs the judge so that the freezing of any such assets or accounts can be ordered.

**7. Avoidance and similar actions**

**(a) Belgium**

Transactions carried out during the suspect period that are improper or gratuitous (lack of consideration; payments of unmatured debts; security for previously incurred debts) are unenforceable against the insolvency estate.<sup>89</sup> 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 insolvency is made may be declared unenforceable against the insolvency estate if those who received payment from or dealt with the debtor were aware of the cessation of payments.<sup>90</sup> These provisions do not affect transactions carried out during judicial reorganization proceedings and actions brought by the insolvency representative for the benefit of the estate.

Validly acquired rights arising from mortgages, liens and security interests may be filed or registered up to the date of declaration of insolvency. Filings or registrations submitted after the cessation of payments may be declared ineffective if more than 15 days have elapsed between the date of the mortgage deed or lien instrument and the date of filing or registration.<sup>91</sup> Any fraudulent transactions entered into with creditors, or fraudulent payments made to creditors, are unenforceable, regardless of the date on which they took place.<sup>92</sup> These provisions do not affect actions brought by the insolvency representative for the benefit of the insolvency estate.

**(b) Chile**

In the case of debtor companies, avoidance can be either objective or subjective actions. Objective actions are those based solely on the establishment of specific grounds provided for by the law with regard to acts executed or contracts entered into by the debtor in the year immediately preceding the commencement of the proceeding, such as: (i) advance payments; (ii) payment of mature debts; and

<sup>86</sup> Article 33(1a) of the Act.

<sup>87</sup> Article 6.961 of Civil Code of the Republic of Lithuania.

<sup>88</sup> Article 151 of the Insolvency Act.

<sup>89</sup> Article XX.30 of the Code of Economic Law.

<sup>90</sup> Article XX.112 of the Code of Economic Law.

<sup>91</sup> Article XX.113 of the Code of Economic Law.

<sup>92</sup> Article XX.114 of the Code of Economic Law.

(iii) mortgages, liens or antichreses encumbering the debtor's assets to secure obligations incurred before the commencement of the proceeding. Subjective actions refer to situations in which the contracting party was aware about financial difficulties of the debtor, and the act or contract is detrimental to the insolvency estate or impairs the equal treatment of creditors. Acts done or executed in the two years prior to the commencement of the proceeding are rescindable. In addition, Paulian actions are available to creditors under the general Chilean civil law,<sup>93</sup> including where rescindable acts done or contracts entered into for pecuniary interest by natural person debtors are not covered by the grounds that justify the filing of an avoidance action in insolvency proceedings involving natural person debtors.

**(c) China**

If during the statutory period preceding court acceptance of the debtor's insolvency petition, the debtor has damaged the interests of all or some of the creditors through the lawful exercise of the right to divide property, the insolvency representative may apply to the court for the annulment of the action concerned.<sup>94</sup>

**(d) Hungary**

The insolvency representative or the creditors may challenge transactions detrimental to the general body of creditors by lodging a claim and may request the transaction to be declared invalid.<sup>95</sup> Transactions intended to defraud creditors by concealing the debtor's assets can be challenged within 5 years preceding the date when the court received the application for opening liquidation proceeding. In case of undervalued transactions, the suspect period is 3 years, while in preferential transactions, it is 90 days.

**(e) Japan**

Before the commencement of insolvency proceedings, creditors may file an action to avoid the debtor's acts prejudicial to them.<sup>96</sup> After the commencement of the proceedings, it is the sole responsibility of the insolvency representative to avoid those acts. If any such action by the creditor is pending at the time of the commencement of the proceedings, that action will be discontinued, and the insolvency representative may take it over.<sup>97</sup>

**(f) Jordan**

Transactions effected by the debtor in the year prior to the date of declaration of insolvency are ineffective if they are harmful to the debtor's assets or grant unjustifiably preferential conditions to any of the debtor's creditors. The insolvency representative may request that such transactions not be carried out.<sup>98</sup>

**(g) Panama**

A number of transactions, including transactions and contracts involving deceit or fraud and other operations conducted to the detriment of creditors, may be rendered void.

**(h) Spain**

Once insolvency has been declared, any acts detrimental to the insolvency estate carried out by the debtor within the two years preceding the date of the declaration

<sup>93</sup> Article 2468 of the Civil Code.

<sup>94</sup> Articles 16, 31 and 32 of the Enterprise Insolvency Law and articles 14, 15 and 16 of the Provisions of the Supreme People's Court on Certain Issues Relating to the Application of the Enterprise Insolvency Law of the People's Republic of China (II).

