

**UNCITRAL-World Bank Group  
Judicial Capacity-Building Initiative on International  
Best Practices in Insolvency Law**

Questions & Answers

## Events triggering insolvency (1)

**“In case the enforcement of an arbitration award is the cause of insolvency, what would be the position to take?”**

The [UNCITRAL Legislative Guide on Insolvency Law](#) does not address this issue specifically.

Commencement standards in recommendations 15 (*Debtor application*) and 16 (*Creditor application*) would be applicable. They are discussed in more detail in the accompanying commentary that, in particular, alerts about risks of a premature finding of insolvency.

See also recommendation 17 (*Presumption that the debtor is unable to pay*) and its accompanying commentary.

## Events triggering insolvency (1)

**“In case the enforcement of an arbitration award is the cause of insolvency, what would be the position to take?”**

The [\*World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes \(ICR\)\*](#) do not address this issue specifically.

However, the commencement criteria and the presumptions about insolvency should be clearly defined in the law (Principle C4.2). Moreover, the commencement of insolvency proceedings should follow the guidance provided in Principles C5.2 and C5.3.

## Events triggering insolvency (2)

**“And what if the settlement of a secured debt leads to bankruptcy?”**

In addition to recommendations 15, 16 and 17 of the *UNCITRAL Legislative Guide on Insolvency Law* cited on the preceding slide, see recommendation 88 (*Security interests*) and the accompanying commentary that, in particular, states that a security interest may be avoided on the same grounds as other transactions. The commentary provides examples when this could happen, e.g., the repayment in respect of an unmature debt or made in an unusual manner shortly before the commencement of insolvency proceedings (e.g., the under-secured creditor or security interests in favour of directors are paid in full shortly before the application for commencement of insolvency proceedings or before the commencement of insolvency proceedings).

The World Bank ICR Principles do not address this issue specifically.

# The interplay between arbitral and insolvency proceedings

**“In the event of an arbitration clause what is the purpose of insolvency proceedings before the court of law?”**

The question is unclear and not specifically related to the subject of the session. The nature and purpose of arbitral proceedings and insolvency proceedings are very different. Recommendation 46 (a) of the *UNCITRAL Legislative Guide on Insolvency Law* explicitly states that: “The insolvency law should specify that, on commencement of insolvency proceedings: (a) Commencement or continuation of individual actions or proceedings concerning the assets of the debtor and the rights, obligations or liabilities of the debtor are stayed;”. An accompanying footnote notes that it is intended that the individual actions referred to in subparagraph (a) of recommendation 46 would also cover actions before an arbitral tribunal.

See the Insolvency chapter in the yearly bibliography of recent writings related to the work of UNCITRAL found at [Yearly Bibliography | United Nations Commission On International Trade Law](#) for some writings that address the interplay between arbitral and insolvency proceedings.

# The interplay between arbitral and insolvency proceedings

**“In the event of an arbitration clause what is the purpose of insolvency proceedings before the court of law?”**

The World Bank’s ICR Principle C10.1 states that “to achieve the objectives of insolvency proceedings, the system should allow interference with the performance of contracts where both parties have not fully performed their obligations. Interference may imply continuation, rejection, or assignment of contracts.” Moreover, stakeholder rights and priorities established prior to the insolvency proceedings should be upheld (Principle C12.1).

Following the commencement of the insolvency proceedings, the court or the insolvency representative should be allowed to take “prompt measures to preserve and protect the insolvency estate and the debtor’s business” (Principle C8.2). This Principle further elaborates on the system for administering the insolvency estate i.e., it should be “flexible and transparent and enable disposal of assets efficiently and at the maximum values reasonably attainable.”

## Consequences of avoidance

**“Can the outcome of an avoidable transaction be given to the Successful Resolution Applicant?”**

See recommendations 93 and 98 of the *UNCITRAL Legislative Guide on Insolvency Law* and their accompanying commentary that, in particular, state that the most common approach is to treat the assets or value recovered through avoidance as part of the estate on the basis that the principal justification of avoidance proceedings is to return value or assets to the estate for the benefit of all creditors, rather than to provide a benefit to individual creditors. Other approaches may however be found in domestic insolvency laws.

The World Bank ICR Principles do not address this issue specifically.

## Consequences of avoidance

**“In case of avoidance of a sale, can we give back the consideration amount to the buyer?”**

See recommendations 98 and 99 of the *UNCITRAL Legislative Guide on Insolvency Law* and their accompanying commentary that, in particular, state that the assets or the value recovered through avoidance must be returned to the insolvency estate, and that the domestic insolvency law should determine whether the counterparty to an avoided transaction would have an ordinary unsecured claim. A claim by the counterparty may be disallowed under some circumstances, in particular, where the counterparty does not comply with the court order avoiding the transaction (e.g., fails to disgorge assets or return value to the insolvency estate).

The World Bank ICR Principles do not address this issue specifically.



## Consequences of avoidance

**“In case of an avoidable transaction of a perishable commodity or a commodity whose quality/value deteriorates over time, if the case for establishing the transaction as avoidable takes much time, is it alright to add the value of the asset to the total assets of the corporate debtor undergoing insolvency proceedings than to give the asset (whose value would be diminished) to the corporate debtor?”**

Recommendation 98 of the *UNCITRAL Legislative Guide on Insolvency Law* envisages that the court may order the counterparty to make a cash payment to the estate for the value of the transaction.

The World Bank ICR Principles do not address this issue specifically.

# Avoidance proceedings in reorganization and liquidation

**“Can avoidance proceedings be concluded before reorganization/resolution is completed, or will these proceedings continue till liquidation?”**

The *UNCITRAL Legislative Guide on Insolvency Law* does not address this issue specifically. The question is also unclear because avoidance proceedings would not necessarily trigger conversion of reorganization to liquidation.

Although approaches vary, The World Bank envisages that effective insolvency systems should, amongst other objectives, aim to strike a careful balance between liquidation and reorganization. This would allow for easy conversion from one proceeding to another (see the [Executive Summary](#) at page 7).

## **Effectiveness of avoidance proceedings (cost of avoidance vs. value for the estate recovered through avoidance )**

**Paragraph 155 of the UNCITRAL Legislative Guide on Insolvency Law (page 137) discusses cost of avoidance proceedings vs. collection under avoidance proceeding. Any impact evaluation study has been conducted by the World Bank Group on the subject?**

Impact evaluation studies are greatly time consuming and costly. Therefore, no such impact evaluation study has been conducted. The World Bank Group does however, conduct more general studies pertaining to insolvency regimes.