

UNCITRAL-World Bank Group

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Judicial Capacity-Building Initiative

on International Best Practices in Insolvency Law

First session (avoidance proceedings), 27-28 October 2021

UNCITRAL work on insolvency law with a focus on avoidance proceedings



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UNCITRAL texts in the area of insolvency law

Cross-border insolvency

- **Model Law on Cross-Border Insolvency (MLCBI) (1997) with the Guide to Enactment and Interpretation (2013) - enacted in 49 jurisdictions**
- **Model Law on Recognition and Enforcement of Insolvency Judgements (2018) (MLIJ) with the Guide to Enactment**
- **Model Law on Enterprise Group Insolvency(2019) (MLEGI) with the Guide to Enactment**
- **Practice Guide on MLCBI (a reference tool for judges)**
- **Judicial perspective on MLCBI (compilation of the case law on main aspects of MLCBI) (*being updated*)**
- **Digest of case law on MLCBI (compilation of the case law on MLCBI per article)**

Available at <https://uncitral.un.org/en/texts/insolvency>

UNCITRAL texts in the area of insolvency law

Substantive domestic insolvency law

- **Legislative Guide**

- **Part one: key objectives and structure of insolvency law;**
- **Part two: core provisions of an insolvency law;**
- **Part three: enterprise groups (supplemented by the MLEGI);**
- **Part four: directors' obligations in the period approaching insolvency, amended by UNCITRAL in 2019 to cover also enterprise group aspects;**
- **Part five: insolvency law for MSEs (expected to be finalized in December!)**

Available at <https://uncitral.un.org/en/texts/insolvency>

New topics

Civil asset tracing and recovery in insolvency proceedings

Applicable law in insolvency proceedings

Both are closely linked to the topic of the session – avoidance!

Avoidance provisions in part two of the Guide

Consist of:

- Provisions addressing the purpose of legislative provisions on avoidance
- Recommendations 87-99 addressing:
 - Types of avoidable transactions, including that security interests could be avoided on the same grounds as other transactions;
 - Suspect period, including that it could be longer for transactions with related persons
 - Exempted transactions (including under non-insolvency laws)
 - Procedural and funding aspects
 - Elements of avoidance and defences
 - Liability of counterparties to avoided transactions
- Accompanying commentary, discussing in particular policy choices involved in avoidance and implications of those choices for courts (e.g., some issues may be left to court determination (valuation, interpretation of defences, etc.))

The purpose of avoidance provisions in insolvency law

- (a) To reconstitute the integrity of the estate and ensure the equitable treatment of creditors;
- (b) To provide certainty for third parties by establishing clear rules for the circumstances in which transactions occurring prior to the commencement of insolvency proceedings involving the debtor or the debtor's property may be considered injurious and therefore subject to avoidance;
- (c) To enable the commencement of proceedings to avoid those transactions; and
- (d) To facilitate the recovery of money or assets from persons involved in transactions that have been avoided.

The design of avoidance provisions requires a balance between various considerations

For example:

- Maximization of the value of the estate for the benefit of all creditors vs. contractual predictability and certainty
- Incentives for out-of-court debt restructuring solutions, including pre-commencement finance vs. protection of unsecured creditors
- Good governance vs. availability of funding

Achieving such a balance would impact policy choices, e.g., who can commence avoidance proceedings (only IP or also creditors), under which conditions, when (e.g., upon discovery of facts or otherwise) and sanctions against abuse!

Avoidance criteria

Objective (e.g., all concluded within the suspect period are void)

Subjective (proof of intent is required)

Each has pros and cons



Combination of both as a solution

Defences to avoidance

Risks of defining them too broadly

- E.g., ordinary course of business, normal commercial practice, good faith, actual or implied knowledge, intent, effects of transactions
- All are difficult to prove and this may make avoidance proceedings complex, unpredictable and lengthy
- There would be no parties willing to commence avoidance proceedings leaving abuses unaddressed

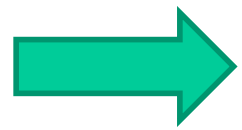


Rebuttable presumptions and shifting burdens of proof (e.g., bad faith may be automatically presumed in case of gratuitous transactions during the suspect period; the counterparty bears the burden of proving otherwise)

Effects of avoidance

- Return of the assets or, if the court so orders, cash, to the estate
- An ordinary unsecured claim
- A claim against the insolvency estate may be disallowed under certain circumstances

Thank you!



Principle C11 of the WBG Principles: types of avoidable transactions and suspect period