<sup>95</sup> Act XLIX of 1991 on Insolvency Proceedings, Liquidation Proceedings.

<sup>96</sup> Article 424 of the Civil Code.

<sup>97</sup> Articles 45 (1), 45 (2), 160 and 173 of the Insolvency Act.

<sup>98</sup> Article 33 of the Insolvency Act.



shall be rescindable, even if there was no fraudulent intent.<sup>99</sup> There are exceptions to that provision.<sup>100</sup> The law provides for irrebuttable<sup>101</sup> and relative presumptions of detriment.<sup>102</sup>

Pecuniary detriment to the estate must be proven by the person who brings the action for rescission.<sup>103</sup> The insolvency representative has the primary legal standing to bring actions for rescission<sup>104</sup> while creditors who have requested, in writing, the insolvency representative to bring an action of rescission, identifying the specific act to be rescinded and the basis for the rescission, have subsidiary legal standing if the insolvency representative fails to do so within two months of the request being made.<sup>105</sup> Creditors litigate at their own expense in the interest of the insolvency but, if the lawsuit is totally or partially upheld and once the sentence becomes final, they are entitled to reimbursement from the estate for expenses and costs incurred up to the limit of the amount obtained as a consequence of the rescission.

Lawsuits for rescission must be filed against the debtor, those who have been party to the challenged act and, if the asset or the right to be restored has been transferred to a third party, against the third party when the complainant intends to rebut the good faith presumption of the transferee or to challenge his or her immunity from suit or the protection derived from registry publicity.<sup>106</sup>

Actions for rescission are processed as part of the insolvency proceedings.<sup>107</sup> Judgments rendered in the case of rescission are directly appealable and appeals are to be processed and resolved as a matter of priority.<sup>108</sup>

The judgment upholding the action declares the inefficacy of the challenged act. If the challenged act is a contract with reciprocal obligations, the judgment orders the restitution of any benefits that are the subject of the act which have already been realized, along with any interest. In the case of a unilateral act, the judgment, if appropriate, orders the restitution to the estate of the benefit that is the subject of the act and orders the inclusion of the corresponding claim in the list of creditors. If the assets and rights that left the insolvency estate cannot be restored to it because they belong to a third party who is not a defendant or who, in accordance with the judgment, acted in good faith or enjoys immunity from suit or registry protection, whoever was party to the rescinded act must be ordered to reimburse the value of the assets when they left the insolvency estate, plus the legal interest. If the judgment finds that the person who entered into a contract with the debtor did so in bad faith, he or she is also ordered to compensate the damages caused to the estate in their totality.<sup>109</sup>

Entitlement to any benefits that accrue to any of the defendants as a consequence of the rescission of a contract with reciprocal obligations is considered a claim against the insolvency estate, which must be settled at the same time as the assets and rights that are the subject of the rescinded act are restored. Any claim in favour of the defendant as a consequence of the rescission of a unilateral act is considered an insolvency claim and classified accordingly. If the judgment finds the defendant to have acted in bad faith, the claim to the benefit is considered a subordinated claim.

<sup>99</sup> Article 226 of the Insolvency Act.

<sup>100</sup> Article 230, e.g., ordinary course of business; provision of securities for public debts; financial contracts.

<sup>101</sup> Article 227, e.g., gratuitous acts of disposition, except for gifts of use, and payment of unmaturing unsecured claims.

<sup>102</sup> Article 228, e.g., transactions with related persons, new security for pre-existing debt, payment of unmaturing secured claims.

<sup>103</sup> Article 229.

<sup>104</sup> Article 231.

<sup>105</sup> Article 232.

<sup>106</sup> Article 233.

<sup>107</sup> Article 234.

<sup>108</sup> Article 237.

<sup>109</sup> Article 235.

Any claim in favour of the creditor who acted in bad faith is classified in the same way in case of rescission of the unilateral act.<sup>110</sup>

**(i) Uruguay**

Different revocatory actions are found (e.g., Pauliana actions,<sup>111</sup> actions to pursue the nullity of a transaction due to lack of consent and lack of cause,<sup>112</sup> piercing the corporate veil<sup>113</sup>). Avoidance actions may be brought, among others, by the insolvency representative.<sup>114</sup> Avoidance may concern: (i) the gratuitous acts carried out within the two years prior to the declaration of the insolvency proceedings; (ii) the acts of constitution or extension of security rights over the debtor's assets or rights granted in the six months prior to the declaration of insolvency; (iii) the payments made by the debtor within the six months prior to the declaration of insolvency for unmatured credits; (iv) the acts of acceptance by the debtor of the request for termination of contracts made within the six months prior to the declaration of insolvency; (v) the debtor's acts to the detriment of creditors carried out in the two years prior to the declaration of insolvency proceedings; and (vi) the debtor's acts in fraud and to the detriment of creditors where the counterparty knew or should have known that the debtor was in a state of insolvency, without affecting the rights of third parties in good faith. If applicable, the third parties must compensate the estate for the value of the assets or rights subject to the revocation action.

**8. Actions against directors, shareholders and other related persons**

**(a) Hungary**

The insolvency representative or the creditors may lodge claims against the debtor's former directors for their activities which were detrimental to the interests of the creditors on the grounds that the former directors did not carry out their managerial functions taking into account the creditors' interests when a situation with the threat of insolvency arose, leading to a decrease in the debtor's assets, or frustrated the full satisfaction of the creditors' claims. If this is proven, the former director of the debtor must compensate the creditors for the damage thus caused. Shareholders can be held liable in the same way as directors for any damage and loss creditors suffer from the shareholders' failure to act in the best interests of the creditors in the likelihood of insolvency. Only those shareholders would be liable who have effective influence on the decision-making process of the company (usually sole shareholders, or if the shareholder is also the managing director).

<sup>110</sup> Article 236.

<sup>111</sup> Governed by section 1296 of the Civil Code. They seek to obtain the rescission or revocation of disposals made by a debtor with the intent to defraud creditors. In reference to a registrable property, the action is registered in the relevant registry, for the knowledge of third parties (art. 17 num. 8 and art. 25 num. "E" of Law No. 16.871). Those actions may be taken not later than one year after the knowledge of the alleged disposal.

<sup>112</sup> Those actions have advantages over the Pauliana actions because they are not subject to statutory limitations, and the lack of cause and consent is easier to prove than the fraudulent intent. Like the Pauliana action, those actions are registered for publicity if they concern a registrable property (art. 17 num. 8 and art. 25 num. "E" of Law No. 16.871).

<sup>113</sup> Section 189 of Law No. 16.060, when the legal personality of the company is used to violate public order, with the intention to defraud or otherwise damage the rights of the partners, shareholders or third parties. The Law requires proving "the effective use of the commercial company as a legal instrument to achieve the expressed purposes".

<sup>114</sup> Governed by articles 81 to 87 of Law No. 18.387 on Judicial Declaration of Insolvency and Business Reorganization. They must be brought within two years from the declaration of the insolvency (article 84 of Law No. 18.387) and are processed in a summary incidental procedure. The decisions are appealable (articles 250, 252, paragraph 2, num. 2 and 253 of Law No. 18.387; articles 318 to 322 of the General Procedural Code).

**(b) Morocco**

The law contemplates different sanctions against directors depending on how their behaviour impacted the insolvency (misfortune, recklessness or fraud).<sup>115</sup>

**(c) Panama**

The private assets of any partners having personal and joint and several liability may be used to pay the company's creditors and the partners' creditors concurrently if the corporate assets are not sufficient to meet the claims.<sup>116</sup>

**9. Reopening insolvency proceedings****Jordan**

Any creditor may request reopening of the insolvency proceedings if the new debtor assets are discovered within one year after the closure of the insolvency proceedings, or it is established that unauthorized transactions took place, or in case of liability of directors or partners.<sup>117</sup>

**B. Cross-border insolvency context****1. Belgium**

At the request of the debtor-in-possession, the insolvency representative or the foreign representative, certain information relating to the insolvency proceedings that have been initiated in accordance with article 3 (1) of the EU Insolvency Regulation in another EU member State in respect of a debtor that has an establishment in Belgium may be published in the Belgian Official Gazette.<sup>118</sup> Such publication is envisaged in relation to insolvency proceedings recognized or that may be recognized in Belgium under article 121 of the Code of Private International Law (i.e., to which the EU Insolvency Regulation does not apply).<sup>119</sup> Publication in such case is mandatory and automatic if the debtor has an establishment in Belgium.

Before rendering its decision with regard to the application for recognition of the foreign proceeding, the court may, at the request of the foreign representative, a creditor or the debtor, order measures to ensure the preservation of the debtor's assets and the protection of creditors' rights, including the suspension of court enforcement with respect to any part of the debtor's property; the loss or limitation of the debtor's administration of its assets in Belgium, together with the appointment of one or more receivers or insolvency representatives; or the hearing of witnesses with regard to the composition of the debtor's property.<sup>120</sup>

Any interested party may request the appointment of an insolvency representative who will be able to take protective measures in the context of the enforcement or continuation of employment contracts concluded in Belgium. The court decides on the appointment of the insolvency representative and the representative then decides whether or not protective measures should be taken.<sup>121</sup>

**2. China**

Chapter 27 of the Civil Procedure Law addresses judicial assistance to foreign courts and proceedings.

<sup>115</sup> Articles 738-739, 745 et seq. of the Commercial Code.

<sup>116</sup> Article 134 of the Insolvency Act.

<sup>117</sup> Article 111 of the Insolvency Act.

<sup>118</sup> Article XX.202 of the Code of Economic Law.

<sup>119</sup> Article XX.213 of the Code of Economic Law.

<sup>120</sup> Article XX.220 of the Code of Economic Law.

<sup>121</sup> Article XX.205 of the Code of Economic Law.

In 2021, the Supreme People's Court and the Government of the Hong Kong Special Administrative Region signed the 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, which clarify that after the Mainland courts have received an application for recognition and assistance and before a ruling is made, they may, upon application by the Hong Kong insolvency representative, take preservation measures in accordance with the law. Upon recognition of Hong Kong insolvency proceedings by the Mainland courts, those proceedings produce effects similar to those of the commenced insolvency proceedings in the Mainland, including, among others, the disallowance of individual settlements, suspension of litigation, arbitral and enforcement proceedings and suspension of preservation measures. Recognition procedures do not have retroactive effect and liquidation already undertaken by the debtor is in principle irrevocable.

### 3. Hungary

Provisions of the EU Insolvency Regulation, including articles 21,<sup>122</sup> 32,<sup>123</sup> 41,<sup>124</sup> 42,<sup>125</sup> 43<sup>126</sup> and 56,<sup>127</sup> are directly applicable. Cooperation and coordination,

<sup>122</sup> The Secretariat notes that the referred provision addresses the powers of the insolvency representative appointed in the main insolvency proceedings and of the insolvency representative appointed in the secondary insolvency proceedings. The insolvency representative appointed in the main insolvency proceedings: (a) 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. Those powers are subject to the provisions of that Regulation on the protection of third parties' rights in rem and reservation of title; and (b) may, in particular, remove the debtor's assets from the territory of the EU 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 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.

<sup>123</sup> The Secretariat notes that the referred provision addresses recognition and enforceability across the EU without any further formalities of insolvency-related judgments of courts with jurisdiction over main and secondary insolvency proceedings. The judgments include: (a) judgments concerning the opening of proceedings; (b) judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court; and (c) judgments relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it.

<sup>124</sup> The Secretariat notes that the referred provision requires cooperation and communication between the insolvency representative in the main insolvency proceedings and the insolvency representative or representatives in secondary insolvency proceedings concerning the same debtor, specifying matters that are expected to be communicated between them, including any information which may be relevant to the other proceedings.

<sup>125</sup> The Secretariat notes that the referred provision addresses cooperation and communication between courts across the EU in order to facilitate the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor. It suggests the following means of cooperation: (a) coordination in the appointment of the insolvency representatives; (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) coordination of the conduct of hearings; and (e) coordination in the approval of protocols, where necessary.

<sup>126</sup> The Secretariat notes that the referred provision requires cooperation and communication between insolvency representatives and courts before which a request to open insolvency proceedings is pending or which has opened such proceedings.

<sup>127</sup> The Secretariat notes that the referred provision addresses cooperation and communication between insolvency representatives in insolvency proceedings of members of a group of companies.

especially in cross-border situation, is in accordance with articles 41-43 of that Regulation.<sup>128</sup>

#### 4. Jordan

Jordan has enacted MLCBI.<sup>129</sup>

#### 5. Morocco

Morocco enacted MLCBI with some modifications.<sup>130</sup>

#### 6. Panama

Panama enacted the MLCBI.<sup>131</sup>

#### 7. Switzerland

The foreign representative can apply for provisional measures of protection together with the recognition request in ex parte proceedings<sup>132</sup> and ask, for example, for the establishment of an inventory, for sealing assets or locations, for blocking accounts or public registers (known or presumed assets on the basis of prima facie evidence). However, those measures will be primarily destined to secure the execution of assets, not to find them. The existence, the location and the fact that the debtor is their legal or beneficial owner must be demonstrated by prima facie evidence when requesting the order.

Upon recognition of a foreign insolvency proceeding,<sup>133</sup> the court orders the opening of local ancillary proceedings,<sup>134</sup> except where a foreign representative requested that no ancillary proceedings should be opened upon recognition.<sup>135</sup> The ancillary proceedings are held according to the Swiss insolvency law.<sup>136</sup> When local privileged creditors (mostly local employees) have filed claims in the call for claims following recognition,<sup>137</sup> ancillary proceedings are opened.

Where the ancillary proceedings have been opened, the local insolvency representative (of the ancillary proceedings) has the primary duty and task to trace and recover assets. In addition to requesting any kind of information from any party, the insolvency office conducting the ancillary proceedings take protective measures to secure the assets.<sup>138</sup> Whenever the insolvency representative of the ancillary proceedings (generally the public insolvency office) renounces to file a claim, the foreign representative of the main proceedings has the right to assume the claim<sup>139</sup> and file it in Switzerland (for instance, an avoidance or responsibility claim against a third party). Where the local ancillary proceeding was not opened, the foreign representative can request all protective measures available under Swiss law and file claims for recovery of assets against third parties in Switzerland (avoidance claim, responsibility claims, restitution and compensation claims). The foreign representative can also request information on the basis of the laws of the main proceeding, excluding the exercise of public powers.

<sup>128</sup> See the footnotes above for the content of the referred provisions.

<sup>129</sup> The submission referred specifically to articles 124 and 128 of the Insolvency Act.

<sup>130</sup> Articles 768-791 of the Commercial Code. The Secretariat notes that modifications upon enactment concern, among others, articles 15.2 (c), 16 (1) and (2), 19 and 26 of MLCBI.

<sup>131</sup> Articles 225-234 of the Insolvency Act.

<sup>132</sup> Article 168 of the Swiss Private International Law Act (SPILA), available at [https://www.fedlex.admin.ch/eli/cc/1988/1776\\_1776\\_1776/en](https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en).

<sup>133</sup> Under article 166 (liquidation) or 175 (restructuring) of the SPILA.

<sup>134</sup> Under articles 170 and 172 of the SPILA.

<sup>135</sup> Article 174a of the SPILA.

<sup>136</sup> DEBA, see the Switzerland entries above.

<sup>137</sup> Article 174a of the SPILA.

<sup>138</sup> Article 223 of the DEBA.

<sup>139</sup> Article 260 of the DEBA.

Switzerland is a signatory of the Hague Evidence Convention. The scope of that Convention is, however, limited in the context of insolvency, as it is only applied to requests (letters rogatory) originating from a foreign court (not from an insolvency representative). Furthermore, the proceedings necessitating recognition and possibly opening a local ancillary proceeding prevail in respect of any action of a foreign insolvency representative regarding assets located in Switzerland.

Since the reform of 2019, there is a possibility to recognize foreign decisions on avoidance and other insolvency-related decisions, subject to several conditions. Recognition is possible if the defendant did not have its domicile in Switzerland at the time when the claim was filed (should this have been the case, it is presumed the claim should and could have been filed in the proper defendant forum in Switzerland). In addition, the insolvency proceeding to which the decision is related must be eligible for recognition in Switzerland. These conditions are for example fulfilled when a defendant, against whom avoidance proceedings have been initiated abroad, has taken advantage of an avoidable act in a foreign jurisdiction and has subsequently moved to Switzerland (with the assets subject to the avoidable transaction). In such a case, the new provision provides for a basis for direct recognition of the foreign avoidance decision.<sup>140</sup> Such a recognition request can be combined with a request for protective measures (with reference to the assets to be secured).

Seizure orders<sup>141</sup> allow for the freezing of assets, e.g. upon presentation of a title, such as a foreign judgment. This tool is available outside the context of insolvency proceedings. It may be applied for where a claim 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 an insolvency representative. In such situations, a foreign seizure order (e.g., a "Mareva injunction") can be recognized and given a similar effect in Switzerland (if the defendant had a right to be heard). The seizure request must provide prima facie evidence of the assets (their existence, location, ownership of defendant).

## **C. Criminal law and other non-insolvency aspects**

### **1. Dominican Republic**

Legal provisions for the tracing of assets belonging to companies are set out also in Act No. 155-17 on money-laundering, which establishes rules for preventing the diversion of assets not only in relation to money-laundering but also with respect to actions to defraud creditors.

### **2. Spain**

Assets that have unduly left the insolvency estate may be recovered by initiating criminal proceedings to prosecute the offence of punishable insolvency. This offence is regulated by articles 259 et seq. of the Criminal Code of Spain that envisage imprisonment of different duration and fines of different amount for this offence depending on its gravity. The offence is to be prosecutable only when the debtor has ceased to regularly comply with his or her enforceable obligations or has been declared insolvent. This offence and the singular offences related to it, when committed by the debtor or a person acting on his or her behalf, may be prosecuted before the insolvency proceedings have concluded and without prejudice to their continuation. The amount of any civil liability derived from such offences must be incorporated into the estate.

As specifically related to ATR, the punishable insolvencies include, in a situation of actual or imminent insolvency: (i) concealing, damaging or destroying assets or elements that are included, or that would have been included, in the insolvency estate at the time of its opening; (ii) performing acts of disposition by handing over or

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<sup>140</sup> Article 174c of the SPILA.

<sup>141</sup> Article 271 of the DEBA.

transferring money or other assets, or by taking on debts which are not commensurate with the debtor's financial situation or his or her income and which cannot be justified by financial or business reasons; (iii) carrying out sales or service transactions for a price which is lower than the cost of their acquisition or production and which, in the circumstances of the case, cannot be justified by financial reasons; (iv) fabricating claims by third parties or proceeds to recognize fictitious claims; (v) participating in speculative business ventures when doing so cannot be justified by financial reasons and is, in the circumstances of the case and in view of the economic activity carried out, contrary to the duty of diligence in the management of financial affairs; (vi) failing to comply with the legal duty to keep accounting records, keeping double accounting records or, in the keeping of accounting records, committing irregularities which may affect the ability to arrive at an understanding of his or her asset or financial situation. The destruction or alteration of accounting books shall also be punishable when this makes it difficult or impossible to arrive at an understanding of his or her asset or financial situation; (vii) concealing, destroying or altering the documentation that businesspersons are obliged to keep before the statutory time limit for doing so expires, when this makes it difficult or impossible to examine or assess the debtor's actual financial situation; (viii) compiling annual accounts or accounting books in a manner contrary to the regulations governing commercial accounting, thus making it difficult or impossible to examine or assess the debtor's actual financial situation, or failing to comply with the duty to compile balance sheets or inventories within the applicable deadline; and (ix) committing any other acts or omissions that constitute a serious breach of the duty of diligence in the management of financial affairs and to which a decrease in the debtor's assets is attributable or through which the debtor's actual financial situation or business activity is concealed.

The punishable insolvencies also include: (i) causing insolvency; (ii) when finding itself in a situation of actual or imminent insolvency, favouring any of the creditors by carrying out an act of disposition of assets or an act generating obligations intended to pay an unearned receivable or to provide him or her with a security to which he or she is not entitled, when it is a transaction that cannot be justified by financial or business reasons; and (iii) once the application for insolvency has been admitted for processing, without being authorized to do so either judicially or by the insolvency representative, and outside the cases permitted by law, performing any act of disposition of assets or an act generating obligations intended to pay one or more creditors, preferred or not, while postponing payment to the rest.

### 3. Switzerland

In criminal proceedings, the local public prosecutors (acting on the basis of a commission rogatoire or a complaint) have broad powers to obtain information from the debtor, from authorities and from third parties such as banks. This information can be used by the private interested party (e.g., a foreign insolvency representative) in subsequent proceedings abroad or in Switzerland. Protective measures and seizures under criminal law generally take priority over civil or insolvency law measures. Specific legislation applies to the assets of politically exposed persons and to the return of any assets illegally brought by such persons to Switzerland.<sup>142</sup>

### 4. Uruguay

Criminal law measures for identification, tracing and recovering assets and precautionary measures for property seized or confiscated through criminal proceedings<sup>143</sup> can assist civil proceedings. They are often more effective and provide better access to information than civil law measures. For example, with some exceptions, the sworn statements of assets and income of public officials obliged by law to submit such statements periodically to the Transparency and Public Ethics Board are protected under personal data law, and are not accessible in civil

<sup>142</sup> See [www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/unrechtmaessigerworbene-gelder.html](http://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/unrechtmaessigerworbene-gelder.html).

<sup>143</sup> Articles 101, 216, 250 to 254 of the Code of Criminal Procedure.

proceedings unlike criminal proceedings from where they could subsequently be used in civil proceedings.<sup>144</sup>

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<sup>144</sup> Articles 10 to 19 of Law No. 17.060; and article 11 of Law No. 18.331 on Personal Data Protection. 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.